U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: LOS ANGELES (SAN BERNADINO) Date: FEB 02 2009

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be sustained.

The applicant, [redacted], is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of assault with intent to commit rape, which is a crime involving moral turpitude.

The applicant is the spouse of a lawful permanent resident of the United States. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and his four adult children, who are either lawful permanent residents or citizens of the United States.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 6, 2006.

On appeal, counsel states that the district director denied the waiver application based upon errors of law and fact. He contends that extreme hardship to the applicant's wife and adult stepchildren is demonstrated by their declarations, and by his stepson's military service. Counsel states that the applicant's family members, including his grandchildren, would experience extreme emotional hardship if separated from the applicant. He states that the applicant and his wife raised four children together and that the applicant's wife has a close relationship with her husband and relies upon him financially. Counsel also points out that the applicant has committed no other crimes since his conviction, which occurred 14 years ago.

The record reflects that on April 28, 1992, in the Superior Court of California, County of Los Angeles, the applicant was convicted of assault with intent to rape in violation of California Penal Code section 220 and was sentenced to two years imprisonment. *Abstract of Judgment – Prison Commitment Single or Concurrent Count Form.*

Section 212(a)(2) of the Act states that:

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> (I) a crime involving moral turpitude (other than a purely political offense)
>
> or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

An application for admission or adjustment is a "continuing" application, adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The applicant's application for adjustment of status remains pending and the application is, as of today, still seeking admission. Since the criminal conviction for which the applicant was found inadmissible occurred more than 15 years ago, it is waivable under section 212(h)(1)(A)(i) of the Act.

Section 212(h)(1)(A)(ii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States and the applicant must establish that he has been rehabilitated.

The evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) of the Act consists of his wife's declaration, his stepdaughter's letter, the letter by his employer, income tax records, and other documentation.

The record reflects that the applicant entered the United States without inspection in 1991. In 1992, he was convicted of assault with intent to rape, and the record suggests that the applicant has not been charged with any additional crimes since then. The applicant's wife indicates that she has a close relationship with her husband and that he assisted her in raising her four children. *Declaration by Applicant's Wife.* The record contains the permanent resident cards of her two adult sons and her oldest daughter, and the U.S. birth certificate of her youngest daughter, who is now 22 years old. The applicant lives with his wife and stepdaughter and one of his stepsons. *Declaration by Applicant's Wife.* The applicant's stepdaughter conveys that she has a close relationship with her stepfather, and that he worked hard to help her mother and brothers and sister. *Letter by Applicant's Stepdaughter, dated February 27, 2006.* The letter by [redacted] states that the applicant has been employed there since January 23, 2003, as a floor covering installer and is a trusted and valued employee. Income tax records confirm his employment in 2004 and 2003.

The AAO finds that the record indicates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) of the Act. The applicant's prior conviction occurred 16 years old and he has had no other convictions since 1992. His spouse and stepdaughter commend his character, and although the record is not clear as to his entire history period of employment, it shows that he has been gainfully employed since 2003. Consequently, he has established the criterion under the waiver provision of section 212(h)(1)(A) of the Act

Furthermore, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The favorable factors are the applicant's work history and payment of taxes, and the declaration by his wife and letter by his step-daughter and employer attesting to his good character; the negative factors are his conviction, his entry into the United States without inspection, and periods of unauthorized presence in the United States.

While the AAO cannot condone the applicant's criminal conviction and immigration violations, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

In discretionary matters, the applicant bears the full burden of proving his eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.