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U.S. Citizenship  
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FILE:

Office: LOS ANGELES, CALIFORNIA

Date: **FEB 10 2009**

IN RE:

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

ON BEHALF OF APPLICANT:

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The record reflects that the applicant is a native and citizen of Guatemala who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is married to a legal permanent resident and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and children in the United States.

The district director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. *Decision of the District Director*, dated July 31, 2006.

On appeal, counsel contends that the district director failed to give proper weight to the evidence of hardship. *Notice of Appeal to the Administrative Appeals Unit (AAU) (Form I-290B)*.<sup>1</sup>

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, indicating they were married on October 22, 1981; financial and tax documents; conviction documents; letters from the applicant's employers; a decision from the Board of Immigration Appeals granting suspension of deportation; report cards from the couple's children's schools; and an approved Immigrant Petition for Alien Worker (Form I-140). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(2)(A) of the Act states in pertinent part:

(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:

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<sup>1</sup> On the applicant's Form I-290B, counsel stated that he would submit a brief and/or evidence to the AAO within 30 days from the date of the appeal. On January 6, 2009, the AAO forwarded a fax to counsel informing him that this office had not received a brief or evidence related to this matter. Counsel responded that he did not file a brief or evidence in support of this appeal. Therefore, the AAO will adjudicate the appeal based on the documentation in the record of proceeding.

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (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 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.

(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 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 . . . .

The record shows that the applicant entered the United States in 1978 without inspection. The record further indicates that the applicant has been arrested and convicted numerous times, as follows:

1. On June 22, 1985, the applicant was arrested and charged with assault, battery, assault with a deadly weapon, and theft/petty theft. He was subsequently convicted of battery and theft/petty theft. He was sentenced to 33 days imprisonment and three years probation.
2. On August 4, 1987, the applicant was arrested and charged with assault, battery of a peace officer, and assault with a deadly weapon. He was subsequently convicted of battery of a peace officer and assault with a deadly weapon. He was sentenced to two years imprisonment.
3. On October 10, 1987, the applicant was arrested and subsequently convicted of driving under the influence of an alcoholic beverage and a drug and under their combined influence, and driving a vehicle while having 0.10 percent and more of alcohol in his blood. He was sentenced to three years probation.
4. On May 29, 1988, the applicant was arrested and subsequently convicted of driving under the influence of an alcoholic beverage and a drug and under their combined influence. He was sentenced to three years probation.

5. On September 25, 1988, the applicant was arrested and subsequently convicted of driving under the influence of an alcoholic beverage and a drug and under their combined influence. He was sentenced to three years probation.

6. On December 18, 1988, the applicant was arrested and charged with assault with a deadly weapon, driving under the influence of an alcoholic beverage and a drug and under their combined influence, driving a vehicle while having 0.10 percent and more of alcohol in his blood, and driving a vehicle without a valid driver's license. He was convicted of assault with a deadly weapon and battery and sentenced to two years imprisonment.

7. On January 19, 1990, the applicant was convicted of assault with a deadly weapon, battery of a peace officer, driving under the influence of an alcoholic beverage and a drug and under their combined influence, and driving a vehicle while having 0.10 percent and more of alcohol in his blood. He was sentenced to two years imprisonment.

8. On February 5, 1990, the applicant was arrested and subsequently convicted of assault with a deadly weapon. He was sentenced to two years imprisonment.

9. On October 6, 1998, the applicant was arrested and charged with driving without a license, failing to provide evidence of financial responsibility for the vehicle upon demand of a peace officer, and driving with a suspended license. He was convicted of driving without a license and sentenced to three years probation.

The record clearly shows, and the applicant does not contest, that he is inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having committed a crime involving moral turpitude. *See Matter of G-R-*, 2 I&N Dec. 733, 734 (A.G. 1947) (“Assault with a deadly weapon in general has been held to be a crime involving moral turpitude”); *Gonzales v. Barber*, 207 F.2d 398, 400 (9<sup>th</sup> Cir. 1953), *aff’d on other grounds*, 347 U.S. 637 (1954) (assault with a deadly weapon in violation of Calif. Penal Code § 245(a)(1) is a crime involving moral turpitude); *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988) (crime of battery against a peace officer resulting in serious injury is a crime involving moral turpitude); *Briseno-Flores v. Att’y Gen. of U.S.*, 492 F.3d 226, 228 (3<sup>d</sup> Cir. 2007) (guilty plea to petty theft was a crime involving moral turpitude) (citing *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3<sup>d</sup> Cir. 1956) (“It is well settled as a matter of law that the crime of larceny is one involving moral turpitude regardless of the value of that which is stolen”), and *Matter of Scarpulla*, 15 I&N Dec. 139, 140-41 (BIA 1974) (“It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude”)).

The district director evaluated the applicant's waiver application for extreme hardship to a qualifying relative under section 212(h)(1)(B). However, as explained below, the AAO finds that the applicant has shown that he is eligible for a waiver under section 212(h)(1)(A).

A section 212(h)(1)(A) waiver is dependent upon a showing that the activities for which the alien is inadmissible occurred more than fifteen years before the date of the alien's adjustment of status application; the alien's admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and the alien has been rehabilitated. *See* section 212(h)(1)(A) of the Act, 8 U.S.C. § 1182(h)(1)(A). Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

In this case, the applicant has shown that he is eligible for a section 212(h)(1)(A) waiver. 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). There has been no final decision made on the applicant's I-485 adjustment application, so the applicant, as of today, is still seeking to adjust his status to that of a legal permanent resident. The applicant's most recent crime involving moral turpitude occurred on February 5, 1990, when he was arrested and subsequently convicted of assault with a deadly weapon. Therefore, the activities for which the applicant is inadmissible occurred more than fifteen years before the date of the alien's application for adjustment of status.

In addition, the evidence indicates that the alien has been rehabilitated and his admission to the United States would not be contrary to the national welfare, safety, or security of the country. In his declaration, the applicant takes responsibility for his past criminal activities and expresses remorse. *Declaration of [REDACTED]*, dated February 15, 2006. In addition, he explains that he "lost [his] way and began to drink" after he lost his premature son in the early 1980's. *Id.* The applicant states that it has taken him a few years to "pull out of it, but [he] eventually did." *Id.* He affirms he will not have any further trouble with the law. *Id.* The applicant has not had any further arrests or convictions for over ten years. Furthermore, the applicant has been gainfully employed by the same employer for over twenty-six years. *Letter from [REDACTED]*, dated April 13, 2005 (indicating that the applicant has been employed since October 1982 first as a Cabinetmaker and then as a Wood Model Maker). He and his wife have owned a home for eleven years and have been going to the same church for the past twenty years. *Declaration of [REDACTED]*, dated February 15, 2006. Based on this information, the AAO finds that the applicant has been rehabilitated and his admission is not contrary to the national welfare, safety, or security of the United States.

The AAO further finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

The adverse factors in this case are the applicant's initial entry into the United States in 1978 without inspection, the applicant's numerous arrests, and the applicant's serious criminal convictions.

The positive factors in this case include the applicant's significant family ties in the United States, including his wife, two U.S. citizen children,<sup>2</sup> his mother, two sisters, and one brother, all of whom

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<sup>2</sup>The applicant's oldest child, who is twenty-six years old, lives in Guatemala.

are legal permanent residents. In addition, the applicant has lived in the United States for approximately thirty years since he was twenty-one years old. He and his wife have been married and living together for twenty-one years. The applicant owns a home, has been continuously employed by the same employer for twenty-six years, and has paid taxes while working in the United States. He has taken responsibility for his past criminal history, has expressed remorse for it, and has not had any further arrests or convictions for over ten years.

The AAO finds that, although the applicant's immigration violation and criminal history are very serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.