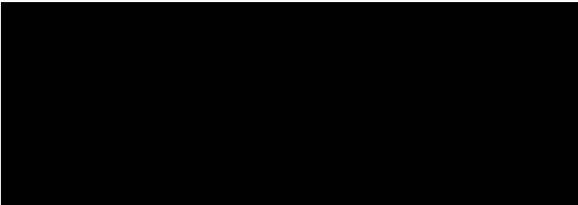


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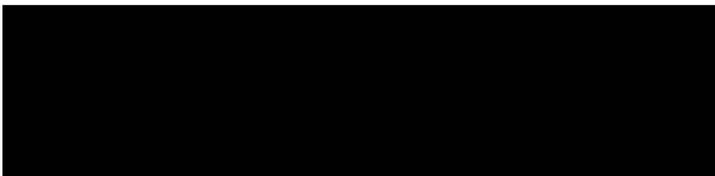
FILE: [REDACTED] Office: LOS ANGELES, CA
RELATES)

Date: FEB 17 2009

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(h) of the
Immigration and Nationality Act, 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 cursive script, 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 Mexico who entered the United States without inspection in 1984. The applicant was found to be inadmissible to the United States pursuant to § 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 arrested and convicted of crimes involving moral turpitude (CIMT). The record indicates that the applicant is married to a U.S. citizen and is the father of four U.S. citizen children. He is the beneficiary of an approved petition for alien relative and seeks a waiver of inadmissibility in order to reside with his wife and children in the United States.

The district director denied the application after finding that the applicant had failed to establish extreme hardship to his U.S. citizen spouse or children. *Decision of the District Director*, dated May 24, 2006.

On appeal, counsel asserts that the evidence submitted establishes that the applicant's spouse and children would suffer extreme hardship upon his removal. In support of his assertions, counsel submits a brief, his personal declaration, a statement from the applicant's spouse, statements attesting to the applicant's character, health insurance cards, proof of home ownership, school records and awards for the applicant's children; a letter from the applicant's employer, earnings statements for the applicant and his spouse, W-2 Wage and Tax Statements for the applicant and his spouse and their 2005 federal and California income tax returns. The entire record was considered in rendering a decision on the appeal.

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

(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) states in pertinent part that:

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if-

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

- (i) [T]he 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 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 in the file and the related file reflects that the applicant was convicted of several misdemeanors. The record contains a final court disposition dated August 2, 1988 showing that the applicant was found guilty of a misdemeanor in violation of California Penal Code (PC) sections 484-488; a final court disposition dated January 5, 1990 showing that the applicant was found guilty of theft of personal property, a misdemeanor, in violation of PC section 484(a); a final court disposition dated August 21, 1991 showing that the applicant was found guilty of driving while license suspend and revoked, a misdemeanor, in violation of California Vehicle code (VC) section 14601.1, unlicensed driver, a misdemeanor, in violation of VC section 12500, and false representation or identification as another person, a misdemeanor, in violation of PC section 148.9; and a final court disposition dated August 27, 1991 showing that the applicant was found guilty of theft charges in violation of PC sections 484-488. The district director concluded that these offenses constituted a crime(s) involving moral turpitude and thus that the applicant was inadmissible.

The record shows that the applicant was convicted of three driving offenses and three theft offenses during the period from August 1988 to August 1991. While generally a driving offense is not considered a CIMT,¹ theft may be a CIMT.

Section 484(a) of the California Penal Code provides in pertinent part that:

Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been

¹ A conviction for aggravated driving while intoxicated (where the individual driving has his license suspended, cancelled or revoked yet knowingly drives while intoxicated) has been held to be a CIMT, *see Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) and failure to stop and render aid after being involved in a vehicular accident resulting in any injury or death is a CIMT, *see Garcia-Maldonado v. Gonzales*, No. 05-60692, 2007 WL 1865562 (5th Cir. 2007).

entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

In Matter of D, 1 I&N Dec. 143 (BIA 1941), the Board of Immigration Appeals (BIA) held that while theft crimes that include the deprivation of possession from the owner for a temporary period without intent to steal are not crimes involving mortal turpitude, those cases which by their nature necessarily constitute theft or stealing as those offenses are known in common law, are crimes involving moral turpitude. In that the language of section 484(a) of the California Penal Code (PC) clearly indicates that intent is an element of the offense and does not consider the temporary taking of property, the AAO finds that the applicant's convictions for theft under section 484(a) of the PC constitute crimes involving moral turpitude. The applicant is not eligible for the petty offense exception under section 212(a)(2)(ii)(II) of the Act because she was convicted of three CIMTs.

The record, however, indicates that the events that resulted in the applicant's conviction occurred during the period July 1988 through August 1991, more than 17 years ago. The AAO notes that an applicant for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of decision is the date of the final decision on the application for adjustment of status, which, in this case, must await the AAO's findings in the present matter.² Therefore, section 212(h)(1)(A) of the Act applies to the applicant as the crimes for which he has been found inadmissible to the United States occurred more than 15 years prior to his application for adjustment of status.

An applicant may establish eligibility for a waiver under section 212(h)(1)(A) of the Act by demonstrating that his or her admission to the United States would not be contrary to the national welfare, safety or security of the United States. In the present case, the record does not contain any evidence showing that the applicant has ever been arrested, charged with or convicted of any crime since his conviction in 1991. Nor does the record contain any evidence that would indicate that the admission of the applicant would be contrary to the national welfare, safety, or security of the United States. Therefore, the AAO finds the record to establish that the applicant meets the statutory requirements for a waiver of inadmissibility under section 212(h)(1)(A) of the Act.

As the granting of a waiver under section 212(h)(1)(A) of the Act is discretionary, the applicant must also establish that the favorable factors in his case outweigh the negative. The favorable factors in this matter are the passage of more than 17 years since the applicant's last conviction, the absence of

² The AAO notes that the appeal of the Form I-601 is part of the process of adjustment of status and, therefore, technically, the application for adjustment of status is not final until the appellate process is complete.

further criminal record, his U.S. spouse and children, the approved visa petition benefiting him, the affidavits submitted in testimony to his *good moral character* and his consistent payment of taxes. The unfavorable factors in this matter are the applicant's crimes, and his unlawful presence and unlawful employment in the United States.

The AAO finds that the crimes and immigration violations committed by the applicant are serious in nature and cannot be condoned. Nevertheless, the AAO finds that, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.