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U.S. Citizenship
and Immigration
Services

H12

[Redacted]

FILE: Office: WEST PALM BEACH (MIAMI, FL) Date: FEB 18 2009

IN RE: Applicant: [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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, West Palm Beach, Florida, and 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 Nicaragua 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 record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his United States citizen spouse, children, and lawful permanent resident parents.

The District Director found that the applicant 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 May 14, 2008.

On appeal, the applicant, through counsel, asserts “[t]he Service delayed approximately seven years in adjudicating the...waiver application, and when it finally did adjudicate the application, it failed to fully consider the many equities of the applicant.” *Form I-1290B*, filed June 12, 2008. Counsel further contends that “[t]he decision contains errors of fact and law...Given that seven years have passed since the waiver was originally filed, the applicant has acquired additional equities which should be considered as well.” *Id.*

The record includes, but is not limited to, counsel’s brief, affidavits from the applicant’s parents and sister, numerous letters of recommendations from the applicant’s friends and family, and court dispositions for the applicant’s arrests and conviction. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on December 30, 1992, the applicant was convicted of statutory burglary, in violation of Virginia Annotated Code § 18.2-91, by the Circuit Court of Henry County, Virginia, and was sentenced to five (5) years in prison, which was suspended on five (5) years active probation and restitution.

The AAO notes that in determining whether the applicant’s conviction was for a crime involving moral turpitude, the Board of Immigration Appeals (Board) has held that they must “consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.” *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992); *see also Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the “statutory provision . . . encompasses at least some violations that do not involve moral turpitude”).

Virginia Annotated Code § 18.2-91 provides, in pertinent part, that:

If an person commits any of the acts mentioned in § 18.2-90 [Entering dwelling house, etc., with intent to commit murder, rape, robbery or arson] with intent to commit larceny, or any felony other than murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79 or § 18.2-80, or if any

person commits any of the acts mentioned in § 18.2-89 or § 18.2-90 with intent to commit assault and battery, he shall be guilty of statutory burglary...

Burglary has been held to be a crime involving moral turpitude where it involves breaking and entering with intent to commit larceny or another crime involving moral turpitude. *See Matter of R-*, 1 I&N Dec. 540 (BIA 1943). The AAO notes that the record of conviction establishes that the applicant entered the victim's house with intent to commit larceny; therefore, the applicant was convicted of a crime involving moral turpitude.

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

(A) *Conviction of certain crimes.*—

- (i) In general.—Except as provided in clause (ii), any 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...

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of 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 [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 established to the satisfaction of the [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...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant was convicted of burglary on December 30, 1992. The applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) under NACARA on September 17, 1998. The AAO notes that the applicant's conviction did not occur in excess of 15 years prior to his filing for adjustment of status; however, 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). On May 14, 2008, the District Director certified her decision to an immigration judge, "so that an immigration judge may conduct a hearing to determine whether this decision should be made final." *Notice of Certification*, dated May 14, 2008. The AAO finds that there has been no final decision made on the applicant's I-485 application filed on September 17, 1998, so the applicant, as of today, is still seeking admission by virtue of his application for adjustment of status. Therefore, the crime involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

The AAO finds that the District Director erred in basing her decision on section 212(h)(1)(B) of the Act and failing to consider the eligibility of the applicant for a waiver under section 212(h)(1)(A). The record reflects that on June 28, 2001 and May 15, 2002, the applicant was arrested for possession of cocaine; however, there is insufficient evidence in the record showing that the applicant was convicted of any crimes in accordance with the meaning of a conviction found at section 101(a)(48) of the Act. Therefore, the AAO notes that the applicant has not been convicted of any additional criminal charges since his last conviction in 1992. The AAO notes that the applicant was granted an early release from probation supervision on July 6, 1995. See *letter from [REDACTED], Probation Officer*, dated July 10, 1995. The applicant's mother states the applicant "is today a different person than the [applicant] of 1992. He is now a hard and responsible worker.... [The applicant] has made mistakes in the past, but is now in the right track." *Affidavit from [REDACTED]* dated July 7, 2001. There are no additional convictions on the applicant's record further attesting to his rehabilitation and the record of proceedings does not establish that the admission of the applicant to the United States would be "contrary to the national welfare, safety, or security of the United States."

The record reflects that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's United States citizen children and lawful permanent resident parents would suffer hardship as a result of their separation from the applicant. See *affidavits from [REDACTED] and [REDACTED]*, dated July 7, 2001. Counsel states that the applicant pays half of his parent's mortgage and utilities. See *Appeal Brief*, dated July 8, 2008. [REDACTED] states the applicant "has been employed at J&J Produce/Producer Transport since May 7, 1999. His employment has continually surpassed expectations of company policy." *Letter from [REDACTED], Transportation Manager*, dated July 20, 2001. The applicant's father states "[t]o the best of his abilities and

learning from mistakes from his past, [the applicant] has been doing a wonderful job raising his two children from a previous marriage without any assistance from his former wife, trying to provide a stable environment.” *Affidavit from* [REDACTED], dated July 7, 2001. The applicant’s mother states the applicant “is trying his best to raise his two oldest kids as a parent.... [The applicant] has helped [her] and [her] husband tremendously by assisting [them] with the purchase of [their] house.” *Letter from* [REDACTED] *supra*. The applicant’s sister states the applicant “has single handedly raised his two sons from a previous marriage, conveying responsibility and pride for his accomplishments learning from mistakes of the past.” *Affidavit from* [REDACTED], dated July 16, 2001.

The favorable factors presented by the applicant are the hardship to his lawful permanent resident parents and United States citizen children, who depend on him for emotional and financial support; the applicant’s stable work history in the United States; the applicant’s history of paying his federal income taxes; and the lack of any other criminal convictions since his last conviction in 1992.

The unfavorable factor presented in the application is the applicant’s conviction for burglary on December 30, 1992. The AAO notes that the applicant has not been convicted of any criminal violations since his last conviction and the applicant’s crime occurred more than 15 years ago.

While the AAO does not condone his actions, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The District Director’s denial of the I-601 application is withdrawn.

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 now met that burden. Accordingly, the appeal will be sustained.

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