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U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES, CALIFORNIA

Date: FEB 18 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 Mexico 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 U.S. citizen 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 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 March 17, 2006.

On appeal, counsel contends that the district director erred in failing to find extreme hardship and failing to articulate reasons for her decision. *Brief in Support of Appeal*, dated May 3, 2006.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, Ms. [REDACTED] indicating they were married on July 30, 1999; financial and tax documents; conviction documents; letters from the applicant's and [REDACTED] employers; a copy of [REDACTED] naturalization certificate; a copy of [REDACTED]s former husband's death certificate; a copy of the applicant's birth certificate; declarations from the applicant and [REDACTED] a letter from Ms. [REDACTED] son's physician and copies of her son's school records; a copy of [REDACTED]'s medical records; a copy of [REDACTED]'s Social Security Statement; the 2004 Country Reports on Human Rights Practices for Mexico; and an approved Immigrant Petition for Alien Relative (Form I-130). 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:

(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

In the instant case, the record shows that the applicant entered the United States in 1989 without inspection. The record further indicates that the applicant has been arrested and convicted several times, as follows:

1. On December 23, 1977, the applicant was arrested and charged with misdemeanor drunk driving in violation of California Vehicle Code § 23102(a) (renumbered as § 23152(a)). He pled guilty and was sentenced to twelve months probation.
2. On January 8, 1979, the applicant was arrested and charged with misdemeanor drunk driving in violation of California Vehicle Code § 23102(a) (renumbered as § 23152(a)). He pled guilty and was sentenced to 45 days imprisonment and three years probation.
3. On January 17, 1981, the applicant was arrested and subsequently convicted of driving with a suspended license in violation of California Vehicle Code § 14601(a). He was sentenced to 30 days imprisonment.
4. On April 4, 1981, the applicant was arrested and subsequently convicted of hit and run: property damage in violation of California Vehicle Code § 20002(a). He was sentenced to 15 days imprisonment.
5. On December 31, 1986, the applicant was arrested and subsequently convicted of giving false information to a peace officer in violation of California Vehicle Code § 31. The record indicates the

applicant was sentenced to jail and fined; however, the length of the applicant's sentence is unclear from the record.

6. On January 4, 1993, the applicant was arrested and subsequently convicted of hit and run: property damage in violation of California Vehicle Code § 20002(a). He was sentenced to 28 days imprisonment.

The record also shows, and counsel concedes, that in September 1983, the applicant was arrested and charged with forgery, possession of a driver's license or identification to commit forgery, possession of a bad check or money order, and passing a fictitious check. *State of California, Department of Justice, Criminal History Transcript at 3-4; Response to Request for Additional Evidence*, dated July 28, 2004. However, there is no evidence in the record showing that the applicant was convicted of these charges.

Significantly, counsel does not contend that the applicant was *not* convicted of a crime involving moral turpitude. Because the burden of proof is on the applicant to establish that he is not inadmissible, *see* section 291 of the Act, 8 U.S.C. § 1361, the AAO finds that the applicant 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. As such, he is eligible to apply for a waiver under section 212(h) of the Act. 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 criminal conviction occurred in 1993. 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 21, 2006. In addition, he explains that he does not

want his wife to suffer the consequences of his past mistakes and states that he is not the same person now that he was before. *Id.* The applicant states that his goal in life now is to keep his family happy and to provide for them to the best of his ability. *Id.* The applicant has not had any further arrests or convictions for over fifteen years. Furthermore, the applicant has been gainfully employed as a Drape Maker for almost twenty years and his current employer describes him as “an exceptional and loyal employee [who] learns quickly and has the ability to grow with the company.” Letter from [REDACTED] dated February 9, 2006. The record also shows that the applicant has paid taxes while working in the United States. 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 1989 without inspection, periods of unauthorized presence, and the applicant’s numerous arrests and criminal convictions.

The positive factors in this case include the applicant’s significant family ties in the United States, including his wife, U.S. citizen child, mother-in-law, sister-in-law, and brother-in-law, all of whom are either U.S. citizens or legal permanent residents. In addition, the applicant has lived in the United States for twenty years. The applicant has been continuously and gainfully employed for almost twenty 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 fifteen years.

The AAO finds that, although the applicant’s immigration violations 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.