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U.S. Citizenship
and Immigration
Services

H2

FILE:

Office: BALTIMORE, MD

Date: JAN 06 2009

IN RE:

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

ON BEHALF OF PETITIONER:

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, MD and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained, and the application will be approved.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under sections 212(a)(1)(A)(i) and 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(1)(A)(i) and 1182(a)(2)(A)(i)(I). The applicant was found inadmissible under section 212(a)(1)(A)(i) of the Act as an alien who is determined to have been infected with HIV, a communicable disease of public health significance. The applicant was found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to sections 212(g) and 212(h) of the Act, 8 U.S.C. §§ 1182(g) and 1182(h), in order to remain in the United States with his U.S. citizen spouse and children.

The District Director determined that in regard to the applicant's request for a section 212(h) of the Act waiver, the applicant had failed to establish a qualifying family member would suffer extreme hardship if he were denied admission to the United States. The applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), was denied accordingly. The District Director did not issue a determination on the applicant's request for a section 212(g) of the Act waiver. *See Decision of the District Director*, dated July 27, 2006.

On appeal, counsel for the applicant submits a brief, dated September 21, 2006, and supporting documentation. *See Brief In Support of the Appeal*. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A)(i) of the Act provides 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.

Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *See Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). It is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581

(BIA 1992). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS, supra*.

The record reveals that on October 11, 1995, the applicant was convicted of *Grand Larceny* in violation of section 18.2-95 of the Code of Virginia and *Possession of Burglary Tools* in violation of section 18.2-94 of the Code of Virginia.

Section 18.2-95 of the Code of Virginia provides:

Any person who (i) commits larceny from the person of another of money or other thing of value of \$5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value of \$200 or more, or (iii) commits simple larceny not from the person of another of any handgun, rifle or shotgun, regardless of the handgun's, rifle's or shotgun's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than \$2,500, either or both.

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. See *Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974)(stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, due to his conviction for larceny, found to be a crime involving moral turpitude.

Section 18.2-94 of the Code of Virginia provides:

If any person have in his possession any tools, implements or outfit, with intent to commit burglary, robbery or larceny, upon conviction thereof he shall be guilty of a Class 5 felony. The possession of such burglarious tools, implements or outfit by any person other than a licensed dealer, shall be prima facie evidence of an intent to commit burglary, robbery or larceny.

Section 18.2-94 of the Code of Virginia contains two parts, one of which may not include a crime involving moral turpitude: the first part, "if any person have in his possession any tools, implements or outfit, with intent to commit burglary, robbery or larceny," identifies the intent to commit a crime involving moral turpitude (burglary, robbery or larceny), while the second part, "possession of such burglarious tools, implements or outfit by any person other than a licensed dealer, shall be prima facie evidence of an intent to commit burglary, robbery or larceny," does not define a crime involving moral turpitude since possession of burglarious tools alone without the requisite "evil intent" can result in a conviction. Under the statute, evil intent must be explicit or implicit given the nature of the crime.

Gonzalez-Alvarado, v. INS, 39 F.3d 245, 246 (9th Cir. 1994).

Since statute under which the applicant was convicted contains an offense which involves moral turpitude and an offense which does not, it is to be treated as a “divisible” statute, and we look to the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999). The applicant furnished a court document entitled, *Current Offense Information*, which lists his September 18, 1995 indictment as, “On or about the 28th day of June, 1995, in the County of Fairfax, [REDACTED] did unlawfully and feloniously have in his possession certain burglarious tools *with the intent to commit larceny*” (emphasis added). The applicant’s conviction for possession of burglarious tools with the intent commit larceny, renders him inadmissible under section 212(a)(2)(A)(i) of the Act, for having been convicted of a crime involving moral turpitude. Therefore, the applicant has been convicted of two crimes involving moral turpitude.

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

The Attorney General [now, Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2)

....

(1)(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) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *Id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of

fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that in *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals held that, “the most important single hardship factor may be the separation of the alien from family living in the United States”, and that, “[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion.” (Citations omitted.)

The AAO notes further, however, that U.S. Courts have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Ninth Circuit Court of Appeals defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Ninth Circuit emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The record reflects that the applicant married a naturalized U.S. Citizen, [REDACTED] on May 4, 1992. The applicant has two U.S. Citizen children, [REDACTED] and [REDACTED].

The applicant’s wife and children are qualifying family members for section 212(h) of the Act extreme hardship purposes.

The children’s birth certificates show that [REDACTED] is eighteen years old and [REDACTED] is fifteen years old. Counsel asserts that the applicant’s children have never lived in El Salvador and do not speak the language well. *Brief in Support of Appeal* [hereinafter “*Brief*”] at 6. Counsel contends that the applicant’s children would be forced to learn a new language, culture and friends if they moved to El Salvador. *Id.* Counsel states that the applicant’s wife and children are close with their extended family members who reside in the United States. *Id.*

As the applicant’s wife states in her October 24, 2005 letter:

I would lose everything I have gained [sic] the United States since I came here in 1989 if I relocated to El Salvador. Most of my family has moved here to the United States. [REDACTED] and my job, my house, and my social support network are all in the United States as well. Losing these important foundations to my life, as well as losing the benefits of United States citizenship would cause me extreme hardship.

Counsel further asserts that the applicant's wife, who is currently a nanny, would not be able to find such employment in El Salvador. *Brief* at 2. Counsel notes that the applicant and his wife were both raised in abject poverty, and their parents continue to live in such poverty. *Brief* at 5. Counsel contends that according to a U.S. Agency for International Development budget report, much of El Salvador lives below the poverty line, even after a period of slight continued economic growth. *Brief* at 5.¹

Court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life style. The BIA found that uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether extreme hardship has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The AAO notes that Temporary Protected Status (TPS) was extended for nationals of El Salvador until September 9, 2010. Pursuant to section 244(b)(1) of the Act, 8 U.S.C. § 1254a, the Secretary may designate a country for TPS when he/she determines, after consulting with appropriate government agencies, that:

There is an ongoing armed conflict within the state and, due to that conflict, return of nationals to that state would pose a serious threat to their personal safety;

The state has suffered an environmental disaster resulting in a substantial, temporary disruption of living conditions, the state is temporarily unable to handle adequately the return of its nationals, and the state has requested TPS designation; or

¹ The U.S. Agency for International Development's budget report for 2007 provides, "El Salvador continues to face daunting development challenges. These range from high levels of rural poverty, to vulnerability to natural disasters, to an economy that falls short of providing enough good jobs to keep the population gainfully employed. Poverty rates are close to 44% in the rural areas."

There exist other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless the Secretary finds that permitting nationals of the state to remain temporarily is contrary to the national interest of the United States.

Given the Secretary's renewal of TPS for nationals of El Salvador, the high level of poverty and lack of employment opportunities in El Salvador, the applicant's children's unfamiliarity with the Salvadoran culture, customs and their lack of proficiency in the Spanish language, and the applicant's wife and children's attachment to their extended family members in the United States, it has been established that they would suffer extreme hardship if they relocated to El Salvador due to the applicant's inadmissibility.

Although hardship to the applicant's wife and children in the event that they accompany the applicant to El Salvador is material for establishing eligibility for a waiver under section 212(h) of the Act, it is not the only factor to be considered. Extreme hardship to the applicant's wife and children must be established in the event that they accompany the applicant or in the event that they remain in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

Counsel asserts that the profound and lifelong emotional grief that the applicant's wife and children would experience upon the applicant's premature and agonizing death from AIDS in El Salvador is an extreme hardship that goes beyond the existence of mere hardship or disappointment caused by family separation. *Brief* at 1. Counsel contends that the terrible suffering and death of a spouse from AIDS is not an ordinary hardship or disappointment that separated family members might typically experience. *Brief* at 3. Counsel states that because El Salvador has a particularly weak health care system, treatment for HIV infection is practically impossible to obtain and the medicines, when available, are prohibitively expensive. *Brief* at 4.

Hardship to the applicant is not relevant for the purpose of establishing eligibility for a waiver under section 212(h) of the Act. However, it will be considered insofar as it results in hardship to the qualifying relative.

The applicant's wife states in her October 24, 2005 letter:

I would also suffer extreme hardship if my husband were denied lawful permanent residency because I know he would die an early and painful death in El Salvador from complications due to HIV. My husband is HIV infected. He receives medical treatment for the disease in the United States through his employer-subsidized group health insurance plan. I am terrified that [REDACTED] could not obtain treatment for HIV in his home country of El Salvador.

I would have to send a great amount of my earnings to [REDACTED] every month in El Salvador just to give him the opportunity to purchase HIV medications to keep him alive. But I understand that these medications can cost over \$1,000 a month, and this expense would cause me severe economic hardship. I work full-time, fifty hours per

week, and my salary as a daytime nanny is not nearly enough to send this money and allow my daughters and me to survive economically in the United States.

She further states in her September 15, 2006 letter:

If the Service were to expel [REDACTED] to El Salvador, it would likely be sending him to a swift and certain death. The quality of El Salvador's health system is terrible, especially as compared with the United States, and Mauricio simply will not be able to obtain the proper HIV treatment there. Sending [REDACTED] back to El Salvador will not only cause unrelenting anguish and break up our family; it will kill him.

The record shows that the applicant has private health insurance with Coventry Health Care of Delaware, Inc. The applicant also has been admitted into the Maryland Department of Health and Mental Hygiene's Maryland AIDS Drug Assistance Program (MADAP). The applicant furnished a letter from his attending physician, [REDACTED], which states, "[REDACTED]'s good health is due to his excellent adherence to his medication regime. If he forced to return to El Salvador, where these medications are erratically available and prohibitively expensive, his expected course will be one of decline and progression to AIDS."

Counsel furnished as corroborating evidence a U.S. Agency for International Development *HIV/AIDS Country Profile* dated December 2004. The current U.S. Agency for International Development's *HIV/AIDS Health Profile* (dated September 2008) provides in pertinent part:

Free HIV testing began in El Salvador in 1997, and in January 2002, the Ministry of Health (MOH) began to offer antiretroviral treatment (ART). By December 2006, 174 health facilities and two mobile clinics offered HIV testing for free, and 3,447 people were receiving ART without charge. In cooperation with other countries in the region, the Salvadoran Government negotiated with major pharmaceutical manufacturers and received price reductions on antiretroviral drugs. Currently, 39 percent of people infected with HIV who need ART receive it.

Counsel further asserts that that Salvadorans infected with HIV face discrimination. *Brief at 4.* [REDACTED] contends in her October 24, 2005 letter that, "El Salvadoran society attaches great stigma to people with HIV, and I fear that Mauricio will suffer ostracism in El Salvador due to his health condition." Counsel cites to reports he furnished from the U.S. Department of State and the U.S. Agency for International Development, which corroborate his assertions regarding discrimination in El Salvador against HIV infected individuals. *Brief at 4-5.*

The current U.S. Department of State *Country Reports on Human Rights Practices* in El Salvador, dated March 11, 2008, provides, "The law prohibits discrimination on the basis of HIV status and sexual orientation, although in practice discrimination was widespread. . . . Lack of public information remained a problem in confronting discrimination against persons with HIV/AIDS or in assisting persons suffering from HIV/AIDS." Similarly, the current U.S. Agency for International Development *HIV/AIDS Health Profile*, dated September 2008, provides, "Although the government

began initial HIV/AIDS prevention activities as early as 1988, a great deal of stigma surrounding HIV persists.”

In addition, counsel refers to an article published in the January/February 2003 edition of the magazine, *The Witness*, entitled “Living With AIDS in EL Salvador One Woman’s Story.” See *Brief* at 5. This article discusses the life of an HIV infected woman in El Salvador. Regarding the discrimination she faces, the article provides, “When rumors came about her sickness, some wanted to expel her from the neighborhood. At that time she worked selling food, such as tamales and pastries. Some of her customers stopped buying from her, saying that she was ‘una sidosa,’ (a bearer of ‘SIDA,’ the Spanish acronym for AIDS). She says that many times the rejection of her neighbors has hurt her more than the sickness.”

The AAO notes that a World Bank study entitled, *Reducing HIV/AIDS Vulnerability in Central America*, also addresses the issue of discrimination in El Salvador:

The lack of consistency between the Labor Code and the HIV/AIDS Law is an obstacle for PLWH seeking to protect their labor rights. The laws of El Salvador protect PLWH from stigma and discrimination in employment. However, it was not until recently (2004) that paragraph “d” of Article 16 authorizing HIV tests for job applicants was revoked. In practice, stigma and discrimination happen in the following four situations: compulsory testing before hiring, compulsory testing while employed, lack of confidentiality regarding HIV status and firing or change in the conditions of employment due to HIV status. Statistics supplied by the Atlacatl Foundation confirm that compulsory testing prior to employment is a recurrent problem.

Compulsory testing during employment is stipulated in Article 31, paragraph 10 of the Labor Code (Obligation of Workers), which states that workers must “submit to a medical exam when required by the employer or by administrative authorities for the purpose of verifying their medical condition.” . . . Many institutions copy internal work regulations from the Labor Code, adding articles specific to their activities and interests. This suggests that the majority of companies may have, in their internal regulations, the capacity to require tests from their employers, including HIV tests, even though the practice is an act of discrimination.

There were no known incidents involving the denial or restrictions on social security or national insurance due to HIV status. However, as mentioned before, there are bank and insurance company forms and mortgage applications that ask the applicant to make a sworn statement indicating that he or she has not been diagnosed with HIV and authorizing doctors, hospitals, clinics and laboratories to provide information and reports on his or her medical condition to the insurance companies.

The World Bank, *Reducing HIV/AIDS Vulnerability in Central America, El Salvador: HIV/AIDS Situation and Response to the Epidemic*, 16-20 (December 2006).

Based on the foregoing, the AAO finds persuasive counsel's assertion that the terrible suffering and death of a spouse from AIDS is not an ordinary hardship or disappointment that separated family members might typically experience. Given the prevalence of discrimination against HIV infected individuals in El Salvador, and the fact that only 39% of the population infected with HIV receives antiretroviral treatment, it has been established that the applicant's spouse and children would suffer emotional hardship that is beyond the hardship normally expected upon the removal of a family member if the applicant was denied admission to the United States. The AAO therefore finds that the applicant has established that his wife and children would suffer extreme hardship if his waiver of inadmissibility is denied.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's October 11, 1995 convictions for *Grand Larceny* in violation of section 18.2-95 of the Code of Virginia and *Possession of Burglary Tools* in violation of section 18.2-94 of the Code of Virginia. The favorable factors in the present case are the extreme hardship to the applicant's wife and two children and the passage of thirteen years since he was convicted of the aforementioned offenses. The applicant does not appear to have been arrested for any other criminal offenses and he has not been charged with any other immigration violations. The AAO finds that the crimes 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. Therefore, the applicant has established his eligibility for a section 212(h) of the Act waiver.

As discussed, the applicant was also found inadmissible under section 212(a)(1)(A)(i) of the Act as an alien who is determined to have been infected with HIV, a communicable disease of public health significance. Section 212(a)(1)(A)(i) of the Act provides that any alien who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome is inadmissible.² Aliens infected with HIV, however, upon meeting certain conditions, may have such inadmissibility waived.

Section 212(g)(1) of the Act provides, in part, that the Attorney General may waive such inadmissibility in the case of an alien who:

(A) is a spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or

(B) has a son or daughter who is a United States citizen or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa; . . .

in accordance with such terms, conditions, and controls, if any, including the giving of bond, as the Attorney General [now, Secretary, Homeland Security, "Secretary"], in the discretion of the Attorney General [Secretary] after consultation with the Secretary of Health and Human services, may by regulation prescribe.

An applicant found to be inadmissible under section 212(a)(1)(A)(i) of the Act, who meets this statutory requirement, must also demonstrate that the following three conditions will be met if a waiver is granted:

- (1) The danger to the public health of the United States created by the alien's admission is minimal; and
- (2) The possibility of the spread of the infection created by the applicant's admission is minimal; and
- (3) There will be no cost incurred by any government agency without prior consent of that agency.

² Human Immunodeficiency Virus (HIV) has been determined by the Public Health Service to be a communicable disease of public health significance. 42 C.F.R. § 34.2(b)(4).

Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection, Aleinikoff, Exec. Assoc. Comm., HQ 212.3-P (Sept. 6, 1995); U.S. Citizenship and Immigration Services Adjudicator's Field Manual, *Waiver of Medical Grounds of Inadmissibility*, Chapter 41.3 (updated October 2008).

Examples of evidence considered sufficient to meet the first two requirements include, but are not limited to:

- (a) evidence that the applicant has arranged for medical treatment in the United States;
- (b) the applicant's awareness of the nature and severity of his or her medical condition;
- (c) evidence of counseling;
- (d) the applicant's willingness to attend educational seminars and counseling sessions;
and
- (e) the applicant's knowledge of the modes of transmission of the disease.

As for the third requirement, applicants may submit evidence of private insurance, personal financial resources, proof that a hospital, research organization or other type of facility will provide care at no cost to the government, or any other evidence establishing the ability to cover the cost of medical treatment for HIV/AIDS. *Id.*

The applicant has demonstrated that he has met each of these requirements. In a letter, dated October 14, 2005, the applicant states:

Since learning that I am HIV positive . . . I have sought a great deal of information about HIV disease. I understand that HIV is transmitted through bodily fluids. I also understand the precautions that must be taken in order to prevent transmission of the disease to others. Currently, I am a patient of [REDACTED] at the office of Drs. [REDACTED], and [REDACTED] in Silver Spring, Maryland. [REDACTED] specializes in treating HIV disease, and has provided me with counseling on HIV disease. My doctor has also discussed precautions that must be taken in order to prevent transmission of the disease to others.

As a resident of the United States, I live carefully and avoid all activities that might cause me to transmit the virus to another person. In addition, I would not cause any government agency to cover any of my healthcare costs. I have health insurance coverage through my employer, Cannon Seafood. This health insurance plan is comprehensive and covers all of my medical expenses related to HIV disease, save my medications, which are covered by the State of Maryland.

treatment of the applicant is corroborated by her letter, dated September 20, 2006, which provides in pertinent part:

██████████ is under my care for HIV disease. He is compliant with his treatment and remains stable on the following regimen:

Lamivudine 300mg. qd
Tenofovir 300mg. qd
Atazanavir 300mg. qd
Ritonavir 100mg. qd

good health is due to his excellent adherence to his medication regimen.

The foregoing letters establish that the applicant has received counseling and treatment from ██████████ in accordance with the first two requirements. Accordingly, the danger to public health and the possibility of the spread of infection created by the applicant's admission to the United States is minimal.

Regarding the third requirement, the applicant furnished a copy of his health insurance card with Coventry Health Care, showing that he is on an Open Access HMO plan. The applicant also furnished a letter from the Maryland Department of Health and Mental Hygiene (DHMH), stating that he has been admitted into the DHMH's Maryland AIDS Drug Assistance Program (MADAP).

Additionally, the record reflects that the applicant is maintaining long-term employment with ██████████. A letter from ██████████, dated June 1, 2006, states that the applicant is a full-time employee and has been employed with the company for a total of ten years. In 2006, the applicant's rate of pay was \$15.00/hour and he was employed 55 hours a week, giving him an annual gross salary of \$42,900.00. *See Employer Letter from ██████████, dated June 1, 2006.* The applicant's 2005 Wage and Tax Statements show that he earned \$45,349.59 during that year. As stated above, in 2006 the applicant's wife earned \$640/week for full-time employment, giving her an annual gross salary of \$33,280.00. *See Employer Letter from ██████████, dated May 19, 2006.* The applicant's wife's 2005 Wage and Tax Statement (Form W-2) shows that she earned \$29,812.00 during that year.

The foregoing evidence of the applicant's private health insurance, enrollment in MADAP, full-time employment with ██████████, and his wife's full-time employment with Deborah Paxson, demonstrate that if the applicant is admitted to the United States there will be no cost incurred by any government agency without prior consent of that agency.

Applicants found inadmissible under section 212(a)(1)(A)(i) of the Act as having HIV, a communicable disease of public health significance, also are potentially inadmissible under section 212(a)(4) of the Act. Section 212(a)(4)(A) of the Act renders inadmissible any alien who, in the opinion of the Attorney General [Secretary] at the time of application for admission or adjustment of status, is likely at any time to become a public charge. Section 212(a)(4)(B)(i) of the Act

specifically lists the factors to be taken into account when making a public charge determination. These factors include the alien's age, health, family status, assets, resources, and financial status, and his or her education and skills. U.S. Citizenship and Immigration Services Adjudicator's Field Manual, *Waiver of Medical Grounds of Inadmissibility*, Chapter 41.3; See *Immigrant Waivers for Aliens Found Excludable Under Section 212(a)(1)(A)(i) of the Immigration and Nationality Act Due to HIV Infection*, Aleinikoff, Exec. Assoc. Comm., HQ 212.3-P (Sept. 6, 1995).

The 2005 Wage and Tax Statements for the applicant and his spouse show that they earned \$75,161.59 during that year. The U.S. Department of Health and Human Service's 2005 federal poverty guidelines reflect that an annual income of less than \$19,350 for a family of four constitutes poverty, thus allowing for financial eligibility for certain federal program purposes.³ The applicant and his spouse had a gross income in 2005 that was far above this income amount. Therefore, the applicant has demonstrated that he is not likely to become a public charge if he is admitted to the United States.

Finally, U.S. Citizenship and Immigration Services (USCIS) may grant a waiver under section 212(g)(1) of the Act in accordance with the terms, conditions, and controls considered necessary after consulting with the Secretary of Health and Human Services (HHS). Before USCIS makes a final determination on the waiver application, the Centers for Disease Control and Prevention (CDC) must first issue an endorsement of review. U.S. Citizenship and Immigration Services Adjudicator's Field Manual, *Waiver of Medical Grounds of Inadmissibility*, Chapter 41.3. In order to obtain endorsement from the CDC, the applicant must furnish a completed *CDC Form for Applicants with HIV Infection*. *Id.* The record reflects that the applicant completed this form, with the requisite signature from his attending physician, Lynette H. Posorske, and an endorsement from a local health officer with the Montgomery County Department of Health & Human Services' Dennis Avenue Health Center.

In viewing the record, the AAO finds that the applicant has satisfied the statutory and procedural requirements for waiver under section 212(g)(1) of the Act. The decision of the District Director does not indicate otherwise. See *Decision of the District Director*, dated July 27, 2006. Therefore, the applicant has established his eligibility for a section 212(g)(1) of the Act waiver.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h) and 212(g) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the previous decision of the District Director will be withdrawn and the application will be approved.

ORDER: The appeal is sustained.

³ <http://aspe.hhs.gov/poverty/05poverty.shtml>