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U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED] Office: LOS ANGELES, CALIFORNIA

Date: JUN 03 2009

IN RE: [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 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.

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom,  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under 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 (assault with a firearm on a police officer). The applicant is the husband of a U.S. Citizen and the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife.

The district director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative. The application was denied accordingly. *See Decision of the District Director dated August 29, 2005.*

On appeal, the applicant states that his wife would suffer extreme hardship if the application is removed from the United States because she has been married to him for 18 years and had lived with him for more than 27 years. He further states that she has not left the United States in over 20 years and would have difficulty adapting to life in Mexico if she were to relocate there. *See Statement in Support of Appeal* at 3-4. The applicant further states that his wife and children would suffer financially, physically, and emotionally if the applicant were removed and he remained in the United States. *Id.* at 4. In support of the waiver application the applicant submitted letters from himself, his wife, and his daughter, and a letter from his employer. The entire record was reviewed and considered in arriving at a 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) states in pertinent part:

(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 applicant was convicted of assault with a firearm on a police officer in violation of section 245(c) of the California Penal Code on January 10, 1986 in Los Angeles County, California. At the time of his conviction, section 245 of the California Penal Code provided, in pertinent part:

§ 245. Assault with deadly weapon or force likely to produce great bodily injury; punishment

(c) Every person who commits an assault with a firearm upon the person of a peace officer or fireman, and who knows or reasonably should know that the victim is a peace officer or fireman engaged in the performance of his or her duties, when the peace officer or fireman is engaged in the performance of his or her duties shall be punished by imprisonment in the state prison for four, six, or eight years.

The BIA and U.S. courts have found that assault on a law enforcement officer is not a crime involving moral turpitude absent elements including malicious intent, use of a weapon or infliction of bodily injury. *Partyka v. Attorney General*, 417 F.3d 408, 411-17 (3d Cir. 2005) (no moral turpitude involved in aggravated assault on a law enforcement officer under a New Jersey statute where the person may be convicted for negligent conduct and the record in the case did not reveal otherwise); *Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933) (no moral turpitude involved in assault related to resisting arrest); *Ciambelli v. Johnson*, 12 F.2d 465 (D.Mass. 1926) (moral turpitude not involved because there was no weapon used in assault on an officer); *Zaranska v. DHS*, 400 F.Supp. 2d 500, 504-05 (E.D.N.Y. 2005) (no moral turpitude involved in assault of a police officer pursuant to N.Y. Penal Law), distinguishing *Matter of Danesh, supra*; *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (same). In *Matter of Danesh*, the BIA found that, unlike the cases noted above, aggravated assault against a police officer is a crime involving moral turpitude where the statute specifies, *inter alia*, that the person assaulted must sustain bodily injury and the accused must know that the person assaulted is a peace officer. *Matter of Danesh, supra* at 673. In the present case the statute does not require that the victim sustain bodily injury, but does require that a firearm be used in the assault. The AAO therefore finds that in light of controlling case law and the statute at issue in this case, the applicant's conviction of assault with a firearm on a law enforcement officer is a crime involving moral turpitude. However, as this conviction was more than 15 years ago the applicant is eligible for consideration of a waiver under section 212(h)(1)(A) of the Act.

The record reflects that the applicant is a fifty year-old native and citizen of Mexico who has resided in the United States since February 1977, when he entered without inspection. His wife is a sixty-one year-old native of Mexico and citizen of the United States. In addition to the applicant's 1989 conviction for assault

on a police officer, he was also convicted of Driving under the Influence on November 24, 1997 and November 3, 1999 in Los Angeles County, California.

The applicant has not been arrested or charged with a crime since 1999, and his only crime of violence was his 1986 conviction, in which he pleaded guilty to discharging a firearm in the direction of a police officer. *See Superior Court of the State of California for the County of Los Angeles, Guilty Plea* dated January 10, 1986. The record 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.” Further, the record establishes that the applicant has rehabilitated. He has not been arrested or charged with a crime in the past ten years and evidence on the record indicates that he has been employed with the same company for the past ten years and has filed income tax returns. *See letter from 3G Technology, Inc.* dated September 8, 2005 *and U.S. Individual Income Tax Returns filed jointly with the applicant’s spouse for tax years 2000 to 2002, submitted with affidavit of support.*

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).

*See 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 include the applicant’s January 1986 conviction for the offense of assault with a firearm on a police officer. The underlying offense was an incident in which the applicant discharged a firearm in the direction of a police officer, and the officer was not harmed. The applicant was also arrested and convicted of driving under the influence of alcohol twice, and also entered and remained unlawfully in the United States.

The favorable factors in the present case are the applicant's length of residence and family ties in the United States, including a U.S. Citizen wife whom he married in 1987 and with whom he has resided since 1978, two U.S. Citizen children, and three grandchildren. Evidence on the record also indicates that the applicant's wife has resided in the United States since 1978, and due to the length of her marriage to the applicant and her residence in the United States, she would suffer hardship if she were separated from the applicant or relocated to Mexico. Further, as noted above, the applicant has not been arrested or convicted of a crime since 1999, and twenty-three years have passed since the crime that rendered him inadmissible. The applicant also has a stable employment history in the United States and has filed income tax returns.

The AAO finds that the immigration violations and 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. 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.