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

PUBLIC

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FILE:

Office: CHICAGO, IL

Date:

JUN 12 2009

IN RE:

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:

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 Field Office Director, Chicago, Illinois, 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 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 two crimes involving moral turpitude (theft). The record reflects that the applicant is the spouse of a lawful permanent resident and a mother of three U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside with her family in the United States.

The field office director concluded that the applicant had failed to establish that extreme hardship would be imposed on her spouse and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, at 4, dated August 29, 2007.

On appeal, counsel asserts that the field office director failed to consider hardship to the applicant's children and the suffering that the applicant's spouse would experience due to the children's suffering. ¹ *Form I-290B*, at 2, received September 27, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's spouse's statement, medical and educational documentation relating to the applicant's children, letters of support from family and friends, country conditions information on Mexico, and articles on the mother-child bond and life without a father. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that on January 3, 1991 and January 29, 1993, the applicant was convicted of theft under Texas Penal Code, Title 7, Section 31.03 (prosecuted under Section 12.44(b)). She was sentenced to a total of seven days in jail and \$250 in fines. As the applicant has been convicted of crimes involving moral turpitude, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act. *Matter of D*, 1 I&N Dec. 143 (BIA 1941).

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) of the Act provides, in pertinent part:

¹ The AAO notes that the applicant's children are qualifying relatives for a section 212(h)(1)(B) waiver and that hardship to them was not addressed in the denial letter.

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (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 [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 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 . . .

The AAO notes that an application 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 the decision is the date of the final decision, which in this case, must await the AAO's findings regarding the applicant's eligibility for a waiver of inadmissibility. Therefore, the applicant's Form I-485 is considered pending and section 212(h)(1)(A) of the Act applies to the applicant as the activities resulting in the applicant's convictions (which occurred before she was charged on September 7, 1990 and December 23, 1992) occurred more than 15 years prior to the applicant's adjustment of status application.

In order to be eligible for a section 212(h)(1)(A) waiver, the applicant must demonstrate that her admission to the United States would not be contrary to its national welfare, safety, or security and that she is rehabilitated. There is no indication that the applicant has ever relied on government financial assistance or will rely on government financial assistance. There is no indication that the applicant is involved with terrorist-related activities or is involved in activities harmful to the national security. There is no evidence that the applicant has been convicted of any crimes since January 29, 1993. Therefore, the record reflects that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security, and that the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant include her lawful permanent residence spouse, three U.S. citizen children, an approved

Form I-130, general hardship to her family members if she were removed, and letters attesting to her good moral character.

The unfavorable factors present in the application are the applicant's criminal convictions, her entry without inspection and her unauthorized periods of stay and employment.

The AAO finds that the crimes committed by the applicant 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 met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.