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U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



H2

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

MAR 30 2009

IN RE: Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The waiver application will be approved. The matter will be returned to the director for continued processing.

The applicant is a native and citizen of Cuba. In August 1991, the applicant was convicted of Grand Theft in the Third Degree, a violation of section 812.014 of the Florida Penal Code and Criminal Mischief, a violation of section 806.13 of the Florida Penal Code, based on a May 1991 incident and arrest. The applicant was placed on probation for one year and ordered to pay restitution. The applicant is thus deemed to be inadmissible for having committed crimes involving moral turpitude. The applicant does not contest the director's findings. He 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 U.S. citizen father and three children, born in 1989, 1992 and 1997.

The director concluded that the applicant had 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 Director*, dated December 4, 2006.

In support of the appeal, the applicant submitted a brief, dated December 22, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act provides, in pertinent part:

(A)(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, or

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

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 (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 . . . .
- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The AAO finds the analysis as to whether the applicant's qualifying relatives would suffer extreme hardship if the applicant were removed to Cuba unnecessary, as a waiver of inadmissibility is available to the applicant under section 212(h)(1)(A) of the Act. The above-referenced crimes occurred more than fifteen years ago. The record does not establish that the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States. Moreover, the record indicates that the applicant has not been convicted of any crimes since the above-referenced incident in 1991, more than seventeen years ago, which indicates rehabilitation.

To further support the applicant's rehabilitation, the applicant's U.S. citizen father provides an affidavit, asserting that his son, who has been residing in the United States for over twenty years, is a father to three minor children and that he and said grandchildren will experience emotional and psychological trauma if the applicant is removed. *Affidavit of [REDACTED]*, dated November 14, 2006.

The applicant also elaborates on the hardships his U.S. citizen father and children would encounter were his waiver denied. He asserts that his three children have lived with him since they were born, and he is the sole financial provider for the family. He goes on to state that his father is an old man and does not have the time to watch the children or give them attention, were the applicant to relocate abroad due to his inadmissibility. *Brief in Support of Appeal*, dated December 22, 2006.

A psychological evaluation has been provided that further supports the assertions above with respect to the applicant's active involvement in his children's lives-- financially, emotional and psychologically. *Psychological Evaluation from [REDACTED]*, dated December 21, 2006.

The record reflects that the applicant meets the requirements for a waiver of inadmissibility under section 212(h)(1)(A) of the Act. Further, the AAO notes that the applicant's U.S. citizen father and children would suffer hardship as a result of their separation from the applicant. However, the grant

or denial of the waiver does not turn only on the mere passage of fifteen years of time. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. 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 . . . 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 favorable factors in this matter are the applicant's U.S. citizen father and children, the hardships that the applicant's U.S. citizen father and children would face if the applicant were not present in the United States, community ties, gainful and long-term employment, payment of taxes, and the passage of more than 17 years since the violations that lead to the above-referenced convictions. The unfavorable factors in this matter are the applicant's criminal convictions and unlawful entry to the United States.

The crimes committed by the applicant were serious in nature and cannot be condoned. Nonetheless, the AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h), the burden of establishing that the application merits approval remains entirely with the applicant.

Section 291 of the Act, 8 U.S.C. § 1361. The applicant has sustained that burden. Accordingly, this appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained. The waiver application is approved. The director shall continue to process the applicant's adjustment of status application.