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

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FILE: Office: CALIFORNIA SERVICE CENTER Date: **MAY 15 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 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.

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 Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Guatemala. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States with his U.S. citizen wife and children.

In a decision dated August 29, 2006, the director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant asserts that the Director erroneously cites to precedent relating to the higher standard for cancellation of removal rather than that applicable to a waiver of inadmissibility. Counsel also contends that the cumulative weight of the medical and financial issues of the applicant's wife and son, combined with difficulties they would face in Guatemala, would make their hardship rise to the level of extreme. Counsel submitted a brief and additional evidence in support of these claims.

The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part that:

(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 . . . is inadmissible.

A crime involves moral turpitude where knowing or intentional conduct is an element of the offense. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992).

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

(h) The Attorney General 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

(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 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 record reflects that in December 1992, the applicant was convicted of "assault in the second degree" under section 53a-60 of the Connecticut General Statutes and sentenced to eighteen months imprisonment with three years probation. A review of the record and the applicable laws indicate that the applicant was convicted of a crime involving moral turpitude. *See* Conn. Gen. Stat. § 53a-60(a); *see also* *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (second degree assault under the same Connecticut statute was found to be a crime involving moral turpitude).

In addition, the record shows that on July 22, 1999, the applicant was convicted of illegal possession of a weapon in a motor vehicle under section 29-38 of the Connecticut General Statutes and sentenced to one year imprisonment, suspended with three years probation. The relevant statute reads, in part, as follows:

- (a) Any person who knowingly has, in any vehicle owned, operated or occupied by such person, any weapon, any pistol or revolver for which a proper permit has not been issued as provided in section 29-28 or any machine gun which has not been registered as required by section 53-202, shall be fined not more than one thousand dollars or imprisoned not more than five years or both . . .

Conn. Gen. Stat. § 29-38. Thus, while the statute under which the applicant was convicted expressly requires knowledge of illegal possession of a weapon, it does not include any language of intent, willfulness, or knowledge to use a weapon against another. As such, the conviction in this instant does not constitute a conviction of a crime involving moral turpitude. *See Matter of Serna*, 29 I&N 579, 583 (BIA 1992), *citing Matter of G.*, 7 I&N Dec. 114, 118 (BIA 1956) ("violation of statutes which merely license or regulate and impose criminal liability without regard to evil intent do not

involve moral turpitude"). *See also Matter of Granados*, 16 I&N 726, 728 (BIA 1979) (simple possession of a concealed weapon is not a crime involving moral turpitude).

Stemming out of the same arrest in May 1999, the applicant was convicted on September 20, 1999 of following too closely in a non-commercial vehicle under section 14-240 of the Connecticut General Statutes and fined \$138.00. A review of the record and the applicable laws indicate that this conviction involves a traffic infraction under a statute which involves no *mens rea* and, therefore, is not a crime involving moral turpitude. *See Matter of Perez-Contreras*, 20 I&N Dec. 615.

Accordingly, while the applicant's 1999 convictions are not convictions for crimes involving moral turpitude, in light of the applicant's 1992 assault conviction, the AAO finds that the Director correctly found the applicant to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act. However, while the Director's decision to deny the applicant's application for waiver of inadmissibility is based solely on consideration of extreme hardship to a qualifying relative under section 212(h)(1)(B) of the Act, the AAO finds that consideration of the eligibility of the applicant for waiver under section 212(h)(1)(A) is appropriate at this time, as explained below.

A section 212(h)(1)(A) waiver is dependent upon a showing that the activities which render the applicant inadmissible occurred more than fifteen years before the date of the applicant's adjustment of status application; the applicant's admission to the United States would not be contrary to the national welfare, safety, or security of the United States; and the applicant 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 record shows that the applicant 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). Here, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, on June 25, 2004. The AAO notes that the Director denied the applicant's Form I-485 on August 29, 2006, before the applicant was afforded the opportunity to pursue the appellate process with respect to his application for waiver of inadmissibility. Therefore, the denial of the Form I-485 was premature and, as of today, the applicant is still seeking to adjust status to that of a permanent resident. Further, according to the record, the act or acts giving rise to the applicant's 1992 conviction took place on or before his arrest on November 12, 1989. Thus, the crimes involving moral turpitude for which the applicant was found inadmissible occurred more than 15 years prior to the applicant's application for adjustment of status.

In addition, the evidence indicates that the applicant has been rehabilitated and his admission to the United States would not be contrary to the national welfare, safety, or security of this country. In his affidavit, the applicant takes responsibility for his past criminal activities and expresses remorse. *Affidavit of [REDACTED]* dated July 20, 2006. In addition, he noted that the offenses occurred while he was drinking, and that since his son's birth in 1999, he no longer drinks as he used to and has in fact not had any alcoholic beverages for a full year prior to the date of the affidavit. *Id.*

The applicant has not had any further arrests or convictions since 1999. Furthermore, the applicant has been married for twelve years and appears to have provided a stable environment for his family since his son was born. *Id.*; Affidavit of [REDACTED] dated July 28, 2006. Based on the evidence submitted with his Form I-485, it appears that the applicant now owns his own landscaping business and has regularly paid his taxes. In light of the foregoing, 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.

Further, the AAO notes that the applicant and his wife both indicate in their affidavits that their son suffers from asthma and has been hospitalized on three separate occasions. In addition, the record indicates that the applicant's spouse is employed irregularly as a housekeeper, and that she and her son, as well as the applicant's U.S. citizen daughter from a previous relationship, are dependent on the applicant for financial support. Affidavits of [REDACTED] and [REDACTED]; Psychological Evaluation by [REDACTED] (social worker and psychotherapist), dated July 22, 2006.

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 criminal convictions over ten years ago, his initial entry without inspection, and periods of unauthorized presence. The positive factors in this case include the applicant's family ties in the United States, including his U.S. citizen spouse and children, who are emotionally and financially dependent on him. In addition, the applicant has lived in the United States for nineteen years; he and his wife have been married and living together for twelve years; the applicant has been continuously employed 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 ten years.

In light of the above, the AAO finds that the applicant meets the requirements for waiver of his grounds of inadmissibility under section 212(h)(1)(A) of the Act. Furthermore, the record shows that the applicant has established that the favorable factors in his application outweigh the unfavorable 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 and the application for waiver of inadmissibility is approved.