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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

H12

FILE:

Office: CHICAGO

Date: **MAY 29 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.

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District 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 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), in order to remain in the United States with his U.S. citizen wife and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated October 5, 2006.

On appeal, counsel for the applicant contends that the applicant's wife and children will experience extreme hardship if the applicant is compelled to depart the United States. *Brief from Counsel*, undated.

The record contains a brief from counsel; statements from the applicant's wife; a letter from the applicant's children's school; a copy of the applicant's birth certificate; documentation relating to the applicant's and his wife's employment; tax records for the applicant and his wife; a copy of birth certificates for the applicant, the applicant's wife, and the applicant's children; a copy of the applicant's wife's naturalization certificate; a copy of the applicant's marriage certificate, and; documentation relating to the applicant's criminal conviction. The entire record was reviewed and considered in rendering this decision.

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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the

alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

- (h) The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) [or] (B) . . . 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 [now the Secretary of Homeland Security (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 record reflects that the applicant was convicted of theft under Illinois Compiled Statute Ch. 38 par. 16-1(a)(1) on March 30, 1990. A conviction under this law involves the permanent taking of property. Illinois Compiled Statute Ch. 38 par. 16-1(a)(1). There is ample support that the applicant’s conviction constitutes a conviction of a crime involving moral turpitude. *See, e.g., Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

The applicant has not provided ample documentation of his conviction in order to show the value of the property he stole, or to show what level of crime the criminal court designated his conviction. Thus, the evidence of record does not indicate the maximum sentence the applicant could have received for his conviction. *See* Illinois Compiled Statute Ch. 38 par. 16-1(b). Accordingly, the applicant has not shown that he is eligible for the “petty offense” exception found in section 212(a)(2)(A)(ii)(II) of the Act.

Thus, the applicant was properly deemed inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

In examining whether the applicant is eligible for a waiver, the AAO will assess whether he meets the requirements of section 212(h)(1)(A) of the Act. The applicant's conviction for which he is inadmissible involved his conduct on or before March 30, 1990. As this conduct took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act.

The record does not reflect that admitting the applicant would be contrary to the national welfare, safety, or security of the United States. Section 212(h)(1)(A)(ii) of the Act. The record does not show that the applicant has engaged in criminal activity since his conviction in 1990. The applicant was charged with battery under Illinois Compiled Statute Ch. 38 par. 12-3 on August 10, 1993, yet the record does not reflect that he was convicted. The record does not show that the applicant has exhibited violent behavior since the incident that led to his arrest in 1993.¹ The applicant has not been a public charge since his arrival in 1988. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(ii) of the Act.

The applicant has shown by a preponderance of the evidence that he has been rehabilitated. Section 212(h)(1)(A)(iii) of the Act. As discussed above, there is no evidence that he has engaged in criminal activity since his conviction in 1990. The record shows that he has conducted himself well during the previous 15 years, including marrying and starting a family with two children, working to support his family, paying taxes, participating in the raising of his children including visiting their school regularly. The record does not reflect that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirement of section 212(h)(1)(A)(iii) of the Act.

Based on the foregoing, the applicant has shown that he is eligible for consideration for a waiver under section 212(h)(1)(A) of the Act.

In determining whether the applicant warrants a favorable exercise of discretion under section 212(h) of the Act, the Secretary must weigh positive and negative factors in the present case.

The negative factors in this case consist of the following:

The applicant has been convicted of theft. The applicant entered the United States without inspection in 1988 and remained in the country for a lengthy period without a legal immigration status. The applicant has worked in the United States for a lengthy period without authorization.

The positive factors in this case include:

¹ It is noted that the applicant is not prejudiced by criminal charges that did not result in a conviction.

The applicant has family ties to the United States, including his U.S. citizen wife and two U.S. citizen children; the applicant has not been convicted of a crime since 1990, in approximately 19 years; the applicant works and pays taxes; the applicant provides emotional and economic support for his wife and children; the applicant is involved with his children's care and activities including visiting their school, and; the applicant's wife and children would experience significant hardship should the applicant be prohibited from remaining in the United States.

The applicant's criminal conviction and violation of U.S. immigration law cannot be condoned. However, the positive factors in this case outweigh the negative factors.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) 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. In this case, the applicant has met his burden that he merits approval of his application.

ORDER: The appeal is sustained.