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



U.S. Citizenship  
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FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date: SEP 03 2009

IN RE:

[REDACTED]

PETITION: 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:

[REDACTED]

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 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. The applicant is the spouse of a United States citizen and the father of two United States citizen children.<sup>1</sup> He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and children.

The District 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) on April 6, 2006.

On appeal, counsel asserts that the applicant has established that his spouse and children, one of whom has Spina Bifida, will suffer economic and emotional hardship.

In support of his assertions, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; an earnings statement and W-2 Form for the applicant; tax returns for the applicant and his spouse; criminal records and court documents for the applicant; an employment letter for the applicant; an educational assessment and medical records for the applicant's youngest son indicating he has Spina Bifida and requires continuing medical support. The entire record was considered in rendering a decision on the appeal.

The record reflects that on December 12, 1991, the applicant was arrested by the San Jose Police Department for Battery and Petty Theft, and was subsequently convicted of Petty Theft, § 488 of the California Penal Code, in the San Jose, California Municipal Court; on May 8, 1993, the applicant was arrested and charged with Petty Theft, § 484 of the California Penal Code, in the Superior Court of the County San Mateo, California, and subsequently convicted on October 31, 2002; on August 9, 1991, the applicant was arrested for theft and was subsequently convicted of § 488 of the California Penal Code, Theft, in the Superior Court of the County of San Mateo, California, on March 23, 1992. The record also indicates that the applicant was arrested on August 13, 1988, for Appropriation of Lost Property, by the Fullerton Police Department, Fullerton, California; arrested on March 21, 1992, for Theft by the Redwood City Sherriff's Office, Redwood City, California; and arrested on December 3, 1993, for Burglary in the First Degree and Possession of Burglary Tools, by the Palo Alto Police Department, Palo Alto, California. The applicant has failed to provide the final dispositions for his arrests on August 13, 1988, March 21, 1992, and December 3, 1993. Based on the record, the AAO finds the applicant to have been convicted of crimes involving moral turpitude (CIMTs) and to be inadmissible under section 212(a)(2)(A) of the Act. The applicant does not contest the finding that he has been convicted of a CIMT.

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<sup>1</sup> The AAO notes that at the time of the appeal, the applicant's spouse was pregnant with their third child.

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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.

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

(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 . . .

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 decision is the date of the final decision on the application, which in this case must await the AAO's findings in the present matter. Any activities resulting in CIMT convictions which occurred fifteen years prior to the final decision on an application may be waived as a matter of discretion pursuant to section 212(h)(1)(A) of the Act.

An examination of the record reveals that the applicant's conviction on October 31, 2002, relates to an arrest from May 8, 1993. The applicant's most recent arrest was on December 3, 1993. Although

the final disposition for several charges has not been provided, the record indicates that the applicant has not been arrested, convicted of or charged with any crimes relating to activities subsequent to December 3, 1993, a date which is fifteen years prior to the date of this appeal's adjudication. As such, he may establish eligibility for a waiver by showing that he is not a risk to the welfare, safety or security of the United States and has been rehabilitated.

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*, 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 applicant has resided in the United States since 1988, a substantial portion of his adult life. There is no indication in the record that the applicant has ever relied on the government for financial assistance or will rely on the government for financial assistance. Rather, tax records indicate that he and his spouse have consistently paid federal taxes. Further, there is nothing in the record that points to the applicant's involvement in any activities that would undermine national safety or security. The applicant has not been convicted of any crimes relating to activities subsequent to 1993. There is no indication that he has violated any of the terms of his probations resulting from his convictions. Therefore, the AAO finds the record to demonstrate 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 applicant's spouse is a United States citizen, and has asserted that she depends on him financially and emotionally, and that their children are deeply attached to their father – the applicant – and that the applicant is a good father. The record establishes

that their youngest son has Spina Bifida and requires continuing medical attention in the form of daily catheterization and treatment by a team of doctors who have cared for him since birth. As previously noted, the applicant has also paid taxes. The negative factors are the applicant's criminal history, his entry without inspection, and his periods of unlawful residence and employment. As noted above, the lack of any recent criminal activity lessens the impact of this particular negative factor. Based on its review of the record, the AAO finds that the favorable factors outweigh the unfavorable factors in this case. The AAO therefore finds that the applicant qualifies for a 212(h) waiver of his inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden.

**ORDER:** The appeal is sustained.