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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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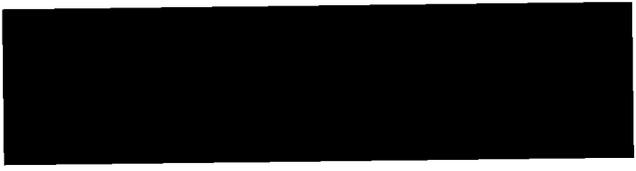
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IN RE:



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:



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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Colombia 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 three United States citizen children. 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 August 24, 2006.

On appeal, counsel asserts that the Acting District Director erred in her decision, and that the applicant's spouse has a severe disability, which will result in extreme hardship to her if the applicant is removed. Counsel indicates that he will submit a brief and/or additional evidence within 30 days. As of this date, however, the record contains no brief or additional evidence and the record will be considered complete.

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 . . .

A fingerprint check on the applicant revealed the following criminal charges:

11-19-1972, Jostling and Criminal Possession of Stolen Property;
12-16-1972, Petty Larceny, Criminal Possession of Stolen Property;
01-05-1973, Jostling
06-08-1973, Petty Larceny, CPS/P, Resisting Arrest, Harassment
08-02-1974, Theft, Simple Battery;
08-15-1975, Organized Gang Shoplifting
02-02-1977, Possession of Stolen Property, Public Order Crimes,
03-13-1978, Jostling
05-09-1980, Larceny
12-31-1980, Possession of a Loaded Gun, Assault 2, Possession of a Defaced Gun
08-23-1981, Trespassing
09-25-1983, Attempt to Commit Larceny, Larceny
05-28-1984, Larceny,
10-14-1984, Larceny, Trespassing
04-01-1989, Larceny
06-24-1989, Larceny

On June 8, 2006, the Acting District Director sent the applicant a Notice of Intent to Deny based on his failure to provide the dispositions for his arrests, and gave the applicant an additional 30 days to submit the final dispositions of any criminal charges against him. Counsel for the applicant submitted two requests for extensions but did not ultimately submit dispositions for the above charges. The AAO notes that it is the applicant's burden to establish eligibility in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361.

Despite the failure of the applicant to submit the evidence requested by the Acting District Director, the AAO finds the record to include sufficient documentation to establish that the applicant was convicted of Larceny on November 15, 1984 under New Jersey Statutes § 2C:20-3 and Attempted Criminal Possession of a Weapon, Third Degree, on May 13, 1985 under New York Penal Code § 265.02. Larceny has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966); *Matter of V-*, 2 I. & N. Dec. 340 (BIA 1940) and *Matter of V-I-*, 3 I. & N. Dec. 571 (BIA

1949)(concluding that petit larceny was also a CIMT). Accordingly, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a CIMT.¹

Although the record does not contain dispositions for the majority of the applicant's arrests, the AAO notes that all of the activities for which he was arrested occurred more than 15 years ago as of the date this appeal is being adjudicated. Therefore, pursuant to section 212(h)(1)(A) of the Act, the applicant may establish eligibility for a waiver by demonstrating that he is not a risk to the welfare, safety or security of the United States and has been rehabilitated.

The record contains documents filed in relation to the applicant's Form I-130, Form I-864, and Form I-485. In addition, pertaining to the Form I-601 in this proceeding, the record includes, but is not limited to, correspondence from counsel; letters of support; medical documentation for the applicant's spouse; and birth certificates for the applicant's children.

To qualify for a waiver, the applicant first must show that he does not pose a threat to the welfare, safety or security of the United States and has been rehabilitated. The applicant's last arrest that could have resulted in conviction took place on October 14, 1984,² more than 25 years ago. He has been married to the same U.S. citizen spouse for more than 22 years, has three U.S. citizen children, and has consistently applied for and received employment authorization under the Act. He has acquired certification as a nurse's aide and the record contains a letter of appreciation from an individual for whom he provided care. A letter from his parish priest attests to his character and a letter from a friend notes the sustained support he has provided his spouse during her periods of ill health. Based on the evidence before it, the AAO finds that there is nothing in the record to indicate that the applicant's admission would be contrary to the national welfare, safety, or security of the United States and that he 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 section 212(h)(1)(B) 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

¹ The AAO will not consider whether the applicant's conviction for Attempted Criminal Possession of a Weapon also constitutes a CIMT as the applicant's conviction for larceny is not amenable to the petty offense exception under section 212(a)(2)(ii)(II) of the Act. Although the record indicates that the applicant was sentenced to only 35 days, the maximum sentence of imprisonment for a conviction under § 2C:20-3 exceeds one year.

² The AAO notes that the record indicates that the applicant's arrests in 1989 ended with the dismissal of the charges against him.

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 discretionary factors for the applicant in this case include the applicant's U.S. citizen spouse and three U.S. citizen children; his spouse's history of depression and suicidal ideation, as well as her physical impairment; his long-term role as his spouse's primary caregiver; his history of lawful employment in the United States; and the absence of a criminal record for the last 25 years. The unfavorable factors for the applicant are his two criminal convictions and the 12 arrests for which he has provided no dispositions. Although the AAO does not condone the applicant's past criminal behavior, it, nevertheless, finds that the favorable factors outweigh the applicant's prior criminal history. Therefore, the applicant qualifies for a 212(h) waiver of his inadmissibility under section 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.