

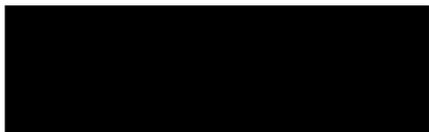
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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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



H2

Date: **APR 20 2011** Office: CALIFORNIA SERVICE CENTER

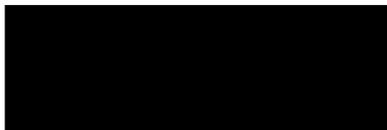
FILE: 

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)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

f. Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director of the California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the application will be approved.

The applicant is a native and citizen of the Dominican Republic 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 committed crimes 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 daughter.

The Director concluded that the applicant had failed to establish that his admission would impose extreme hardship on his qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated December 3, 2007.

On appeal, counsel asserts that the applicant's daughter would suffer extreme hardship if the applicant's waiver application is denied. *Notice of Appeal (Form I-290B)*, dated December 31, 2007.

In support of the application, the record contains, but is not limited to: the applicant's conviction records; statements from the applicant and his daughter; a statement from the applicant's friend; photographs; letters from the applicant's church; the applicant's daughter's birth certificate; a list of the applicant's U.S. citizen and lawful permanent resident relatives; and documentation related to the applicant's involvement in his community. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — Except as provided in clause (ii), any 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
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
 - (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(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).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that the applicant was convicted on February 25, 1981 of *disorderly conduct* in violation of N.Y. Penal Law § 240.20 and sentenced to a \$50 fine (Docket No. 0Q025116). On May 21, 1982, the applicant was convicted of *receiving stolen property* in violation of N.J. Stat. Ann. § 2C:20-7 and sentenced to 62 days in the Bergen County Jail and 3 years probation (Indictment No. S-253-82). On December 8, 1983, the applicant was convicted of *attempted criminal mischief* in the fourth degree in violation of N.Y. Penal Law § 145.00 and sentenced to time served in prison (Docket No. 3Q029339).

At the time of the applicant's conviction, New Jersey Stat. Ann. § 2C:20-7a provided:

A person is guilty of theft if he knowingly receives or brings into this State movable property of another knowing that it has been stolen, or believing that it is probably stolen. It is an affirmative defense that the property was received with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.

New Jersey Stat. Ann. § 2C:20-3a. stated that "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, immovable property of another with purpose to deprive him

thereof.”

New Jersey Stat. Ann. § 2C:20-1a stated that to deprive another of his or her property means:

- (1) to withhold or cause to be withheld property of another permanently or for so extended a period as to appropriate a substantial portion of its economic value ... or
- (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

In determining whether theft is a crime of moral turpitude, the Board of Immigration Appeals (BIA) considers “whether there was an intention to permanently deprive the owner of his property.” *See In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). New Jersey Stat. Ann. § 2C:20-1a defines the term “deprive” to include withholding property of another permanently or for an extended period so “as to appropriate a substantial portion of its economic value” or “to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.” In view of the fact that the affirmative statutory defense to the crime of receiving stolen property is “that the property was received with purpose to restore it to the owner,” the AAO finds that the term “deprive” under New Jersey Stat. Ann. § 2C:20-1a indicates an intention to permanently deprive an owner of his property. Thus, the AAO finds that the offense of which the applicant was convicted under New Jersey Stat. Ann. § 2C:20-7a involves moral turpitude, as there was an intention to permanently deprive the owner of his property. The applicant’s conviction under New Jersey Stat. Ann. § 2C:20-7a was a third degree offense, punishable with a term of imprisonment “for a specific term of years which shall be fixed by the court and shall be between three years and five years.” New Jersey Stat. Ann. § 2C:43-6a(3). Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest his inadmissibility on appeal.

The AAO notes that the record reflects that on October 20, 2003, the applicant was charged with criminal possession of marihuana in the fifth degree under N.Y. Penal Law § 221.10 (Docket No. 2004BX000984). The applicant was granted an adjournment in contemplation of dismissal under N.Y. Penal Law § 170.56.

At the time of the applicant’s conviction, N.Y. Penal Law § 170.56 provided:

1. Upon or after arraignment in a local criminal court upon an information, a prosecutor’s information or a misdemeanor complaint, where the sole remaining count or counts charge a violation or violations of section 221.05, 221.10, 221.15, 221.35 or 221.40 of the penal law and before the entry of a plea of guilty thereto or commencement of a trial thereof, the court, upon motion of a defendant, may order that all proceedings be suspended and the action adjourned in contemplation of dismissal, or upon a finding that adjournment would not be necessary or appropriate and the setting forth in the record of the reasons for such findings, may dismiss in furtherance of justice the accusatory instrument . . .
2. Upon ordering the action adjourned in contemplation of dismissal, the court must set and specify such conditions for the adjournment as may be appropriate, and such conditions may include placing the defendant under the supervision of any public or private agency. At any time prior to dismissal the court may modify the conditions or

extend or reduce the term of the adjournment, except that the total period of adjournment shall not exceed twelve months. Upon violation of any condition fixed by the court, the court may revoke its order and restore the case to the calendar and the prosecution thereupon must proceed. If the case is not so restored to the calendar during the period fixed by the court, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed in the furtherance of justice.

3. Upon or after dismissal of such charges against a defendant not previously convicted of a crime, the court shall order that all official records and papers, relating to the defendant's arrest and prosecution, whether on file with the court, a police agency, or the New York state division of criminal justice services, be sealed and, except as otherwise provided in paragraph (d) of subdivision one of section 160.50 of this chapter, not made available to any person or public or private agency; except, such records shall be made available under order of a court for the purpose of determining whether, in subsequent proceedings, such person qualifies under this section for a dismissal or adjournment in contemplation of dismissal of the accusatory instrument.

4. Upon the granting of an order pursuant to subdivision three, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

On appeal, counsel asserts that the applicant is not inadmissible for violating a law relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act because his records were sealed and upon the grant of the dismissal, "the arrest and prosecution shall be deemed a nullity." *Brief from Counsel*, dated November 15, 2010.

The AAO agrees with counsel and finds that the adjournment in contemplation of dismissal is not a conviction for immigration purposes.

Section 101(a)(48) provides:

(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In *Matter of Grullon*, the Board held that a conviction does not exist for immigration purposes where an alien's criminal charges were dismissed without prejudice following his successful completion of a pretrial intervention program. 20 I. & N. Dec. 12 (BIA 1989). The Board noted that "[s]ince no plea or finding of guilt has previously been entered, criminal proceedings are necessary to determine

the guilt or innocence of the accused.” *Id.* at 15. In the instant case, the court disposition reflects that the charge against the applicant under N.Y. Penal Law § 221.10 was dismissed after a one year probationary period. The AAO notes that any probationary period the applicant may have served is a restraint on his liberty that satisfies the second prong of section 101(a)(48)(A) of the Act. However, in light of N.Y. Penal Law § 170.56 and the holding in *Matter of Grullon*, we find that there is no evidence that a judge or jury has found the applicant guilty or that he has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, as required by the first prong of section 101(a)(48)(A) of the Act. Therefore, based on the record before the AAO, we find that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having committed a controlled substance violation.

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

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 . . .

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, it is waivable under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated.

The record reflects that the applicant has resided in the United States since April 28, 1978. The applicant has indicated that he has significant family ties in the United States, including his daughter,

granddaughter, siblings, nieces and nephews. *See Form I-601 Addendum (list of relatives in the United States)*. The applicant asserts that his U.S. citizen daughter, [REDACTED] would suffer extreme hardship if he is removed from the United States. He states that he has provided his daughter with emotional and financial support. The applicant claims to regret his past offenses. He notes that he is now an active member of the Incarnation Roman Catholic Church and he participates in church and community events. *Affidavit from [REDACTED] dated April 25, 2006*. A letter from the Pastor of the Church of the Incarnation provides that the applicant has been a registered member of the church for eleven years. *Letter from [REDACTED] dated March 9, 2002*.

The applicant's daughter, [REDACTED] asserts that she and her father have a close relationship and she relies on him for emotional support. She states that if her father is not permitted to remain in the United States she and her daughter will miss him. [REDACTED] notes that it is impossible for her to travel to the Dominican Republic to visit her father. She states that she is expecting a second child and the father of her children is on active duty with the military. [REDACTED] contends that she would be unable to travel to the Dominican Republic with two young children to visit her father. She notes that she would be unable to afford the expense of airline tickets. *Affidavit of [REDACTED] dated December 26, 2007*.

The AAO finds that the record indicates that the applicant's admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated, as required by section 212(h)(1)(A) of the Act. The applicant is the father of a U.S. citizen and he has attested to his numerous family ties in the United States. The applicant has not been convicted of a violent or dangerous crime. His last conviction was in December 1983, which is over 27 years ago. The applicant is now an active member of his church and he has attested to his involvement in his community. Accordingly, the applicant has established that he merits a waiver under section 212(h)(1)(A) of the Act.

Furthermore, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The favorable factors are the applicant's family ties in the United States and the passage of 27 years since his last conviction. The negative factors are his criminal convictions and period of unauthorized presence in the United States.

While the AAO cannot condone the applicant's criminal convictions and immigration violation, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.