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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: Office: DETROIT, MI FILE: [REDACTED]

JUN 01 2011

IN RE: Applicant: [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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Detroit, Michigan, the decision was affirmed in response to a motion to reopen and reconsider, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Iraq 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)(I), for having been convicted of a crime involving moral turpitude. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant had failed to establish extreme hardship to a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Field Office Director's Decision*, at 4, dated June 17, 2008. The decision was affirmed in response to the applicant's motion to reopen and reconsider. *Field Office Director's Second Decision*, at 3, dated August 27, 2008.

On appeal, counsel for the applicant asserts that the field office director's conclusion regarding extreme hardship is an error of law and fact. *Form I-290B*, at 2, received September 25, 2008.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's spouse's statement, the applicant's mother-in-law's statement, a medical letter for the applicant's daughter, country conditions information on Iraq, and a psychological evaluation of the applicant's spouse. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted on December 13, 1995 under prior New York Penal Code § 130.40(2) of sodomy in the third degree. He was sentenced to a maximum split sentence of six months in jail, 5 years of probation, a mandatory surcharge and a \$155 crime victim assistance fee. He was also required to register as a sex offender.

Prior New York Penal Code § 130.40(2) states, in pertinent part:

A person is guilty of sodomy in the third degree when:

....

2. Being twenty-one years old or more, he engages in deviate sexual intercourse with a person less than seventeen years old.

The AAO will apply the method of determining whether a crime involves moral turpitude as followed in the U.S. Court of Appeals for the Sixth Circuit. *Kellermann v. Holder*, 592 F.3d 700, 703 (6th Cir. 2010) states:

In ascertaining whether a crime is a CIMT, we must first examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. If the

statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a crime involving moral turpitude for immigration purposes, and our analysis ends. However, if the statute contains some offenses which involve moral turpitude and others which do not, it is to be treated as a “divisible” statute, and we look to the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted.

The AAO notes that any intentional sexual conduct by an adult with a child involves moral turpitude, as long as the perpetrator knew or should have known that the victim was under the age of consent. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). As such, prior New York Penal Code § 130.40(2) encompasses some activity that would involve moral turpitude (i.e., cases where the perpetrator knew or should have known that the victim was under 17) and some that would not (i.e., cases where the perpetrator did not and should not have known that the victim was under 17). Therefore, it is not categorically a crime involving moral turpitude. *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979) considered the transcript from proceedings of arraignment in which an alien accepted a guilty plea as part of the record of conviction. In his December 13, 1995 transcript in which he accepted a guilty plea, the applicant states that he did not know that the victim was either under 17 years old or that he was 15 years old. The record of conviction reflects that the applicant did not know the victim’s age. The record of conviction reflects that the victim was 15 at the time of the crime and that the applicant was 28 years old. Based on the age difference between the applicant and his victim, and the lack of evidence in the record of conviction that he should not have known the victim’s age, the AAO finds that the applicant should have known that the victim was under the age of 17. The AAO notes that the burden of proof is on the applicant in these proceedings to establish that he is not inadmissible. Therefore, he committed a crime involving moral turpitude and he is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. The AAO notes that counsel does not contest the applicant’s inadmissibility on appeal.

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

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.

....

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

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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 . . .

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 record reflects that the activity resulting in the applicant's convictions occurred prior to December 13, 1995, the date of his conviction. The AAO notes that an application for admission or adjustment of status is considered 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) (citations omitted). The date of the Form I-485 decision is the date of the final decision, which in this case, must await the AAO's finding regarding the applicant's eligibility for a waiver of inadmissibility. As the activities for which the applicant is inadmissible occurred more than 15 years before the date of his adjustment of status "application", 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. The record reflects that the applicant works as a construction laborer. The record includes federal tax returns for him and his spouse which indicate financial

stability. There is no indication that the applicant has ever relied on the government for financial assistance. The applicant has not been convicted of any crimes since his December 13, 1995 conviction. In addition, there is no indication that the applicant is involved with terrorist-related activities. 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 per section 212(h)(1)(A)(iii) of the Act. As discussed above, the record reflects that the applicant has not been convicted of any crimes since his December 13, 1995. He has conducted himself well since that time, including caring for his spouse and two children. 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.

The granting of the waiver is discretionary in nature. The favorable factors include the applicant's U.S. citizen spouse and two children, hardship to his family members, an approved Form I-130, lack of a criminal record since his December 13, 1995 conviction, and filing of tax returns.

The unfavorable factors include the applicant's sodomy conviction, violation for alcohol beverage in a park under [REDACTED] in or around July 26, 1995 and removal order. The AAO notes the seriousness of the offense committed by the applicant. The applicant engaged in having a 15 year old place his mouth on the applicant's penis.

Based primarily on the facts behind the applicant's sodomy conviction, the AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors.

As the applicant is not being granted a section 212(h)(1)(A) waiver based on a negative exercise of discretion, no purpose would be served in evaluating his claim of extreme hardship under section 212(h)(1)(B) of the Act as it would also be denied based on a negative exercise of discretion.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.