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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: **JUN 07 2011** Office: PHILADELPHIA

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,

Michael Shumway

for 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 and the application will be approved.

The applicant is a native and citizen of Guyana 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 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 spouse and children.

The director concluded that the applicant failed to demonstrate extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Director*, dated April 23, 2008.

On appeal, counsel asserts that the applicant has established “extreme and extraordinary hardship” to his qualifying relatives if his waiver application is denied. *Notice of Appeal (Form I-290B)*, dated May 21, 2008.

In support of the application, the record contains, but is not limited to, statements from the applicant and the applicant’s spouse, conviction records, medical documentation, financial documentation, the applicant’s spouse’s naturalization certificate, the applicant’s children’s birth certificates, and the applicant’s marriage certificate. The entire record was reviewed and considered in arriving at a decision on the 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, . . . is inadmissible.

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 reflects that on April 16, 1990 the applicant pled guilty in the United States District Court for the Southern District of New York to one count of bank embezzlement in violation of 18 U.S.C. § 656. The applicant was sentenced to 8 months imprisonment, and ordered to pay \$9,000.00 in restitution and a \$50.00 fine (Case No. [REDACTED]).

At the time of the applicant's conviction, 18 U.S.C. § 656 provided:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$1,000,000 or imprisoned not more than 20 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Embezzlement under 18 U.S.C. § 656 has been found to be categorically a crime involving moral turpitude. In *Matter of Batten*, the BIA held that a "[c]onviction of conspiracy to embezzle and misapply funds, monies and securities in violation of the Federal Reserve Act (18 U.S.C. § 656) is conviction of a crime involving moral turpitude." 11 I. & N. Dec. 271 (BIA 1965). Therefore, the applicant has been convicted of a crime involving moral turpitude, and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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 subparagraphs (A)(i)(I), (B), (D), and (E) 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 conviction for which the applicant was found inadmissible occurred more than 15 years ago, his inadmissibility 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 family ties in the United States, including his U.S. citizen spouse, [REDACTED]. The applicant's spouse has attested to the emotional hardship she would suffer if the applicant is denied admission to the United States. *See Letter from [REDACTED]*, dated February 13, 2008, and *Letter from [REDACTED]*, dated March 7, 2008. The applicant also has a 16-year-old U.S. citizen son, [REDACTED], and 18-year-old U.S. citizen son, [REDACTED], through his previous marriage. The applicant's children are under the custody of his former spouse, and he has visitation rights and pays child support weekly. *Divorce Decree*, dated June 7, 2007. The applicant's son, [REDACTED] was diagnosed with autism when he was 4 years old. *See Pediatric Neurodevelopmental Evaluation*, dated January 27, 1997; *Individualized Education Plan*, dated August 1, 2005. A letter from [REDACTED] pediatrician states that [REDACTED] is autistic and the applicant supports him financially and "takes him on weekends and on vacations." The pediatrician also states that "[i]t would be in [REDACTED] best interest that his father stay in close contact with him." *Letter from [REDACTED]*, dated May 9, 2008. The applicant has attested to his close bond with his children and his active involvement in their lives. He contends that [REDACTED] "will most certainly regress" if he is compelled to depart the United States. *See Letter from [REDACTED]*, dated May 20, 2008.

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 record indicates that the applicant self-employed as an accountant. *See Biographic Information Form (Form G-325A)*, dated July 19, 2007. The applicant is the spouse of a U.S. citizen and the father of two U.S. citizen children. The applicant has demonstrated that his family members would suffer hardship if he is denied admission to the United States. The applicant has not been convicted of a violent or dangerous crime. His conviction was more than 21 years ago, and he has not been arrested or convicted of any other crimes. Consequently, he 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 21 years since his last conviction. The negative factors are the applicant's conviction for embezzlement and his unlawful presence in the United States.

While the AAO cannot condone the applicant's criminal conviction, the AAO finds that the positive factors outweigh the negative, and a favorable 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.