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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **AUG 28 2013**

OFFICE: PHILADELPHIA, PA

File: [Redacted]

IN RE:

Applicant: [Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reopen and reconsider. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of Poland 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 been convicted of a crime involving moral turpitude. He is the beneficiary of an approved Form I-130 Petition for Alien Relative filed on his behalf by his U.S. citizen spouse and a Form I-360 Petition for Widow(er) filed on his own behalf following his spouse's death. The applicant seeks a waiver of inadmissibility in order to remain in the United States.

The field office director denied the Form I-601 waiver application as a matter of law, finding that the applicant is ineligible to adjust his status to that of a lawful permanent resident under section 245(a) of the Act based on his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. *See Decision of the Field Office Director*, dated September 16, 2011.

On appeal, the AAO concluded that while the applicant meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act, he failed to establish by a preponderance of the evidence that he has been rehabilitated and that admitting him to the United States would not constitute a risk to the safety of others in the United States. The AAO dismissed the appeal accordingly. *See Decision of the AAO*, dated April 3, 2013.

In response, counsel for the applicant filed a Notice of Appeal or Motion (Form I-290B), indicating that he was filing a motion to reopen and reconsider by marking box F in Part 2. *See Form I-290B*, received May 1, 2013.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel contends that additional evidence of the applicant's rehabilitation has been submitted on motion. In support, the record has been supplemented with a letter by counsel, and with seven "Good Moral Character Affidavit"[s], all identical pre-printed forms varying only in each affiant's name, age, address, and the year in which they met the applicant.

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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record shows that the applicant's most recent conviction for a crime involving moral turpitude, Retail Theft, in violation of 18 PA C.S. § 3929(A)(1), occurred on December 1, 1998 as a result of his culpable conduct on November 11, 1995. As the culpable conduct occurred more than 15 years ago, the applicant meets the threshold requirement for consideration under section 212(h)(1)(A)(i) of the Act. In the AAO's decision on appeal, we found that despite meeting this threshold requirement, the applicant failed to establish by a preponderance of the evidence that he has been rehabilitated and his admission to the United States would not be contrary to the national welfare, safety, or security of the United States.

Counsel's motion seeks to persuade the AAO that the applicant has established that he has been rehabilitated. While counsel has not addressed in the record the applicant's eligibility under new section 204(l) of the Act, which became effective on October 28, 2009, the AAO finds that we erred in not addressing such eligibility on appeal. If the applicant is eligible under section 204(l), it will be unnecessary to address whether he has established rehabilitation under 212(h)(1)(A)(i) of the Act. We will now consider the applicant's eligibility under section 204(l) of the Act as part of the motion to reconsider before us. Section 204(l) states, in pertinent part:

1) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);
- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 01(a)(15)(U)(ii); or
- (F) an asylee (as described in section 208(b)(3)).

The applicant qualifies for relief under section 204(l) of the Act, as the record indicates that he was residing in the United States when his spouse died, he continues to reside in the United States at this time and he is the beneficiary of an approved family-based visa petition. Consequently, the applicant is eligible to obtain a waiver based on extreme hardship as a result of the death of his spouse, who was the petitioner on the approved Form I-130 filed on the applicant's behalf.

Pursuant to the Policy Memorandum issued on December 16, 2010, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, the fact that the qualifying relative has died will be "deemed to be the functional equivalent of a finding of extreme hardship...." See *Approval of Petitions and*

Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act, dated December 16, 2010. Consequently, a review of the record reflects that the applicant has established extreme hardship. Accordingly, the AAO finds that the situation presented in this application rises to the level of extreme hardship.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin, supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin, supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section 212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant 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, recency and seriousness, and the presence of other evidence indicative of an 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 the alien began his 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 and service to 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).

Id. at 301.

The favorable factors in the present case include a statutory finding of extreme hardship to the applicant by virtue of his spouse's death as a result of current USCIS policy. The applicant further asserts hardship to himself, contending that removal to Poland would result in the loss of his custom painting business and exposure to a low minimum wage, general corruption and human rights abuses. Favorable factors also include the applicant's family ties in the United States to his brother, [REDACTED] and [REDACTED] wife and sons; and his business and community ties. With regard to the latter, 10 affidavits were previously submitted on appeal in which different individuals have attested to the applicant's good moral character and domestic difficulties related to his late wife's alcoholism. While these affidavits vary in scope and nature, the seven form-affidavits submitted on motion are all identical (with the exception of the name, age, address, and year in which each affiant met the applicant), and provide no additional probative evidence. For example, item six on the form-affidavits asks the affiant to "[s]tate reasons affiant knows" that the applicant is a person of good moral character, and item seven reads: "State any additional information that bears on [REDACTED]'s good service to the community or that otherwise indicates he is a person of good moral character." None of the affiants have provided a statement in response to items six or seven describing the basis for their assessment that the applicant is a person of good moral character or any examples related thereto. Ratings posted at [REDACTED] between July 2006 and September 2011 were also submitted on appeal, and these reflect favorably on the applicant and his work. Additional favorable factors asserted by the applicant are that he has continuously maintained employment in the United States and has paid taxes on his income. The record corroborates that the applicant filed income tax returns for tax years 2010 and 2011. And it appears that with the exception of an arrest on the day of his spouse's funeral in July 2009, the applicant has not been arrested since her death four years ago. Addressing the circumstances of his most recent arrest, the applicant states that he got into an argument with park rangers who had confronted him for allowing his dog to run free without a leash. He indicates that the rangers "tried to give me a ticket and then they decided to take me to the police station."

The unfavorable factors include the applicant's immigration violations, a lack of candor and veracity, a propensity to rationalize rather than take responsibility for his own misconduct, a criminal conviction and a history of numerous arrests spanning an approximately 18-year period. The applicant's immigration violations includes his failure to submit the final disposition related to this conviction as required and as repeatedly sought by USCIS without response by the applicant or counsel. While the applicant's multiple arrests not resulting in conviction do not serve as a further basis for inadmissibility, the extent and circumstances of the applicant's repeated contacts with law enforcement does call into question the applicant's desirability as a permanent resident. As also noted by the AAO on appeal and acknowledged by counsel without attempt to rectify, the applicant expresses no personal responsibility for his behavior and he has not provided

sufficient explanation or evidence to show that he no longer has a propensity to engage in unlawful conduct.

The applicant's lengthy statement dated June 21, 2011 contains incorrect assertions regarding the number of times he has been arrested and the charges related thereto. Further, he attributes all of his contacts with law enforcement to factors beyond his control, including the behavior of others. For example, the applicant states that his first arrest was on November 11, 1995 and was "one of the few arrests that had nothing to do with my wife and her drinking problem." In fact, the applicant was arrested on at least three earlier occasions, for violating a protection order (September 9, 1991), for simple assault, aggravated assault, and recklessly endangering another person (October 9, 1994); and for retail theft and receiving stolen property (March 11, 1995). The applicant's fourth arrest, on November 11, 1995, only 8 months after his earlier retail theft arrest, resulted in the conviction on December 1, 1998 for retail theft after the court revoked his participation in the Accelerated Rehabilitative Disposition (ARD) program. Counsel claims that the applicant "accepted responsibility for the crimes for which he was convicted." But in the applicant's statement, he asserts that he was falsely accused of stealing because he did not speak English well and did not have a receipt for clothing he was simply trying to return. Conversely, the probable cause statement from the record of conviction indicates that the applicant was observed selecting a black DKNY dress and a black DKNY sweater with a total value of \$590, bagging these articles, and exiting the store without making any attempt to pay for what was taken. Regarding the applicant's numerous domestic violence arrests, he contends that these problems happened because his spouse "would get drunk and I would try to take the alcohol from her and pour it down the sink or down a toilet. [REDACTED] would get angry and call the police on me." The criminal complaints, on the other hand, reflect violent conduct by the applicant and physical injuries to the applicant's deceased spouse. The record contains evidence of numerous domestic violence-related arrests spanning nearly 18 years and shows that nearly all of the charges were ultimately withdrawn, dismissed or *nolle prossed* without explanation. While counsel contends that this is because "there was no basis for the charges being brought in the first place," and it is correct that the AAO cannot look beyond the record of conviction to re-litigate the applicant's guilt or innocence, we also will not ignore the applicant's record of being repeatedly arrested during a period spanning nearly two decades, as it is an indicator of the applicant's undesirability for permanent residence.

Regarding the applicant's CIMT conviction and lack of candor and/or veracity related thereto, the record shows that after initially permitting him to enter the ARD program, the court revoked his participation in ARD on December 1, 1998, the same day he pled guilty to the retail theft offense and was convicted. The field office director noted that the applicant failed to submit, as required, an accurate final disposition for the November 1995 arrest that led to his December 1998 conviction, instead providing only ARD documentation. Rather than addressing this deficiency on appeal by submitting an explanation as to the applicant's motives and/or documentary evidence demonstrating that the omission was not an intentional attempt to conceal a conviction for a crime involving moral turpitude, counsel attempted to shift the applicant's burden stating: "DHS claims that the applicant did not complete this ARD program" and "DHS' conclusion that the applicant was even convicted of a crime involving moral turpitude is without substantial support in the record." As stated in the AAO's decision on appeal, it is a matter of court record that the applicant's ARD program

participation was revoked and that he pled guilty and was convicted on December 1, 1998 of Retail Theft in violation of 18 PA C.S. § 3929(A)(1). (*See* Court of Common Pleas of Montgomery County Criminal Docket Number CP-46-CR-0027152-1995), and it is the applicant's burden alone to prove eligibility for a waiver under section 212(h) of the Act (*See* section 291 of the Act, 8 U.S.C. § 1361). As also noted by both the field office director and the AAO, it is the applicant's responsibility to provide accurate documentary evidence of all final dispositions related to his criminal record. By continuing to not provide an accurate final disposition, and by failing to provide adequate explanation for failing to disclose the known fact that the Pennsylvania court revoked the applicant's ARD participation, that the applicant plead guilty to the offense of Retail Theft, and that the applicant was convicted of this crime of moral turpitude on December 1, 1998, calls into question the applicant's veracity and desirability as a lawful permanent resident.

This is reflective of the applicant's history of questionable veracity and failure to cooperate with immigration authorities. On the Form I-485 filed in June 1997, the applicant indicated at Part 3, Number 1(b) that he has never "been arrested, cited, charged, indicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations." The record shows that by that date the applicant had already been arrested on at least four separate occasions (in September 1991 for assault in violation of a protection from abuse order; in September 1994 for simple assault, aggravated assault and recklessly endangering another person; in March 1995 for retail theft and receiving stolen property; and in November 1995 for retail theft, receiving stolen property and criminal conspiracy). In a letter dated March 12, 2004, the then interim district director, reminded the applicant that he was informed on June 27, 2003 to submit his fingerprints to USCIS for a criminal background check to be completed, and that he did not so submit. As a result, the applicant's Form I-485 was considered abandoned and denied pursuant to 8 C.F.R. § 103.2(b)(13). The applicant did not file for adjustment of status again until May 24, 2010, after his spouse's death, submitting a Form I-485 alone. This time the applicant acknowledged he had been arrested, but as noted in the field office director's Notice of Intent to Deny, he did not comply with the requirement to bring to his interview certified dispositions of all his arrests. And, as noted, while the applicant through counsel subsequently submitted some dispositions, he failed to provide USCIS with certified final dispositions for all of his arrests in the United States, most notably for his November 1995 arrest that resulted in his conviction for retail theft in December 1998 following the court's revocation of his participation in an ARD program and his entrance of a guilty plea.

In weighing the positive factors and the negative factors in the present case, the AAO finds that the negative factors outweigh the positive. Thus, the AAO finds that as the record is currently constituted, the applicant does not merit a favorable exercise of discretion despite having established extreme hardship by virtue of his spouse's death.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The motion is granted, but the prior AAO decision is affirmed.

ORDER: The prior AAO decision is affirmed.