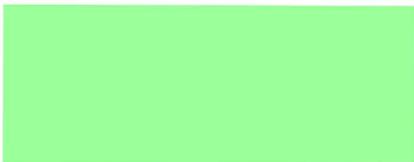


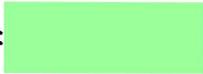


U.S. Citizenship  
and Immigration  
Services

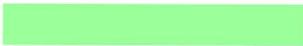
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Date: **FEB 04 2013** Office: NEW DELHI, INDIA

FILE: 

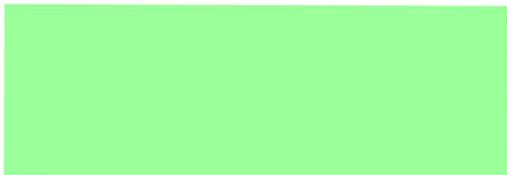
IN RE:

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:

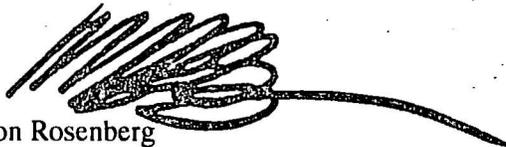


INSTRUCTIONS:

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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Field Office Director, New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India 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. The applicant's spouse and three children are U.S. citizens, and his mother is a lawful permanent resident. He seeks a waiver of inadmissibility in order to reside in the United States.

The acting field office director found that the applicant committed an aggravated felony and is not eligible for a waiver, and she denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Acting Field Office Director's Decision*, dated July 13, 2011.

On appeal, counsel asserts that the applicant did not commit an aggravated felony and he is eligible for a waiver under section 212(h)(1)(A) of the Act. *Brief in Support of Appeal*, undated.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's criminal records, and statements from the applicant and his spouse. 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, or

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

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- 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 . . .

(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.

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The applicant was convicted on April 25, 1995 of sexual battery in violation of Georgia Statutes Section 16-6-22.1. The AAO notes that at the time of the acting field office director's decision, the record reflected that the applicant was sentenced to 12 months imprisonment (suspended after serving 16 days), and as he had been admitted as a lawful permanent resident before his conviction he was ineligible to file for a waiver based on committing an aggravated felony.<sup>1</sup>

On appeal, counsel has submitted an Order Clarifying Sentence Nunc Pro Tunc reflecting that the applicant received a sentence of 11 months and 14 days of supervised probation and confinement of 16 days. This new evidence is sufficient to establish that the applicant has not been convicted of an aggravated felony and he is eligible to file an application for a waiver. As the applicant has not contested his inadmissibility on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

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 . . . .

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<sup>1</sup> Section 101(a)(43) of the Act provides, in pertinent part:

(43) The term "aggravated felony" means-

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least 1 year. . .

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(2) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

- (iv) . . . 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,
- (v) 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
- (vi) 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 more than 15 years ago. The AAO notes that an application for admission 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 immigrant visa 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 immigrant visa 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 per section 212(h)(1)(A)(i) of the Act. The record reflects that the applicant was a business owner while in the United States. There is no indication that the applicant has ever relied on the government for financial assistance. The record reflects that the applicant has not had a criminal conviction since 1995 and that he completed the terms of his probation. There is no indication that the applicant is involved with terrorist-related activities or poses other security issues.

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 mentioned, the record reflects that the applicant has not had a criminal conviction since 1995 and that he completed the terms of his probation. In addition, he is

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involved with his family although he is living abroad. 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 presence of the applicant's U.S. citizen spouse and two children, his lawful permanent resident mother, his five U.S. citizen and lawful permanent resident sisters; hardship to his family; prior residence in the United States; and lack of a criminal record since the aforementioned convictions. The applicant states that he was guilty of his offense and is truly sorry to the victim and his family and friends.

The unfavorable factors include the applicant's sexual battery conviction and his September 5, 1995 simple battery conviction. The record reflects that the applicant did intentionally make contact with the intimate parts of a woman without her consent between June 4, 1993 and June 28, 1993. As such, his actions related to his sexual battery conviction were not isolated, rather they spanned a period of over three weeks. Considering the facts underlying his conviction and the nature of the crime itself, the AAO gives his conviction significant negative weight.

The AAO finds that the applicant has not established that the favorable factors in his application outweigh the unfavorable factors.

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.

The AAO notes that the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied as a matter of discretion in the I-601 decision. The record reflects that the applicant was removed from the United States on June 12, 2000. As such, he has been outside of the United States for more than 10 years and is no longer inadmissible under section 212(a)(9)(A) of the Act. He is no longer required to receive an approval of his Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

**ORDER:** The appeal is dismissed.