



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

(b)(6)

[Redacted]

DATE: **MAR 14 2013**

Office: HARLINGEN

FILE: [Redacted]

IN RE: [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:

[Redacted]

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,

Ron Rosenberg, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Field Office Director, Harlingen, Texas. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted and the underlying application is approved.

The applicant is a native and citizen of Mexico who was found to be inadmissible under 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 is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen qualifying relatives.

On March 25, 2009, the Field Office Director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The applicant appealed that decision and the AAO dismissed the appeal on January 30, 2012, finding that the applicant failed to establish rehabilitation or extreme hardship to his U.S. citizen spouse. The applicant filed a motion to reopen and/or reconsider the AAO decision.

On motion, counsel for the applicant submitted new evidence in regards to rehabilitation of the applicant and extreme hardship to the applicant's spouse as a result of the applicant's inadmissibility.

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 policy. A motion to reconsider a decision on an application or petition 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

In support of the waiver application, the record includes, but is not limited to a brief by the applicant's counsel, a letter from the applicant's spouse, a letter from the applicant's employer, financial and property ownership information for the applicant and his spouse, biographical information for the applicant and his U.S. citizen spouse and daughter, employment records for the applicant and his U.S. citizen spouse, medical records for the applicant's U.S. citizen daughter, a local police clearance for the applicant, the applicant's criminal records, letters of support from friends, family and community members concerning the applicant, and documentation of the applicant's immigration history.

The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. Additionally, in relation to a previous application for adjustment of status, the applicant was found inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of a controlled substance.¹ The applicant does not contest his inadmissibility on appeal or motion.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(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.

The record shows that the applicant has multiple arrests and convictions. The applicant was first arrested on October 21, 1982 in Dallas, Texas and charged with Attempted Burglary of a Building.² He was convicted of that offense, a third degree felony, on December 20, 1982 in the 203rd Judicial District Court of Dallas County and was sentenced to two years of probation and ordered to pay court and probation fees. A court record dated December 26, 1984 indicates that the applicant successfully completed his probation for this offense. The applicant was next convicted of Unlawfully Carrying a Weapon in violation of then Section 46.06 of the Texas Penal Code, a class A misdemeanor, on October 2, 1986. He was sentenced to 180 days confinement and was ordered to pay a fine of \$250.00. A court record dated May 31, 1988 illustrates that the applicant successfully completed the terms of this sentence. The applicant was last arrested in Houston, Texas on November 14, 1991 and charged with possession of narcotics. For this offense, he was convicted of Possession of Marijuana (0-2 oz.) on January 29, 1992, a class B misdemeanor, in the District Court of Harris County, Texas. He was sentenced to 4 days in jail and fined \$100.

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the original decision does not identify all of the grounds for denial. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

² Although the applicant disclosed this conviction on his previous application for adjustment of status filed on August 1, 1987 and was granted adjustment of status, the record does not indicate whether it was determined that this offense was not a crime involving moral turpitude or otherwise a bar to adjustment, or that he has been granted a waiver of inadmissibility for the offense. The applicant is eligible for a waiver under section 212(h) as the record does not indicate that he has been convicted of an aggravated felony.

In regards to the applicant's conviction for Attempted Burglary of a Building, the record of conviction for this offense, however, is not complete and does not include the indictment on which the conviction is based. As such, it is not possible to determine from the record whether the applicant's conviction involved moral turpitude. It is not necessary to reach a conclusion on this issue at this time, however, as the applicant is inadmissible on other criminal grounds, and is eligible to apply for a waiver of inadmissibility of both grounds under the same standard.

The applicant was also convicted of Unlawfully Carrying a Weapon under the Texas Penal Code. In regards to this offense, the BIA held in *Matter of Granados* that a conviction for possession of a concealed sawed-off shotgun is not a crime involving moral turpitude. 16 I&N Dec. 726, 728 (BIA 1979). But, in *Matter of S-*, the BIA held that carrying a concealed and deadly weapon with intent to use against the person of another is a crime involving moral turpitude because "the use of a dangerous weapon against the person of another is motivated by an evil, base, and vicious intent. The essence of the offense is the carrying of the dangerous weapon with a base, evil and vicious intent to injure another." 8 I&N Dec. 344, 346 (BIA 1959) (citations omitted). The record indicates that the applicant was in possession of brass knuckles, which led to his conviction. There is no indication in the portions of the record of conviction before us that the applicant had an evil, base, and vicious intent to injure another as described in *Matter of S-*. Accordingly, we did not find that the applicant's October 2, 1986 conviction under then Texas Penal Code § 40.46 is a crime involving moral turpitude.

Lastly, the applicant was convicted of Possession of Marijuana (0-2 oz.) on January 29, 1992, presumably in violation Texas Health and Safety Code § 481.121. For this offense, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of a controlled substance. As the record makes clear that the applicant's conviction involved 30 grams or less of marijuana, a waiver is available for this ground of inadmissibility under section 212(h) of the Act.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 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 . . . ; 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.

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(II) 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 activities that are the basis for the applicant's criminal convictions occurred more than 15 years ago, the latest on November 14, 1991, he is eligible for a waiver 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.

On motion, the applicant submitted new evidence to establish his eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act. The record contains a criminal history clearance from the Mission Police Department and the Hidalgo County Sheriff's Office indicating that the applicant does not have a criminal record with those departments. The record also contains a letter from the applicant's employer, [REDACTED] dated February 13, 2012, stating that the applicant "has been a reliable employee and risen to a leadership position within the company." The record also contains letters from family, friends, and neighbors of the applicant concerning the applicant's character and stating the important role that he plays in his family. In particular, letters from the applicant's daughter's high school teacher and counselor indicate the contributions that the applicant makes to his daughter's well-being. On motion, the applicant also submitted documentation to illustrate that he filed his federal income taxes in the years preceding his application for a waiver of inadmissibility.

In view of the record, which shows that the applicant has not been convicted of any crimes since 1992 and has been gainfully employed and supporting his family both financially and physically, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his 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)(ii) and (iii) of the Act.

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien 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 and seriousness, and the presence of other evidence indicative of the 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 alien began 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 or service in 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). *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, “[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300. (Citations omitted).

The adverse factors in the present case include the applicant's criminal history, which was listed above, as well as his longtime presence in the United States without authorization. He has no other known criminal or immigration violations. The favorable factors in the present case are the applicant's family ties to the United States, including the applicant's support of his wife and daughter, the role that he has played in his adult stepchildren's life, the hardship to his wife and daughter if the application is denied, and the lack of a criminal record or offense since 1992. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

In proceedings for an 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. § 1361.³ After a careful review of the record, the AAO finds that in the present motion, the applicant has met his burden.

ORDER: The motion is granted and the underlying application is approved.

³ The AAO notes that our prior decision identified an inconsistency in counsel's brief which suggested that the applicant had departed the United States. This issue was not addressed on motion. The AAO notes that the present application only pertains to the applicant's request for a waiver of inadmissibility under section 212(a)(2)(A) of the Act. If another ground(s) of inadmissibility is applicable in the applicant's case, this decision does not apply to that ground(s).