



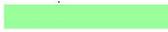
U.S. Citizenship
and Immigration
Services

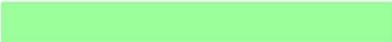
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Date: **MAR 26 2013**

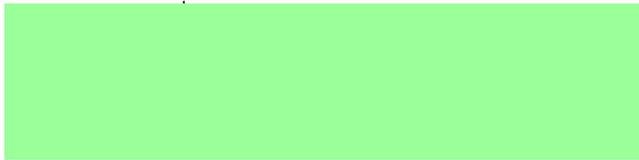
Office: MIAMI, FL

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 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 Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Cuba. The Field Office Director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The Field Office Director concluded that the applicant had failed to establish that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States and that he had been rehabilitated and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel contends that the applicant is not inadmissible, as the applicant was convicted of the misdemeanor of "lewd and lascivious conduct," which counsel argues requires no specific evil intent and is not a *malum in se* offense, citing *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965). Counsel also argues that even assuming, *arguendo*, that the applicant's conviction is a crime involving moral turpitude, it qualifies for the petty offense exception under section 212(a)(2)(A)(ii)(II), as the applicant was not sentenced to a term of imprisonment, but rather placed on probation for a period of 10 years. Furthermore, counsel contends that applicant has established that he has been rehabilitated and that his admission would not be contrary to the national welfare, safety, or security of the United States. Counsel for the applicant also asserts that the applicant's U.S. citizen wife will suffer extreme hardship if the waiver application is denied.

In support of the waiver application, the record includes, but is not limited to, legal briefs by the applicant's attorney, biographical information for the applicant, his wife, and his children, medical records for the applicant's wife, and records concerning the applicant's criminal and immigration history in the United States.

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. The AAO will first address the question of whether the applicant is admissible to the United States.

The applicant was found to be inadmissible under Section 212(a)(2)(A) of the Act which states, in pertinent parts:

(i) [A]ny 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.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(b)(6)

- (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
- (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

Contrary to counsel's assertions, the record indicates that the applicant was convicted of Lewd and Lascivious Conduct in violation of then section 800.04 of the Florida Statutes, a second degree felony, on November 2, 1981 in the Circuit Court, Eleventh Judicial District, for Dade County, Florida.¹ The applicant was originally indicted by a grand jury for Sexual Battery, specifically of an individual eleven years of age or younger, under Fla. Stat. § 794.011(2), but the charge was subsequently amended to Lewd and Lascivious Conduct under section 800.04 (1981), to which the applicant pled guilty. The applicant was given a sentence of one year imprisonment, suspended, 10 years of probation, and ordered to complete a mental health program and stay away from the victim of his crime.

At the time of the applicant's conviction in 1981, Fla. Stat. § 800.04 provided, in pertinent part:

Lewd, lascivious or indecent assault or act upon or in presence of child.—

Any person who shall handle, fondle or make an assault upon any child under the age of 14 years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without the intent to commit sexual battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

Under Florida case law, "lewd and lascivious" has been "referred to as generally and usually involving 'unlawful indulgence in lust, eager for sexual indulgence'.... and connot[ing] wicked,

¹ On appeal the applicant's counsel submits a computer printout from the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County stating that the applicant was charged under Florida Statute § 798.02, Lewd and Lascivious Behavior, a second degree misdemeanor. However, this document contradicts the original certified court judgment filed on November 2, 1981, which is also in the record. No court documents were submitted to illustrate that the applicant's original conviction was subsequently vacated or modified, and if so, for what reason. *See generally Matter of Cota-Vargas*, 23 I&N Dec. 849, 852-53 (BIA 2005) (giving full faith and credit to sentence modifications). As such, the AAO will refer to the applicant's original judgment of conviction for the purposes of this decision.

lustful, unchaste, licentious, or sensual design on the part of the perpetrator.” *See Egal v. State of Florida*, 469 So.2d 196, 197 (1985) (internal citations omitted). The Eleventh Circuit, in *Ramsey v. INS*, 55 F.3d 580 (11th Cir. 1995), held that it was uncontroverted that lewd assault under Florida Statutes section 800.04 was a crime involving moral turpitude. Counsel has provided no legal authority to support his argument that lewd intent is neither an explicit or implicit element of this particular offense. *See, e.g., Matter of Cortes Medina*, 26 I&N Dec. 79 (BIA 2013). Consequently, we will not disturb the finding of inadmissibility.

Florida law provides that, Lewd and Lascivious Conduct, a second degree felony, is punishable by a term of imprisonment of 15 years. Fla. Stat. § 775.082. In this case, the applicant was given a suspended term of imprisonment of one year, as reflected on the second page of the applicant’s original Judgment dated November 2, 1981. As such, the applicant does not qualify for any exception to the ground of inadmissibility at INA § 212(a)(2)(A)(ii)(II), contrary to the assertions of applicant’s counsel.

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) . . . 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)(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). The activities that led to the applicant's admissibility occurred on June 28, 1981, more than 15 years prior, thus the applicant does not need to prove extreme hardship to a qualifying spouse, but nonetheless the applicant's counsel also states that the applicant's U.S. citizen spouse will suffer extreme hardship if the applicant is not admitted as a permanent resident.

We must determine whether the applicant has met his burden of proof under section 212(h)(1)(A) of the Act, by illustrating that he has been rehabilitated and that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, or under 212(h)(1)(B) of the Act, by demonstrating that a denial of his hardship would result in extreme hardship to his qualifying relatives. If the applicant does not first meet his burden under this section of the law, no purpose is served in assessing his ability meet his burden under 8 C.F.R. § 212.7(d).

The record indicates that the applicant's last arrest was on June 28, 1981 for the crime that led to his inadmissibility. The record does not indicate any arrests or convictions for the applicant since that date. The absence of any additional arrests, however, does not indicate rehabilitation in and of itself. We note that the record does not contain any statements from the applicant expressing remorse for the criminal acts for which he was convicted. Rather, the applicant, in his only statement in the record, dated April 26, 1994, denies guilt for the offense which he previously pled guilty, blaming his defense attorney. We note that the record does not indicate that the applicant ever appealed his conviction, despite his assertion innocence. The applicant also has not submitted any evidence of his moral character. Applicant's counsel states that the applicant is an "upstanding and productive citizen (sic) since his first entry in 1968" and that he "has paid his taxes, been gainfully employed, and has been a positive influence for his community." He also states that the applicant regularly attends church and is an active member of his community. Statements by counsel, however, are not evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In view of the record, which fails to demonstrate genuine rehabilitation for a particularly repugnant crime and contains no independent evidence of the applicant's good moral character, the AAO finds that the applicant has not 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 support of his waiver under section 212(h)(1)(B) of the Act, the applicant has submitted evidence to illustrate the extreme hardship his U.S. citizen wife would suffer if he were not admitted as a permanent residence, including medical records from 1995-2002 indicating that his spouse suffered from breast cancer in 1995 and had a follow-up surgery in 2002. No records were submitted regarding the applicant's wife's current condition or the role that the applicant plays in caring for his wife. We also note that at the time of his adjustment of status interview on January 18, 2008, the applicant indicated that he and his spouse were separated. Yet, this is not addressed by the record before us, which contains no statements from the applicant or the wife in support of the waiver application or the instant appeal. Although counsel asserts that the applicant's wife would suffer extreme hardship, the assertions of counsel do not constitute evidence and will not satisfy the petitioner's burden of proof without documentary evidence to support the claim. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983);

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). From the evidence submitted, it is not possible to conclude that the applicant's spouse would suffer extreme hardship if she were to relocate to Cuba with the applicant or if she were to remain in the United States without him. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991); *Perez*, 96 F.3d at 392 (defining "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation); *Matter of Pilch*, 21 I&N Dec. at 631. The burden of proof is upon the applicant to establish he is eligible for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

As the applicant has not established that he is eligible for relief under INA § 212(h), no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion. We note, however, that the applicant's crime may be deemed a violent or dangerous crime, requiring that he satisfy 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.