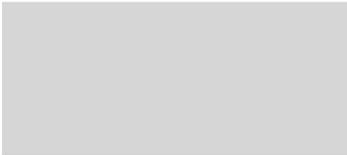




U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **AUG 18 2015**

FILE: [REDACTED]
APPLICATION RECEIPT #: [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:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

for 

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the waiver application. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion is will be granted and the AAO's previous decision dismissing the appeal will be affirmed.

The applicant is a native and citizen of Pakistan who was granted conditional residence under the Special Agricultural Worker program in November 1988. The applicant was granted lawful permanent resident status in 1990. In 1994, the applicant was convicted in the Supreme Court for [REDACTED] State of New York, of grand larceny in the second degree, in violation of section 155.40 of the New York Penal Code, and offering a false instrument for filing in the first degree (20 counts), in violation of section 175.35 of the New York Penal Code. The applicant was sentenced to six months imprisonment, with credit for time served, probation and restitution. Consequently, on July 15, 1999, the applicant was ordered removed. A subsequent appeal was dismissed by the Board of Immigration Appeals (BIA) on February 24, 2003 and a motion to reopen was denied by the BIA on May 20, 2003. The applicant was removed in October 2003. The applicant seeks a waiver of inadmissibility pursuant to 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 spouse and children.

The director determined that the applicant was 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 crimes involving moral turpitude. The director further noted that the applicant was statutorily ineligible for the waiver due to having been convicted of an aggravated felony after admission to the United States as a lawful permanent resident, as noted by the BIA in its May 20, 2003 decision denying the applicant's motion to reopen. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, we determined that as a result of the applicant's aggravated felony conviction after his admission to the United States as a lawful permanent resident, the applicant was permanently barred from obtaining a waiver under section 212(h) of the Act. The appeal was consequently dismissed.

On motion, the applicant re-submits an affidavit from the lawyer who represented him when he entered a guilty plea under Indictment [REDACTED]. The attorney maintains that as part of the plea negotiation, the federal prosecutor indicated that immigration proceedings would not be brought against the applicant as a result of his criminal conviction. The attorney maintains that based upon the federal prosecutor's representations the applicant agreed to enter a guilty plea in the matter.

The record does not establish that the indictment referenced in the attorney's affidavit pertains to the applicant's above-referenced 1994 convictions. Nevertheless, we note that collateral attacks upon an applicant's conviction "do not operate to negate the finality of [the] conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). We "cannot go behind the judicial record to determine the guilt or innocence of the alien." *Id.* (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); see also *Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980). Further, under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a

procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes.” *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999).

Section 212(a)(2)(A) of the Act 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.

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

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.

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 a May 12, 2015 decision, the Board of Immigration Appeals (BIA), citing “the overwhelming circuit court authority” and the importance of “uniformity in the application of the immigration laws,” determined that an alien who adjusted status in the United States and who had not entered as a lawful permanent resident is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act as a result of an aggravated felony conviction. *Matter of J-H-J-*, 26 I&N Dec. 563, 564-5 (BIA 2015) (citing *Matter of Small*, 23 I&N Dec. 448, 450 (BIA 2002)). The BIA held that section 212(h) of the Act only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction, withdrawing from its decisions in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), and *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012).

The record establishes that the applicant adjusted status in 1990 rather than entering the United States as a lawful permanent resident. The applicant is thus eligible for a waiver of inadmissibility under section 212(h) of the Act. In addition, the record establishes that the above-referenced crimes involving moral turpitude occurred more than fifteen years ago and thus, pursuant to section 212(h)(1)(A) of the Act, it is not necessary to determine whether the applicant’s qualifying relatives would suffer extreme hardship if the applicant were to remain in Pakistan as a result of his inadmissibility. The record does not indicate that the applicant’s admission to the United States would be contrary to the national welfare, safety, or security of the United States. Moreover, the record indicates that the applicant has not been convicted of any crimes since 1994, more than twenty years ago, which supports a finding of rehabilitation.

To further support the applicant’s rehabilitation, the applicant’s spouse has submitted a statement. She explains that she and their two children, born in [REDACTED] and [REDACTED] are U.S. citizens. She contends that as a result of her husband’s removal, she and their two daughters relocated to Pakistan to reside with the applicant so he could financially provide for the family while she cares for the children. She asserts that the living conditions in Pakistan have deteriorated and she is fearful for her and her daughters’ safety and well-being. She further maintains that her daughters are experiencing hardship as a result of lower academic standards and inequality for women in Pakistan. In his own 2013 declaration, the applicant maintains that while in the United States, he taught part-time at [REDACTED] Community College and volunteered for the [REDACTED] Sheriff Department. Further, the applicant maintains that he was always employed in the United States, regularly paid all his taxes, and never received any government funding or benefits. Finally, we note that the U.S. Department of State has issued a travel warning for Pakistan, warning U.S. citizens to defer all non-essential travel to Pakistan due to terrorist activity and violence.

As discussed above, there is no evidence that the applicant has been convicted of a crime involving moral turpitude since 1994, more than 20 years ago. The record shows that during the ensuing years, the applicant has resided in Pakistan with his U.S. citizen spouse and two children, where they have experienced hardship as a result of residing 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. However, the grant or denial of the waiver does not turn only on the mere passage of fifteen years of time. It also hinges on the discretion of the Secretary and pursuant to such terms, conditions and procedures as he may by regulations prescribe. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether . . . 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). This office 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 favorable factors in this matter are the applicant's U.S. citizen spouse and children; the hardships that the applicant's family is facing as a result of their relocation abroad to reside with the applicant; and the passage of more than 20 years since the applicant's convictions for crimes involving moral turpitude. The unfavorable factors in this matter are the applicant's criminal convictions; his removal from the United States; and periods of unlawful presence and employment while in the United States. Further, at the time the applicant was removed from the United States in 2003, he was under investigation by the [REDACTED] State Board of Medical Examiners for impersonating a physician. A report from that board indicates that the applicant had claimed to be a physician and cardiologist and obtained a Drug Enforcement Agency (DEA) number from a physician with whom he worked and that

he used the DEA number to order a controlled substance, depo-testosterone, without authorization. The report further states that the applicant had been issued a "Cease and Desist Order" order in 1993 after it was found he was representing himself as a physician in the emergency room of [REDACTED] Hospital and at a medical office in [REDACTED].

The record does not contain a statement from the applicant indicating that he has taken responsibility for the crimes for which he was convicted or expressing regret for his actions, which included providing a company with fraudulent sonograms knowing Medicaid would be billed for services not rendered, for which he received payment of about \$50,000. Rather than explaining in his affidavit the actions that led to the convictions, he discusses his plea negotiation, claiming the federal prosecutor assured him he would not be deported. He states that he would not otherwise have entered the guilty plea, that he was "only held to be guilty by association" and that he was "in the wrong place at the wrong time." Further, the applicant states in his affidavit that he is a law-abiding citizen and refers to his employment in the United States as being lawful, but does not provide any explanation concerning the finding that he was impersonating a physician while employed at a hospital and a medical office.¹

The crimes and immigration violations committed by the applicant were serious in nature.² We find that the applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones. 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.

ORDER: The motion is granted and the AAO decision dismissing the appeal is affirmed.

¹ We note that these actions were previously raised as a negative discretionary factor in his removal proceedings. See *Order of the BIA Dismissing the applicant's motion to reopen dated May 20, 2003*.

² In an oral decision rendered on July 15, 1999, the immigration judge, in denying relief under section 212(c) of the Act, found that the applicant had misrepresented several facts under oath. The applicant failed to disclose he had entered the United States in 1988 with a J-1 visa and was therefore was ineligible for temporary residence under section 210 of the Act, which he obtained in 1988 and which resulted in his adjustment to permanent resident status in 1990.