



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF J-A-O-A-

MAY 16, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility for crimes involving moral turpitude and unlawful presence. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h), and section 212(a)(9)(b)(v), 8 U.S.C. § 1182(a)(9)(b)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust to lawful permanent resident must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant was inadmissible for crimes involving moral turpitude and unlawful presence in the United States for one year or more. The Director further determined that the Applicant had established that refusal of admission would result in extreme hardship to the Applicant's qualifying relatives. However, the Director denied the application as a matter of discretion.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in finding that his criminal convictions are for crimes involving moral turpitude. The Applicant further claims that the Director erred by failing to distinguish dismissed charges from criminal convictions.

Upon *de novo* review, we will sustain the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for unlawful presence in the United States for one year or more and for crimes involving moral turpitude, specifically criminal impersonation and aggravated criminal trespass.

Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible.

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Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(h) of the Act provides for a discretionary waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

As to unlawful presence, section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), provides that a foreign national who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent.

II. ANALYSIS

The issues presented on appeal are whether the Applicant's crimes involve moral turpitude and whether a waiver should be granted as a matter of discretion. Although the Director found that the Applicant established that refusal of admission would result in extreme hardship to his qualifying relatives, the Director denied the waiver as a matter of discretion.

In support of his application, the Applicant submitted the following evidence. With the Form I-601, he submitted statements from himself and his family members, medical records, financial records, criminal court documents, and a letter of support from the president of a social services facility. On appeal, the Applicant submitted a police clearance certificate; and documentation about alcoholism, wages, and food costs in Mexico.

A. Inadmissibility

The record reflects that the Applicant attempted to enter the United States without inspection in March 1998 and March 2002 and was granted a voluntary return to Mexico. In September 2002, he entered the United States without inspection. On May 8, 2008, he was placed into removal proceedings. On June 11, 2008, the Applicant voluntarily departed the United States in accordance with an order of voluntary departure under safeguards. He therefore accrued unlawful presence from September 2002 until June 11, 2008, and when he voluntarily departed he triggered the unlawful presence bar. He is thus inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for having one year or more of unlawful presence in the United States. The Applicant does not contest this finding of inadmissibility on appeal.

As for the Applicant's criminal convictions, the record reflects that on [REDACTED] 2004, he was convicted of criminal impersonation under Tennessee Code Annotated (Tenn. Code Ann.) § 39-16-301. The court sentenced the Applicant to 11 months and 29 days imprisonment, and except for 10

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days, suspended the sentence. On [REDACTED] 2004, the Applicant was convicted under Tenn. Code Ann. § 39-14-406 of aggravated criminal trespass, a Class A misdemeanor. The court sentenced him to 11 months and 29 days imprisonment, and ordered that he serve 4 months incarceration before release on probation. His aggravated criminal sentence was to run consecutively to any prior unexpired sentence.

The Applicant asserts that the consular officer incorrectly concluded that his convictions are for crimes involving moral turpitude. He states that his criminal impersonation conviction was from his use of a false name during his arrest, which is not a crime involving moral turpitude under Ninth Circuit law.¹ As for his aggravated trespass conviction, he asserts that the Board of Immigration Appeals held that trespass involves moral turpitude only if the trespass was committed with the intent to commit a larceny.² He declares that since his trespass crime has no such element it does not involve moral turpitude. We will not make a finding on whether the Applicant's crimes involve moral turpitude, since we will sustain this decision on other grounds.

B. Discretion

Since the Director determined that the Applicant demonstrated extreme hardship to his parents, we will now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must "balance 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). In evaluating whether to favorably exercise 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, recency 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).

¹ The Applicant cites *Blanco v. Mukasey*, 518 F.3d 714 (9th Cir. 2008).

² The Applicant cites *Matter of Esfindiary*, 16 I&N Dec. 659 (BIA 1979).

Id. at 301 (citations omitted). We must also consider “[t]he underlying significance of the adverse and favorable factors.” *Id.* at 302. For example, we assess the “quality” of relationships to family, and “the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed].” *Id.* (citation omitted).

The adverse factors in the present case are the Applicant’s criminal convictions for criminal trespass and criminal impersonation; his driving under the influence conviction in 2002 and 2004; his driving with a suspended license conviction in 2004, 2006, and 2008; his unpaid fine of \$750 in connection with the driving under the influence sentence; his domestic assault conviction in 2004; his placement in removal proceedings; and his unlawful presence and employment in the United States. The favorable factors include the hardship to his parents; his three siblings in the United States; the Applicant’s past residence in the United States for 6 years; the Applicant’s past 6 years of volunteerism at a retirement home; his apparent lack of a criminal record since returning to Mexico in 2008; the Applicant’s statement expressing remorse and regret for his criminal actions; the passage of more than 10 years since the criminal trespass, criminal impersonation, domestic assault and driving under the influence convictions; the passage of 7 years since the driving with a suspended license convictions; and the letters of support for the Applicant. In this case, when the favorable factors are considered together, they outweigh the adverse factors such that a favorable exercise of discretion is warranted.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. Accordingly, we will sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of J-A-O-A-*, ID# 15990 (AAO May 16, 2016)