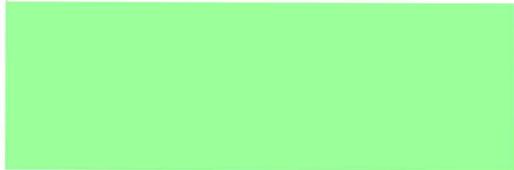




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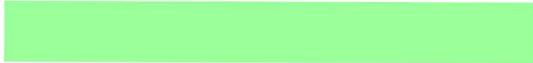


Date: **APR 21 2014**

Office: NEBRASKA SERVICE CENTER

FILE: 

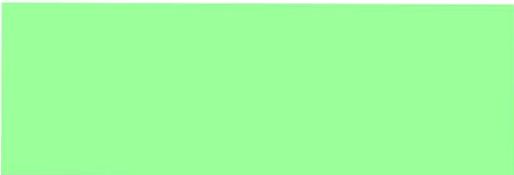
IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the waiver application and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act in order to reside with his wife and children in the United States.

The director found that although the applicant established extreme hardship to a qualifying relative, the applicant was convicted of a violent crime in 2002 and does not warrant a favorable exercise of discretion. The director denied the application accordingly.

On appeal, counsel contends the applicant is remorseful for his previous crime and that there are numerous other positive factors such that he merits a favorable exercise of discretion. Counsel submits additional evidence in support of the waiver application.

The record includes, but is not limited to, the following documents: a copy of the marriage certificate of the applicant and his wife, Ms. [REDACTED] indicating they were married on December 7, 2005; copies of the birth certificates of the couple's two U.S. citizen sons; a declaration from the applicant; declarations from Ms. [REDACTED] statements from Ms. [REDACTED]'s parents; letters from physicians and copies of medical records; letters from the applicant's former employer; numerous letters of support, including from the applicant's pastor; copies of criminal records and court documents; copies of photographs of the applicant and his family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) In General - Any alien (other than an alien lawfully admitted for permanent residence) who -

....

(II) 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 such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is

the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

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

(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 -

(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).

The record shows that the applicant has filed two waiver applications. In the first waiver application, the field office director found the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year, as well as section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. The field office director found that the applicant failed to establish extreme hardship to a qualifying relative and denied the application accordingly. On appeal, the AAO concluded that the applicant's conviction for sexual battery was a violent or dangerous crime, subjecting the applicant to the heightened standard of exceptional and extremely unusual hardship under 8 C.F.R. § 212.7(d). The AAO found the applicant did establish exceptional and extremely unusual hardship, but dismissed the appeal as a matter of discretion considering the gravity of the applicant's offense, the applicant's subsequent conviction for driving without a license, and the applicant's lack of remorse.

The applicant filed a second waiver application, contending he qualifies for the petty offense exception and submitting documentation showing that his conviction for sexual battery was reduced from a felony to a misdemeanor. The field office director concluded that although the applicant established extreme hardship to a qualifying relative, the applicant nonetheless does not warrant a favorable exercise of discretion. The instant appeal followed.

The record shows that in February 2002, the applicant was convicted of sexual battery under California Penal Code § 243.4(a), and sentenced to ninety days imprisonment and five years of probation. Counsel does not dispute the finding that the applicant's conviction involves moral turpitude. See generally *Gonzalez-Cervantes v. Holder*, 709 F.3d 1265 (9<sup>th</sup> Cir. 2013) (holding that there is no realistic probability that conduct resulting in a misdemeanor conviction under California Penal Code § 243.4(e) is not morally turpitudinous). However, counsel contends the applicant's post-conviction relief qualifies him for the petty offense exception set forth in section 212(a)(2)(A)(ii)(II) of the Act. According to counsel, the applicant qualifies for the petty offense exception because he has only been convicted of one crime involving moral turpitude, the maximum possible sentence for a misdemeanor offense is less than one year, and the sentence actually imposed on the applicant was less than six months. Counsel submits copies of two Orders from the Alameda County Superior Court showing the applicant's felony conviction was reduced to a misdemeanor. *Alameda County Superior Court, Order for Release from Penalties and Dismissal Under P.C. 1203.4*, dated February 10, 2012; *Alameda County Superior Court, Order to Reduce Felony Conviction to a Misdemeanor Pursuant to the Provisions of Penal Code Section 17*, dated February 10, 2012.

Counsel's contention that the applicant's conviction qualifies for the petty offense exception is correct. As the AAO stated in our previous decision, at the time of the applicant's conviction for violating California Penal Code § 243.4(a), the statute stated:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

Because the statute allows for either punishment in the county jail or imprisonment in state prison, it is a "wobbler." See *People v. Superior Court (Feinstein)*, 29 Cal. App. 4th 323, 329 (1994) (finding § 243.4(a) to be a wobbler). As a misdemeanor, the maximum penalty possible is less than one year in a county jail.

The applicant has met his burden of proving that his conviction has been reduced from a felony to a misdemeanor. In addition, the applicant has shown he has committed only one crime involving moral turpitude, that the maximum penalty possible did not exceed imprisonment for one year, and that he was

not sentenced to a term of imprisonment in excess of 6 months. Therefore, the applicant meets the petty offense exception set forth in section 212(a)(2)(A)(ii)(II) of the Act and is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Nonetheless, the record shows, and counsel does not contest, that the applicant remains inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence. The AAO previously found that the applicant established exceptional and extremely unusual hardship to a qualifying relative, a standard that is more restrictive than the extreme hardship standard required under section 212(a)(9)(B)(v) of the Act. Therefore, the applicant established extreme hardship to a qualifying relative and the AAO will not disturb our previous finding regarding hardship. Therefore, the sole issue before the AAO is whether or not the applicant is deserving of a favorable exercise of discretion.

In discretionary matters, the applicant 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*, 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).

In this case, for the first time, the applicant has submitted a declaration taking responsibility for his crime and expressing remorse. The applicant states, among other things, that he was twenty-one years old when his fifteen-year old girlfriend got pregnant. His girlfriend's family called the police who arrested him. The applicant explains that when he was growing up in Mexico, it was common for a man to be with a younger girl and, according to the applicant, his father was twenty-three years

old when he started dating his mother who was fifteen-years old at the time. The applicant contends he now realizes that his relationship with his girlfriend was never equal and that his thinking has changed a lot. In addition, he states that he was twice arrested for driving without a license, that he was very scared at the time, and that if he returns to the United States, he will be able to have a driver's license, will have insurance, will drive more carefully, and will follow all laws. The applicant contends he does not do drugs or drink, has never been involved in gangs, goes to church, and only wants to care for his family from whom he has been separated for six years.

After a careful review of all of the evidence, the record establishes that the applicant merits a waiver of inadmissibility as a matter of discretion. A copy of the arrest report and a statement from the applicant's girlfriend corroborate the applicant's contentions that he was having consensual sex with his fifteen-year old girlfriend. In addition, the Alameda County Superior Court's Orders indicate that the Court deemed it to be in the interests of justice to reduce the applicant's conviction to a misdemeanor. Moreover, the applicant's wife indicates that her husband very much regrets his past mistakes and describes him as a wonderful husband and great father. Numerous letters of support in the record describe the applicant as a good person who volunteers to help others, a tireless and hard worker, a dedicated employee with a great attitude, and a calm and non-aggressive person who doesn't drink or smoke and attends church.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y*, 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case include: the applicant's 2002 conviction for sexual battery, the applicant's 2006 conviction for driving without a license, the applicant's entry into the United States without inspection, and periods of unlawful presence and unauthorized employment. The favorable and mitigating factors in the present case include: the applicant's significant family ties to the United States, including his U.S. citizen wife and two U.S. citizen children; the exceptional and extremely unusual hardship the applicant's family has already experienced and will continue to experience if he were refused admission; numerous letters of support; and the applicant's remorse and taking responsibility for his previous violations of law.

The AAO finds that, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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 been met.

**ORDER:** The appeal is sustained.