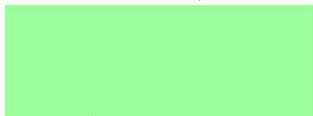




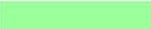
U.S. Citizenship
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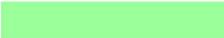
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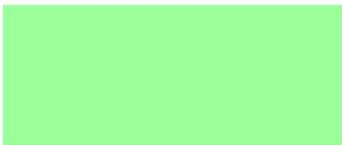
Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE: 

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:



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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States pursuant to 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 committed crimes involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his two U.S. citizen children and his lawful permanent resident mother.

In a decision, dated October 3, 2006, the director concluded that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relatives and denied the waiver application accordingly.

In a brief on appeal, counsel states that although the applicant has several criminal arrests on his record, he has only two criminal convictions from 1991 for petty theft. Counsel states that in his decision, the director weighed heavily the applicant's arrest for aggravated battery even though the applicant was not convicted or even charged with this crime. Finally, counsel states that most of the applicant's arrests happened when he was 18 and 19 years old and that the positive factors in his case now outweigh the negative.

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.

(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 Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The applicant's case arises within the jurisdiction of the Eleventh Circuit Court of Appeals, which has recently reaffirmed the traditional categorical approach for determining whether a crime involves moral turpitude. *See Fajardo v. Attorney General*, 659 F.3d 1303, 1310 (11th Cir. 2011) (finding that the Congress intended the traditional categorical or modified categorical approach to be used to determine whether convictions were convictions for crimes involving moral turpitude and declining to follow the "realistic probability approach" put forth by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). In its decision, the Eleventh Circuit defined the categorical approach as "'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" 659 F.3d at 1305 (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). The court indicated, however, that where the statutory definition of a crime includes "conduct that would categorically be grounds for removal as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered." 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

The record indicates that the applicant has a history of arrests and convictions in Florida. Born on July 31, 1971, the applicant entered the United States without inspection on May 31, 1988 at the age of 16 years old. On July 8, 1990, he was charged with disorderly conduct and on October 11, 1990 he was convicted of this charge. On October 21, 1991, at the age of 20 years old, the applicant was arrested for petty larceny and convicted of this charge on October 25, 1991. On November 21, 1991, the applicant was again arrested for petit larceny and convicted of this charge on November 22, 1991. On July 12, 1992, the applicant was arrested for disorderly conduct and resisting arrest with violence. On September 22, 1992, the charge of resisting arrest with violence was amended to resisting arrest without violence and the applicant pled guilty to

both disorderly conduct and resisting arrest without violence. The record also indicates that on February 19, 1993, the applicant was convicted of driving while under the influence of alcohol. Then, on May 31, 1997, the applicant was arrested for Aggravated Battery for allegedly hitting and kicking his pregnant girlfriend. This charge was dropped on June 30, 1997. On October 12, 1997, the applicant was again charged with aggravated battery and on October 28, 1997 this charge was dropped. Finally, on October 11, 1998, the applicant was charged with assault and battery and resisting an officer without violence. On March 10, 1999, the applicant was acquitted by a jury on the assault and battery charge. The charge for resisting an officer without violence was then nolle prossed.

Unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his admissibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." See Section 291 of the Act, 8 U.S.C. § 1361. Therefore, as counsel does not contest the director's finding that the applicant's 1991 convictions for petty larceny are crimes involving moral turpitude making him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, the AAO will not disturb the director's finding.

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

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 . . .

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).

Since the events which led to the criminal convictions for which the applicant was found inadmissible occurred more than 15 years ago, they are waivable 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.

The record indicates that the applicant's arrests and convictions occurred when he was 20 to 27 years old. The applicant is now 41 years old and has not had an arrest since 1998. We acknowledge that the applicant was arrested for Aggravated Battery for allegedly hitting and kicking his pregnant girlfriend. However, the applicant was never convicted of this crime, he later married the alleged victim, and he financially supports his U.S. citizen son from this pregnancy. The record also indicates, in the applicant's 2005 Federal Income Tax Return that he has a second U.S. citizen child. A statement from the applicant indicates that his mother and two minor siblings live in the United States and he helps them financially. Finally, the record indicates that the applicant has been with the same employer since June 1996 as a driver.

The AAO finds that based on the current evidence, the applicant's 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) of the Act. Consequently, he has established that he merits a waiver under section 212(h)(1)(A) of the Act.

Furthermore, the applicant has established that the favorable factors in his application outweigh the unfavorable factors. The favorable factors include the applicant's rehabilitation, the applicant's family ties to the United States and the passage of 21 years since his last conviction. The negative factors are his convictions for theft, his unlawful entry into the United States (at the age of 16), and his period of unauthorized presence in the United States.

While the AAO cannot condone the applicant's criminal convictions and immigration violations, the AAO finds that the positive factors outweigh the negative and a positive exercise of discretion is appropriate in this case.

In proceedings for 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. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained and the application is approved.