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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: SAN FRANCISCO, CA Date: JUN 2 1 2001

IN RE: Applicant: [redacted]

Application: Application for Waiver of Grounds of Inadmissibility under § 212(h) of the Immigration and Nationality Act, 8 U.S.C. 1182(h)

IN BEHALF OF APPLICANT: [redacted]

Public Copy

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected. The decision of the district director will be withdrawn and the matter will be remanded to him for further action.

The applicant is a native and citizen of the United Kingdom who is inadmissible under § 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 a crime involving moral turpitude. The applicant is the unmarried son of naturalized United States parents and is the beneficiary of an approved petition for alien relative. He seeks a waiver of this permanent bar to admission as provided under § 212(h) of the Act, 8 U.S.C. 1182(h), to reside in the United States with his parents.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the application accordingly.

On appeal, counsel asserts that the district director failed to adequately consider the severity of the medical condition of the applicant's mother; failed to consider the future hardship that would ensue to the parents; and erroneously considered arrests of the applicant while he was a juvenile.

The record reflects that the applicant has the following history of criminal arrests and/or convictions:

> (1) On September 5, 1985, the applicant was arrested in Concord, California, for Burglary. The case was referred to Juvenile Hall and no further information is available as to the outcome.
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> (2) In August 1988, the applicant was arrested in Fresno, California, and charged with a variety of offenses which resulted in a guilty plea to Conspiracy to Commit Robbery.
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> (3) In 1992, the applicant was arrested in Livermore, California, and charged with Criminal Conspiracy (prosecution rejected), Attempted Grand Theft (prosecution rejected), and Grand Theft of an Access Card/Sell with Intent to Defraud (dismissed with pleas to another charge). As a result, he was convicted in 1993 of Receiving Known Stolen Property. This misdemeanor conviction was set aside under diversion after satisfactory completion of two years probation.

Robbery is a crime involving moral turpitude. Matter of Martin, 18 I&N Dec. 226 (BIA 1982). As a matter of law, conspiracy to commit an offense involves moral turpitude when the substantive offense charged therein involves moral turpitude. Matter of G, 7 I&N Dec.

114 (BIA 1956), Matter of Flores, 17 I&N Dec. 225 (BIA 1980).

The record also reflects that the applicant was ordered excluded and deported from the United States by an immigration judge on April 1, 1997. The applicant appealed the decision of the immigration judge to the Board of Immigration Appeals. The record does not contain any evidence of the outcome of that appeal.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> * * *
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> (2) CRIMINAL AND RELATED GROUNDS.-
>
> (A) CONVICTION OF CERTAIN CRIMES.-
>
> (i) IN GENERAL.- Except as provided in clause (ii), an alien convicted of, or who admits having committed, or who admits committing such 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.
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> * * *
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> (9) ALIENS PREVIOUSLY REMOVED.-
>
> (A) CERTAIN ALIENS PREVIOUSLY REMOVED.-
>
> (i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible...
>
> (ii) OTHER ALIENS.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under § 240 of the Act or any other

provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clause (i)...shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(h) of the Act states:

The Attorney General may, in his discretion, waive application of subparagraphs (A)(i)(I),...if-

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General 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 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, 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 provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. 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 7 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.

The Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was recodified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996. The applicant was ordered excluded and deported on April 1, 1997.

The present record does not contain evidence that the applicant has remained outside the United States for the required period since the date of his having been ordered excluded and deported as required by 8 C.F.R. 212.2(a), or that he was granted permission to reapply for admission to the United States.

Service instructions at O.I. 212.7 specify that an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

Since there is no evidence that a Form I-212 application has been adjudicated first and approved in this instance, the appeal of the district director's decision denying the Form I-601 application will be rejected, and the record remanded so that he may adjudicate a Form I-212 application first, or provide evidence for the record that a decision has already been made on a Form I-212.

If the district director approves the Form I-212 application or provides evidence that such application has been approved, he shall certify the record of proceeding to the Associate Commissioner for review and consideration of the appeal regarding the Form I-601 application. However, if he denies the Form I-212 application or provides evidence that such application has been denied, he shall certify that decision to the Associate Commissioner for review, reject the Form I-601 application, and refund the fee.

ORDER: The appeal is rejected. The decision of the district director is withdrawn. The matter is remanded for further action consistent with the foregoing discussion.