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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: San Francisco Date: JUN 24 2003

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212 of the Immigration and Nationality Act, 8 U.S.C. 1182

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States 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 a crime involving moral turpitude. The applicant married a native of Nicaragua in December 1983 and his spouse became a lawful permanent resident in March 2001. The applicant seeks to adjust his status under section 202 of the Nicaraguan Adjustment & Central American Relief Act (NACARA), Pub.L. 105-100, as amended. He seeks a waiver of this permanent bar to admission as provided under section 212(h) of the Act, 8 U.S.C. § 1182(h), to reside with his spouse and seven children, three of whom are under 21 years of age.

The district director concluded that the applicant had established that extreme hardship would be imposed upon his qualifying relatives. However, the district director denied the application after concluding that the unfavorable factors outweighed the favorable ones, and the applicant did not warrant a favorable exercise of discretion.

On appeal, counsel states that the applicant has been steadily employed, is a parent of U.S. citizen children, is a homeowner, and his wife would be unable to support herself and their children if he was removed. Counsel asserts that the negative factors were not so serious as to outweigh the proven extreme hardship to Mrs. [redacted] and the rest of the family.

The applicant was initially present in the United States in 1977 without a lawful admission or parole. He was deported on May 18, 1977. The applicant was unlawfully present again in 1986. On March 3, 1987, he was convicted of the offense of Petty Theft, and was sentenced to two days in jail. On October 27, 2000, the applicant was convicted of Petty Theft. He was sentenced to two days in jail, and placed on probation for three years.

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

> (A)(i) Except as provided in clause (ii), any 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 part, that:-The Attorney General [now Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I),...or 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 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 for adjustment of status....

Here, fewer than 15 years have elapsed since the applicant committed the last violation. Therefore, the applicant is ineligible for the waiver provided by section 212(h)(1)(A) of the Act.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the exercise of discretion and pursuant to such terms, conditions, and procedures as he may by regulations prescribe.
It was held in *Matter of Barnes*, 10 I&N Dec. 755 (Reg. Comm. 1964), that an application for waiver of inadmissibility is denied in the exercise of discretion in the case of an alien who has been released on bond, probation, or parole, because such a court-ordered disability places an extraordinary burden upon the sentenced individual. The Regional Commissioner determined that it is not unreasonable to await the lifting of the restraint imposed by sentence before exercising any discretion in the alien's behalf.
The applicant is still on probation until October 2003. That court-ordered disability has placed an extraordinary burden upon him, which has not been overcome on appeal. Therefore, a favorable exercise of the Attorney General's discretion is not warranted in this matter at the present time.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.