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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: PHOENIX, ARIZONA Date: JUN 3 2004

IN RE: Applicant: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn, the appeal will be dismissed and the application declared moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to 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 beneficiary of an approved Petition for Alien Relative as the spouse of a U.S. citizen. He now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may remain in the United States and reside with his U.S. citizen spouse.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon his qualifying family member. The application was denied accordingly. *See District Director's Decision* dated June 2, 2003.

On September 3, 1997, the applicant was convicted in the Superior Court of Arizona, Maricopa County of the offense of Aggravated Driving or Actual Physical Control While Under the Influence of Intoxicating Liquor or Drugs, a class 4 felony in violation of A.R.S. Sections 28-692(A)(1), 28-697(A)(1), 28-444, 28-445, 28-448, 13-701, 13-702, and 13-801. The District Director found that the applicant's conviction was a crime involving moral turpitude.

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

> (A)(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.
>
> . . . .

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

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . . .
>
> (1) (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 . . . .

On appeal counsel argues that pursuant to the May 27, 2003, Ninth Circuit Court of Appeals decision, *Hernandez-Martinez v. Ashcroft,* 329 F.3d 1117 (9th Cir. 2003), the applicant's conviction is not a crime involving moral turpitude and therefore not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act.

In *Hernandez-Martinez* the Ninth Circuit Court of Appeals states:

> "Eliceo Hernandez-Martinez (Hernandez) petitions for review of the decision of the Board of Immigration Appeals (the Board) holding him to be convicted of a crime of moral turpitude by virtue of his conviction under Arizona law of aggravated driving under the influence. We hold that the statute under which Hernandez was convicted is divisible and its range does not include only crimes of moral turpitude. Accordingly, we grant Hernandez's petition. . . . On June 15, 1998, he was convicted of aggravated driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs (aggravated DUI) in violation of Arizona Revised Statutes §§ 28-692(A)(1) and 28-697(A)(1). . . ."
>
> Judge Wardlaw wrote separately: "I am pleased to concur in the judgment. I write to clarify that the offense of Driving Under the Influence ("DUI") with a suspended license, as defined by Arizona Revised Statute § 28-697(A)(1), is not a deportable crime of moral turpitude as a matter of either Ninth Circuit or BIA caselaw. . . .

Since this case arises in the Ninth Circuit, *Hernandez-Martinez* is controlling. In the instant case the applicant was convicted for aggravated DUI in violation of Arizona Revised Statutes 28-692(A)(1) and 28-697(A)(1) and therefore based on the above facts it is clearly shown that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

In the present case the applicant has established that he is not convicted of a crime involving moral turpitude. He is thus not inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act and a section 212(h) waiver is not necessary. As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(h) of the Act is moot and will not be addressed.

ORDER: The district director's decision is withdrawn and the appeal is dismissed.