U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 20 2015 OFFICE: SAN ANTONIO File:

IN RE: Applicant:

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 (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 waiver application was denied by the Field Office Director, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible and the underlying waiver application is unnecessary.

The applicant is a native and citizen of Mexico 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 been convicted of a crime involving moral turpitude, and under section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The field office director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director,* dated August 5, 2014.

On appeal the applicant contends that the field office director's decision incorrectly interpreted the cases it cited in determining that he failed to establish extreme hardship and it failed to consider the totality of the circumstances of his rehabilitation. With the appeal the applicant submits a letter from a social worker about his mother, letters from his children, school records for his children, and financial documentation. The record contains statements from the applicant's spouse and mother and documents related to the applicant's criminal record. The entire record was reviewed and considered in rendering this decision on the appeal.

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-
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> > (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).

On appeal the applicant asserts that the field office director failed to identify a specific crime involving moral turpitude for which he was convicted. The record shows that between 1994 and 2001 the applicant was convicted on three occasions under section 49.04, Driving While Intoxicated, with his third conviction in 2001 a third degree felony for which he was sentenced to 10 years imprisonment with the sentence suspended and the applicant placed on probation for a period of 10 years. The record shows that the applicant completed probation in 2011. On appeal the applicant asserts that driving while intoxicated convictions are generally not crimes involving moral turpitude. Although the applicant's third conviction was a felony, each conviction fell under the same DWI statute. The Board of Immigration Appeals has found that multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not aggregate into a conviction for a crime involving moral turpitude and that non-CIMT conduct is not rendered turpitudinous through multiple convictions for the same offense. *See Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001).

The record also shows that the applicant pled guilty on March 16, 2001, to Burglary of Vehicle, a Class A Misdemeanor, under section 30.04(a) of the Texas Penal Code for conduct that occurred in 1998, and for which he was sentenced to 150 days confinement. The applicant does not dispute he was convicted of for Burglary of Vehicle, but asserts that the conviction was a Class A Misdemeanor with a maximum penalty of one year or less, and thus qualifies for a petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act.

Section 30.04 of the Texas Penal Code defines the offense of Burglary of Vehicles and provides that:

> (a) A person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft.

Section 12.21 of the Texas Penal Code provides:

> An individual adjudged guilty of a Class A misdemeanor shall be punished by:
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> (1) a fine not to exceed $4,000;
> (2) confinement in jail for a term not to exceed one year; or
> (3) both such fine and confinement.

Here the record shows that the maximum penalty possible for the crime of which the applicant was convicted did not exceed imprisonment for one year and that the applicant's sentence did not exceed six months. Thus the record shows that even if the applicant's conviction for burglary of a vehicle were found to involve moral turpitude, the applicant meets the exception under Section 212(a)(2)(A)(ii)(II) of the Act.

The applicant was also found inadmissible under section 212(a)(2)(B) of the Act, which states in pertinent part:

> (2) Criminal and related grounds.-
>
> (B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Here the record reflects that the applicant's aggregate sentences to confinement total less than one year. Although the applicant was sentenced to 10 years following his 2001 felony DWI conviction, the sentence was suspended before imposition and the applicant was placed on 10 years of probation, from which he was discharged in October 2011. The BIA has held that for the purposes of section 212(a)(2)(B) of the Act, no sentence is "actually imposed" where the imposition of sentence is suspended. *Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995); *Matter of Castro*, 19 I&N Dec. 692 (BIA 1988). Thus the applicant is not inadmissible under section 212(a)(2)(B) of the Act for multiple convictions where the aggregate sentences to confinement totaled five years or more.

Here the record does not establish that the applicant is inadmissible either under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude or under section 212(a)(2)(B) of the Act for having been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more.

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 dismissed as the underlying waiver application is unnecessary.