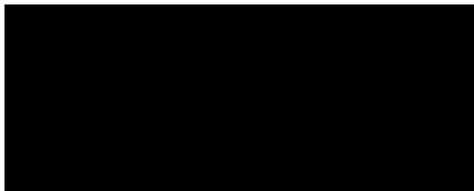




U.S. Citizenship
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Date: OCT 22 2007

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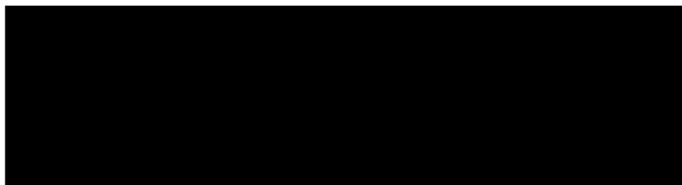
Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under Section 212(a)(9)(A) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:



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, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Officer-in-Charge (OIC), [REDACTED] and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [REDACTED] who was lawfully admitted to the United States on January 14, 1976. On October 7, 1993, the applicant was convicted of the unlawful selling of a stolen firearm, in violation of 18 U.S.C. § 922(j), and was sentenced to thirty-three (33) months in prison and three (3) years probation. On December 1, 1997, an immigration judge ordered the applicant deported. On June 4, 1998, while the applicant's appeal was pending with the Board of Immigration Appeals (BIA), the applicant departed the United States. On December 23, 2000, the applicant attempted to reenter the United States; however, he was refused admission and removed from the United States. On the same day, the applicant voluntarily abandoned his status as a lawful permanent resident of the United States. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He now seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside with his United States citizen wife and child.

The OIC determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law and that a favorable exercise of discretion was not warranted. The OIC denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Officer-in-Charge's Decision*, dated July 12, 2006.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

. . . .

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and 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 aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney

General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, asserts that the OIC's decision in denying the applicant's Form I-212 "as a matter of discretion" was in error. *Form I-290B*, filed August 9, 2006. Counsel contends that the OIC erred in stating that the applicant was "convicted of a crime of moral turpitude" and would be "barred from receiving relief under Section 212(h) of the INA." *Brief in Support of Appeal*, page 2, filed August 9, 2006. The AAO finds that the applicant was convicted of a crime involving moral turpitude in that he had knowledge that he was in possession of stolen property, and with that stolen property, he attempted to benefit himself. See *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000). The AAO notes that the applicant specifically pled guilty to "knowingly" selling a stolen .357 Sturm-Ruger revolver, in violation of 18 U.S.C. § 922(j). In *Michel*, the Second Circuit Court of Appeals held that since "knowledge" was a requisite element of the crimes Michel was convicted of, his offenses were crimes involving moral turpitude. *Id.* at 263; see also *Okoroha v. INS*, 715 F.2d 380, 382 (8th Cir. 1983) (affirming the BIA's conclusion that "possession of stolen mail [is] a crime of moral turpitude because knowledge that the article of mail ha[s] been stolen [i]s an essential element of the offense"); see also *Matter of Bart*, 20 I&N Dec. 436, 437-38 (holding if guilty knowledge is an element of a bad check offense, the crime is one involving moral turpitude). Furthermore, a conviction under 18 U.S.C. § 922(j) is an aggravated felony. The applicant's conviction for the unlawful selling of a stolen firearm is considered a theft offense. See 8 U.S.C. § 1101(a)(43)(G) (defining "aggravated felony" to include a "theft offense (including receipt of stolen property)...for which the term of imprisonment [is] at least one year") (emphasis added); see also section 101(a)(43)(G) of the Act.

Additionally, counsel argues that "[u]nder the rule set forth in *INS v. St. Cyr*, 553 U.S. 289, 290 (2001), the appellant should remain eligible for 212(h) relief pursuant to the law existing at the time of his plea." *Brief in Support of Appeal*, page 2, *supra*. In *St. Cyr*, the Supreme Court held that section "212(c) relief remains available for aliens, like respondent whose convictions were obtained through plea agreements and who, notwithstanding, those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *INS v. St. Cyr*, *supra* at 326. The applicant, in the present case, pled guilty on October 7, 1993, to the unlawful selling of a stolen firearm, in violation of 18 U.S.C. § 922(j), which was before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). However, the *St. Cyr* decision is distinguishable from the present case in both the law and the facts. First, the Supreme Court decision specifically addressed the application of section 212(c) of the Act, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and IIRIRA. The Supreme Court determined that the ultimate repeal of section 212(c) was not retroactive and that section 212(c) relief remains

available to those aliens that entered into plea agreements prior to the repeal. In the present case, counsel asserts that the applicant should remain eligible for a waiver under section 212(h). However, IIRIRA made relief under 212(h) more restrictive. As opposed to section 212(c), the restrictive amendment of section 212(h) has been found to apply retroactively.

the Second Circuit Court of Appeals (Second Circuit) found that “Congress clearly intended that an alien placed in deportation proceedings after IIRIRA’s enactment is subject to the restrictions on section 212(h) regardless of when the underlying criminal activity occurred.” *Id.* at 131; *see also Kuhali v. Reno*, 266 F.3d 93, 110-11 (2d Cir. 2001) (section 321(b) of IIRIRA clearly provides for a retroactive application...the expanded definition of an ‘aggravated felony’ applied to an alien placed in deportation proceedings based on a 1980 conviction.). The Second Circuit held that “Congress’s intent in this case is clear: Section 348 of IIRIRA (which restricts section 212(h) relief for aggravated felons) and section 321 of IIRIRA (which expands the definition of ‘aggravated felony’) apply to criminal acts and convictions occurring prior to IIRIRA’s enactment.” *Guaylupo-Moya v. Gonzales, supra* at 136. Additionally, the *St. Cyr* decision is distinguishable from the present case in that *St. Cyr* was a lawful permanent resident in removal proceedings, while the applicant in the current matter voluntarily abandoned his permanent residency status and is inadmissible. The AAO finds that *St. Cyr* is not applicable to the case at hand. Therefore, the applicant is not eligible for a waiver under section 212(h).

Eligibility for a waiver under section 212(h) is limited, in that:

....

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...

....

Since the applicant was convicted of an aggravated felony after he was lawfully admitted for permanent residence to the United States, he is ineligible for a waiver under section 212(h) of the Act. Additionally, the applicant is inadmissible under sections 212(a)(9)(A)(ii)(I) and 212(a)(2)(A)(i)(I) of the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(h) of the Act. No waiver is available to an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if since the date of such admission the alien has been convicted of an aggravated felony, therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the OIC.



Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.