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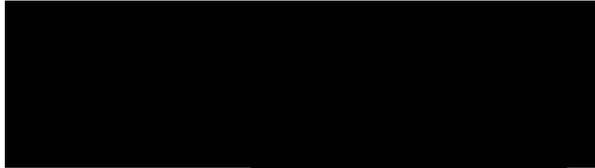
U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W., Rm. 3000
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U.S. Citizenship
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Date: **JAN 30 2008**

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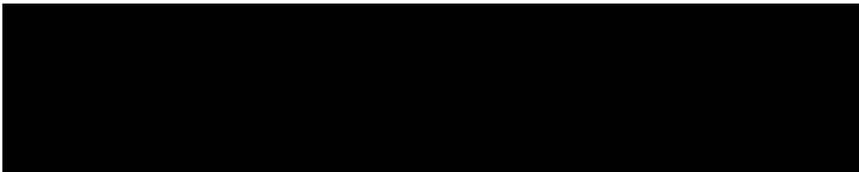
Applicant:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Iran who initially entered the United States on an F-2 nonimmigrant visa on July 2, 1985. On July 29, 1988, the applicant's father filed a Request for Asylum in the United States (Form I-589), including his wife and two children. On May 17, 1989, an Order to Show Cause (OSC) was issued against the applicant. On May 4, 1990, an immigration judge denied the Form I-589, but granted the applicant's family voluntary departure. On May 9, 1990, the applicant's father filed an appeal with the Board of Immigration Appeals (BIA). On April 22, 1994, the applicant was convicted of credit card abuse and was sentenced to five (5) years probation. On August 15, 1995, the applicant was convicted of theft, a third degree felony, and was sentenced to 30 days in jail. On the same day, a motion to dismiss was filed in the applicant's credit card abuse case because of his theft conviction. The BIA remanded the applicant's immigration case back to the immigration judge and the applicant applied for Suspension of Deportation (Form I-256A) on October 6, 1995. Based on the applicant's criminal convictions, on November 13, 1995, an immigration judge denied the applicant's Suspension of Deportation. On July 16, 1996, an immigration judge ordered the applicant deported from the United States. On August 23, 1996, the applicant was convicted of organized crime and was sentenced to two (2) years in jail. Based on the applicant violating his probation for the credit card abuse conviction, on August 23, 1996, the applicant was sentenced to two (2) years in jail. On November 20, 1996, a Warrant of Deportation (Form I-205) was issued against the applicant, and on August 20, 1997, the applicant was removed from the United States to Iran. On August 19, 1998, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212), which was denied on September 16, 1998. On August 30, 1999, the applicant's mother filed a Relative Immigrant Visa Petition on behalf of the applicant, which was approved on March 29, 2001. On July 9, 2001, the applicant filed a second Form I-212. On August 3, 2001, the applicant's mother became a United States citizen. On June 3, 2004, the applicant was paroled into the United States for humanitarian reasons, with authorization to remain in the United States until September 3, 2004. On August 31, 2004, the applicant's parole was extended until October 2, 2004. On September 2, 2004, the applicant filed an Application for Waiver of Ground of Excludability (Form I-601), a third Form I-212, and an Application to Register Permanent Resident or Adjust Status (Form I-485). On June 21, 2006, the District Director denied the applicant's Form I-485 and terminated the Form I-601. Based on the applicant's previous order of removal, the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). Additionally, the applicant is inadmissible under section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii), for being convicted of a crime involving moral turpitude. 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 mother, father, and sisters.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii), for being convicted of a crime involving moral turpitude, and 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 were 5 years or more. Additionally, the District Director determined that at least one of the crimes committed by the applicant was an aggravated felony. Since the

applicant's Form I-601 was denied, the District Director denied the applicant's Form I-212 accordingly. *District Director's Decision*, dated June 21, 2006.

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

(A) *Conviction of certain crimes.*—

- (i) In general.—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 pertinent part, that:

- (h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—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—

- (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] 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 established to the satisfaction of the [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...

(2) the [Secretary], 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.

The AAO notes that counsel admits that the applicant has been convicted of crime(s) involving moral turpitude; however, she states that the applicant has been rehabilitated and would be eligible for an I-601 waiver. *Appeal Brief*, dated July 6, 2006. The AAO notes that the applicant's convictions for crime(s) involving moral turpitude are unfavorable factors. Additionally, the applicant's rehabilitation is irrelevant for a waiver under section 212(h)(1)(A) of the Act, because the applicant's credit card abuse and theft offenses did not occur more than 15 years before the adjudication of his application for adjustment of status.¹

Additionally, counsel argues that the applicant is "applying for adjustment of status under INA §245(a) as the unmarried son of his mother[,] a United States citizen"; therefore, 8 C.F.R. § 212.5(e)(2)(ii) does not apply to the applicant. *Appeal Brief, supra*. The AAO notes that 8 C.F.R. § 212.5(e)(2)(ii) bars an alien who has been paroled into the United States after enactment of the Immigration Reform and Control Act of 1986, from applying for adjustment of status under section 245A. Counsel is correct that the applicant is applying for adjustment of status under section 245(a) of the Act and 8 C.F.R. § 212.5(e)(2)(ii) is not applicable in this case.

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

(B) *Multiple criminal convictions.*—Any alien convicted of 2 of 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 five years or more is inadmissible.

The AAO notes that the applicant was clearly convicted of three offenses. On April 22, 1994, the applicant was convicted of credit card abuse and sentenced to five years probation; however, after violating his probation, the applicant was sentenced to two years in jail on August 23, 1996. On August 15, 1995, the applicant was convicted of third degree felony theft and sentenced to 30 days in jail. Texas Penal Code section 12.34 states that if an individual is found guilty of a third degree felony, that individual shall be punished by a term of imprisonment of not more than 10 years or less than 2 years. The AAO notes that the applicant was found guilty of a third degree felony because he used a deadly weapon, a handgun, when committing the crime. *See Texas Penal Code* § 12.35(c)(1); *see also Criminal Complaint*, Cause No. [REDACTED] dated March 17, 1995. On August 23, 1996, the applicant was convicted of organized crime and sentenced to two years in jail. The sentences actually imposed for the applicant's convictions were four years and 30 days in jail. The AAO notes that in section 212(a)(2)(B) of the Act, the term "actually imposed" was deleted by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 322(a)(2)(B); so now the relevant

¹ The AAO notes that the district director's denial of the Form I-212 indicated that the applicant's Form I-601 waiver application had been denied, however, there is no evidence in the record that a proper denial was completed as required by 8 C.F.R. § 103.3(a).

term of imprisonment is the actual sentence imposed, not the potential sentence that the judge could have imposed or what the applicant actually served. Since the actual sentence imposed for the applicant's convictions, was four years and 30 days in jail, he is not inadmissible under section 212(a)(2)(B) of the Act.

Section 101(a)(43)(F) of the Act states "aggravated felony" means:

(F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment at least 1 year.

Counsel argues that the applicant has not been convicted of a crime of violence, and therefore, has not been convicted of an aggravated felony. *See Appeal Brief, supra*. The AAO finds that the District Director was unclear on which of the applicant's convictions were for crimes of violence and she erred in finding any of the applicant's convictions to be crimes of violence. The AAO notes that there are only two convictions for which the applicant received sentences of over one year or more in jail, which are the credit card abuse conviction and the organized crime conviction. Neither the credit card abuse conviction or the organized crime conviction has as an element of the crime the use of force against a person or property, nor was there a substantial risk that physical force would be used in committing those crimes; therefore, neither of those convictions are for crimes of violence. Even though the applicant used a handgun when committing his theft offense and could have received two to ten years imprisonment for the third degree felony theft, he was only sentenced to 30 days in jail. An aggravated felony requires that the actual sentence imposed is at least one year; therefore, the applicant's theft conviction is not an aggravated felony. *See Alberto-Gonzalez v. INS*, 215 F.3d 906, 909 (9th Cir. 2000); *see also United States v. Graham*, 169 F.3d 787, 789-90 (3d Cir. 1999), *cert. denied*, 528 U.S. 845, 120 S.Ct. 116, 145 L.Ed.2d 99 (1999). The AAO finds that none of the applicant's convictions are for crimes of violence; and therefore, he has not been convicted of an aggravated felony.

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 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, states the "record contains extensive evidence of hardship to [the applicant's] family members, rehabilitation (including statements of remorse, support letters, and a lack of subsequent crimes), long residence in the United States after a legal admission, hardship to the applicant including a rare cancer that can only be treated in the United States, and the passage of more than (9) years since his deportation." *Appeal Brief, supra.* [REDACTED] diagnosed the applicant "with a very aggressive form of testicular cancer...[and] [t]o successfully fight this cancer, [the applicant] will need intensive chemotherapy followed by specialized testing for approximately one (1) year. Since this level of medical care and follow-up is not available in Iran, [she asks] to please extend [the applicant's] medical visa for one year." *Letter from* [REDACTED] dated June 21, 2004. The AAO notes that Dr. [REDACTED]'s letter is dated June 21, 2004, and there was no additional medical documentation submitted with the July 2006 appeal establishing that the applicant was still receiving treatment for his illness. Additionally, [REDACTED] states the applicant only needed to be in the United States for another year, which would be until June 2005, and there is no indication that the applicant has to remain in the United States past June 2005 to receive medical treatments. The applicant's mother states while the applicant was in Iran, she was "trying to pull the family together and keep up a normal appearance for the people around [them]. Deep inside [she was] tortured and broken." *Letter from* [REDACTED] dated June 22, 2004. Ms. [REDACTED] states the applicant's mother, father, and sister's are "suffering from severe depression and separation anxiety due to [the applicant being] deported to Tehran, Iran. The family fears for the safety of their son." *Psychological Evaluation by* [REDACTED] dated October 4, 1999. The AAO notes that there is no evidence in the record that during the time that the applicant resided in Iran, from August 20, 1997 until June 3, 2004, that he was harmed in any way. Further, the applicant started his own business in Iran and was able to take care of himself. *See Notice of Decisions Made by* [REDACTED], dated July 5, 2005; *see also applicant's statement*, dated June 18, 2004. The applicant's father states "[e]very winter [he] make[s] an annual trip to Tehran to visit [the applicant]...Being away for weeks visiting [the applicant] has also had a negative toll on [his] business. The time that [he is] absent there and the emotional stress that comes from visiting him in Iran has almost ran [his] business dry...[He] believe[s] with [the applicant] and his energy [they] can get the boost [they] need to over come these financial difficulties." *Letter from* [REDACTED] dated June 21, 2004. The AAO notes that based on the U.S. Individual Income Tax Returns (Form 1040) submitted by the applicant, the applicant's father's business had \$90,089 in gross income in 2004, \$64,862 in gross income in 2003, and \$64,680 in gross income in 2002; therefore, it does not appear

that the applicant's father's business suffered due to his visits to Iran. Regarding the hardship the applicant's parents may face, the AAO notes that unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's parents, but it will be just one of the determining factors.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

The favorable factors in this matter are the applicant's family ties to United States citizens, his parents, general hardship they may experience, letters of recommendation from friends and family, and the approval of a petition for alien relative.

The AAO finds that the unfavorable factors in this case include the applicant's criminal convictions for credit card abuse, theft, and organized crime, his failure to abide by an order of deportation, and periods of unauthorized presence.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

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.