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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 0 3 2013 Office: NEW DELHI FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v), respectively, and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Field Office Director for proceedings consistent with this decision.

The applicant is a native and citizen of Pakistan 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 crimes involving moral turpitude. The record shows that the applicant was also found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and again seeking readmission within 10 years of his last departure from the United States. The applicant was further found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed under any provision of law and seeking admission within 10 years of the date of his departure or removal. The applicant is the spouse of a U.S. citizen. On July 11, 2012, he filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212). The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h), (a)(9)(B)(v), and permission to reapply for admission to 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 in the United States with his U.S. citizen wife and children.

In a decision dated August 10, 2012, the field office director denied the Form I-601 application for a waiver, finding the applicant statutorily ineligible for a section 212(h) waiver as an aggravated felon. In the same decision, the field office director denied the applicant's Form I-212 in the exercise of discretion.

On appeal, counsel for the applicant asserts that the field office director erred in finding the applicant statutorily ineligible for a waiver. Counsel contends that because the applicant has never been admitted into the United States as an alien lawfully admitted for permanent residence, the aggravated felony bar to discretionary relief found in section 212(h) of the Act does not apply to this case. Counsel requests the AAO remand this matter to the New Delhi Field Office "for a determination as to [] whether [the applicant] has met the standards, and is eligible for the [section 212(h)] waiver."

The record contains, but is not limited to: counsel's brief; a statement by the applicant's wife; character reference letters; country conditions documentation; financial documentation; documentation regarding the applicant's administrative removal order; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act, in pertinent part, provides:

(B) Aliens Unlawfully Present.-

> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> ....
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> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
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> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record shows that the applicant entered the United States as a nonimmigrant visitor on or about June 29, 1979, and remained in the United States beyond the authorized period of stay without permission. Though the applicant submitted applications to adjust his status to that of a lawful permanent resident in 1981 and 1986, the record reflects that such status was never accorded to him. On June 7, 2004, the applicant was ordered removed from the United States by a Final Administrative Removal Order Under Section 238(b) of the Act (Form I-851A). On August 25, 2004, the applicant was removed from the United States to Pakistan. The AAO finds that the applicant thus accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in 2004. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of her 2004 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest his inadmissibility on appeal.

A discretionary waiver of 212(a)(9)(B)(i)(II) inadmissibility is available under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which provides that:

> Waiver.-The Attorney General [Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

However, the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (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

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record reflects that on December 14, 1987, the applicant was convicted in the 337th District Court of Harris County Texas of indecency with a child, a second degree felony. For this offense, the applicant was placed on probation for a period of three years and was fined $500.00. The record further reflects that on the same date, the applicant was convicted of aggravated sexual assault on a child, a first degree felony in violation of Texas Penal Code § 22.021(a)(1)(B)(i). For this offense, the applicant was sentenced to probation for nine years and was fined $2,000.00. The field office director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. As the applicant has not disputed that these convictions render him inadmissible for having been convicted of crimes involving moral turpitude, and the record does not show that finding to be erroneous, the AAO will not disturb the finding of the field office director.

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

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . .
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> (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 . . . .
>
> . . . .

> 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 or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

The field office director found the applicant ineligible for a section 212(h) waiver based upon his December 14, 1987 conviction for aggravated sexual assault of a child. The director found that the applicant's sexual assault charge amounted to an aggravated felony under section 101(a)(43) of the Act, a provision of law for which there is no waiver.

The AAO notes that there are limitations on section 212(h) relief relating specifically to lawful permanent residents. The section 212(h) discretionary waiver provides that an individual who has previously been admitted to the United States as an alien lawfully admitted for permanent residence is ineligible for this waiver if, since the date of such admission, he or she has been convicted of an aggravated felony. Otherwise, an aggravated felony conviction does not preclude an alien from seeking a section 212(h) waiver. *See Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998); *see also Matter of E.W. Rodriguez*, 25 I&N Dec. 784, 788 (BIA 2012).

Here, the record evidence reflects that the applicant was admitted into the United States in 1979 as a nonimmigrant visitor for pleasure who remained beyond the period of authorized stay. Since the record evidence reflects that the applicant was never lawfully admitted to the United States as a lawful permanent resident, an aggravated felony is not an impediment to his eligibility for section 212(h) relief. Consequently, the applicant remains statutorily eligible for section a 212(h) waiver despite the June 7, 2004 finding that his 1987 aggravated sexual assault conviction constitutes an aggravated felony.

The AAO therefore remands the matter to the field office director for the issuance of a new decision addressing the merits of the applicant's Form I-601 waiver application. The field office director should determine whether the applicant has established the requirements for a waiver under either section 212(h)(1)(A) or 212(h)(1)(B), and for a waiver under section 212(a)(9)(B)(v) of the Act. Although we need not make the determination at this time, it appears that the applicant's aggravated assault of a child conviction may constitute a "violent or dangerous" crime. Thus, should the field office director determine that the applicant meets the statutory requirements for a waiver under 212(h) and 212(a)(9)(B)(v) of the Act, the field office director should also determine whether the applicant must meet and has met the requirements of 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion. If the decision is adverse to the applicant, the Field Office Director will certify it for review to the AAO.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.