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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 06 2006

IN RE: [redacted]

APPLICATION: 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: Self-represented

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 Director, Vermont Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador who, on June 9, 1985, was admitted to the United States as a lawful permanent resident. On July 2, 1998, the applicant was convicted of attempted assault in the first degree in violation of sections 110 and 120.10 of the New York Penal Code (NYPC) and was sentenced to 27 months to 54 months in jail. On December 7, 1998, the applicant was placed in proceedings. On May 21, 1999, the immigration judge found the applicant to be removable pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony. The applicant appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). On October 28, 1999, the BIA dismissed the applicant's appeal and affirmed the immigration judge's order. The Applicant filed a motion to reconsider with the BIA. On October 30, 2000, the applicant withdrew his motion to reconsider. On November 28, 2000, the applicant was removed from the United States and was returned to Ecuador where he has since resided. The applicant is the father of a lawful permanent resident son and the spouse of a lawful permanent resident. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 travel to the United States and reside with his lawful permanent resident spouse and son.

The director determined that the applicant was removed under section 237(a)(2)(A)(iii) of the Act, was inadmissible pursuant to 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, and was not eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The director determined that no purpose would be served in adjudicating the Form I-212 and denied the Form I-212 accordingly. *See Director's Decision* dated April 29, 2005.

On appeal, the applicant contends that the crime to which he pled guilty is not a crime that fits under section 237(a)(2)(A)(iii) of the Act and neither his attorney nor the court informed him of the immigration consequences. *See Applicant's Brief,* dated May 16, 2005. To support his contentions, the applicant submitted the above-referenced brief and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

The AAO finds that the applicant's contention in regard to the immigration judge's decision to remove the applicant from the United States pursuant to section 237(a)(2)(A)(iii) of the Act is not pertinent as to whether the applicant is eligible for permission to reapply for admission. The applicant was afforded and took advantage of the appropriate avenues of appealing the immigration judge's decision prior to his removal. The applicant was physically removed from the United States in 2000 and is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act.

Section 101(43) of the Act states in pertinent part:

> (43) The term "aggravated felony" means-
>
> . . . .
>
> (F) a crime of violence . . . for which the term of imprisonment is at least one year

The term "crime of violence" is defined in 18 U.S.C. § 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

> (1) Criminal and related grounds. —
>
> (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:

> Waiver of subsection (a)(2)(A)(i)(I) . . .
>
> The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . .
>
> No waiver shall be provided 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 . . . since the date of such admission the alien has been convicted of an aggravated felony . . .

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. The AAO notes that whether the applicant was informed of the immigration consequences of his guilty plea is not relevant as to whether he is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of attempted assault in the first degree, a crime involving moral turpitude. Section 110 of the NYPC provides, in pertinent part:

> § 110.00 Attempt to commit a crime.
> A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime.

Section 120.10 of the NYPC provides:

§ 120.10 Assault in the first degree.
A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or
3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person
4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class B felony

The AAO finds that the applicant in the instant case does not qualify for a waiver under section 212(h) of the Act because he was convicted of attempted assault in the first degree and was sentenced to 27 months to 54 months in jail, an aggravated felony, after he had been admitted to the United States as a lawful permanent resident. The applicant provides no precedents or argument as to why his conviction is not an aggravated felony and each subsection of the statute under which the applicant was convicted either is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or is an offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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(a)(2)(A)(i)(I) of the Act, which are very specific and applicable. The applicant is not eligible for a waiver of this ground of inadmissibility under section 212(h) of the Act, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.