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



U.S. Citizenship
and Immigration
Services

H₂



FILE:



Office: MOUNT LAUREL

Date:

FEB 18 2010

IN RE:

Applicant



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(g)
of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h), 1182(g)

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Mount Laurel, New Jersey. The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action and consideration consistent with this decision.

The applicant is a native and citizen of Liberia 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 committed crimes involving moral turpitude. The applicant was further found inadmissible to the United States under section 212(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. 1182(a)(1)(A)(iii)(II), as an alien classified as having a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior. The applicant seeks a waiver of his inadmissibility in order to remain in the United States with his naturalized U.S. citizen mother.

The Field Office Director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on his qualifying relative, his U.S. citizen mother, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel asserts that the director's finding that the applicant's conviction constitutes a crime involving moral turpitude is not supported by the relevant authority. Counsel contends that the government's finding that the applicant's mother would not suffer the requisite hardship should the applicant be removed from the United States fails to consider the relevant authority. Lastly, counsel asserts that the director failed to properly review the ground of inadmissibility pursuant to section 212(a)(1)(A)(iii) of the Act.

Counsel indicated on the appeal notice that he filed a brief. However, an appeal brief is not contained in the record of proceedings. In support of the application, the record contains, but is not limited to, medical documentation, court records, and a statement from the applicant's mother. The entire record was reviewed and considered in rendering a 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.

The Board of Immigration Appeals (BIA) 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.)

On August 14, 2009, the director issued a notice of intent to deny (NOID) the applicant's waiver application, finding the applicant inadmissible for having been convicted by the Common Pleas Court of Philadelphia, Pennsylvania of theft-unlawful taking, simple assault and false imprisonment. The director noted that the applicant was sentenced to twelve months probation and mental health treatment. On September 28, 2009, the director denied the waiver application, stating that the applicant was convicted of robbery, receiving stolen property, riot, and re-sentencing for riot.

The record contains a NOID rebuttal from counsel stating that the NOID fails to discuss the role of the applicant's mental health. Counsel stated that the applicant's theft related charge was dismissed and he qualified for the ARD program for the remaining charges. Counsel asserted that the applicant was not mentally capable of forming the requisite evil intent that is the hallmark of all crimes involving moral turpitude.

The AAO agrees that the applicant was not convicted of crimes involving moral turpitude, but not for the reasons presented by counsel. The record reflects that the applicant was arrested in Philadelphia, Pennsylvania on September 23, 2004 for the following offenses: simple assault in violation of section 2701 of the Pennsylvania Consolidated Statutes (18 Pa. Consol. Stat. § 2701); recklessly endangering another person in violation of 18 Pa. Consol. Stat. § 2705; unlawful restraint in violation of 18 Pa. Consol. Stat. § 2902; false imprisonment in violation of 18 Pa. Consol. Stat. § 2903; and robbery in violation of 18 Pa. Consol. Stat. § 3701.

The submitted court record reflects that the applicant's criminal proceedings were conducted in the Common Pleas Court of Philadelphia ([REDACTED]). The criminal record of proceedings reflects that the applicant received a continuance of his criminal hearing without a final disposition of the charges. However, he was sentenced to twelve months probation and mental health treatment. The record contains a letter, dated March 8, 2007, from the applicant's probation officer with the Accelerated Rehabilitative Disposition (ARD) Unit stating that he completed the ARD Program and his record will be expunged. The letter states that the applicant's ARD probation was not a conviction or an admission of guilt.

Section 101(a)(48) provides:

- (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
 - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Chapter 3 of the Pennsylvania Rules of Criminal Procedure contains the rules on the Accelerated Rehabilitative Disposition process. When a defendant is accepted into the program of accelerated rehabilitative disposition after the filing of an information, the judge shall order that further proceedings on the charges shall be postponed during the term of the program. Pa. R. Crim. P. 315. The conditions of the program may be such as may be imposed with respect to probation after conviction of a crime, including restitution, except that a fine may not be imposed. Pa. R. Crim. P. 316. If the judge finds that the defendant has committed a violation of a condition of the program, the judge may order, when appropriate, that the program be terminated, and that the attorney for the Commonwealth shall proceed on the charges as provided by law. Pa. R. Crim. P. 318. When the defendant shall have completed satisfactorily the program prescribed and complied with its conditions, the defendant may move the court for an order dismissing the charges. In some counties, court agencies or the district attorney's office have procedures for initiating the dismissal of the charges upon the defendant's successful completion of the program. Pa. R. Crim. P. 319. When the judge orders the dismissal of the charges against the defendant, the judge shall also order the expungement of the defendant's arrest record. Pa. R. Crim. P. 320. Therefore, to participate in the ARD program, there need not be a finding of plea of guilt, or an admission of facts.

The AAO finds that applicant's twelve month probation is a restraint on his liberty that satisfies the second prong of section 101(a)(48)(A) of the Act. However, there is no evidence that a judge or jury has found him guilty or he has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, as required by the first prong of section 101(a)(48)(A) of the Act. The record contains a March 8, 2007 letter from the applicant's probation officer stating that he has completed the ARD program. There is nothing in the record to indicate that the applicant violated the program and the judge reinstated criminal proceedings on the charges against him. It can thus be concluded that the criminal charges against the applicant have been dismissed. Since the applicant's offenses are not convictions within the definition of section 101(a)(48)(A) of the Act, we cannot find that he has been convicted of crimes involving moral turpitude. Therefore, the applicant is not inadmissible under section 212(a)(2)(A) of the Act.

The director also found the applicant inadmissible to the United States under section 212(a)(1)(A)(iii)(II) of the Act, as an alien classified as having a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior.

Section 212(a) states, in pertinent part:

(a) Classes of Aliens Ineligible for Visas or Admission.--Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds.—

(A) In general.—Any alien-

...

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General [now Secretary of Homeland Security])--

...

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior. . . . is inadmissible.

The applicant furnished medical documentation as evidence of his mental disorder. The medical documentation includes a letter, dated June 16, 2009, from [REDACTED] and [REDACTED] of the Family Service Behavioral Health & Wellness Family Service in Mount Holly, New Jersey. The letter states, [REDACTED] has been with the Family Service since 2/17/2009. He is diagnosed with Schizophrenia, Chronic Paranoid Type (295.32). His symptoms consist of disordered thought processes: auditory hallucinations that are not commanding, delusions relating to religion, flat affect, and disorganized speech and behavior when not on medications. Symptoms began around 2004. . . .”

The AAO has reviewed the record and finds that the director’s determination that the applicant has a medical condition that renders him inadmissible under section 212(a)(1)(A)(iii)(II) of the Act has not been issued “in accordance with regulations prescribed by the Secretary of Health and Human Services,” as required by the statute.

Section 23.3 of the United States Citizenship and Immigration Services (USCIS) Adjudicator’s Field Manual provides the following on the procedure for adjudicating a medical ground of inadmissibility:

(a) Medical Grounds of Inadmissibility Defined . Section 212(a)(1)(A) of the Act designates four categories that render an applicant for a visa, admission, or adjustment of status inadmissible on medical grounds. The medical grounds are determined according to the regulations published by the Department of Health and Human Services (HHS) at 42 CFR part 34. The required medical exam, discussed in Chapter 23.3(b), below, must be performed according to the specific guidelines published by the Centers for Disease Control and Prevention (CDC). These are the Technical Instructions for the Medical Examination of Aliens in the United States, used by civil surgeons in the United States, and the Technical Instructions for the Medical Examination of Aliens, used by panel physicians abroad. (Technical Instructions). The Technical Instructions have the force of a regulation. See 42 CFR 34.3(f). They can be accessed online at: www.cdc.gov/ncidod/dq/technica.htm. If the medical condition found by the panel physician or civil surgeon falls under any of the four categories described below, the civil surgeon or panel physician must certify it as Class A in order for the applicant to be inadmissible on medical grounds. Class B

medical conditions are defined at 42 CFR § 34.2(e) as physical or mental abnormalities, diseases, or disabilities serious in degree or permanent in nature amounting to a substantial departure from normal well-being; however, they do not render the applicant inadmissible on medical grounds.

Section 212(a)(1)(A)(iii) of the Act . This ground covers individuals who have a physical or mental disorder or harmful behavior associated with that disorder. It is further divided into two subcategories:

(I) Current physical or mental disorders, with harmful behavior associated with that disorder; and

(II) Past physical or mental disorders, with associated harmful behavior that is likely to recur or lead to other harmful behavior.

Note 1: Harmful behavior is defined under section 212(a)(1)(A)(iii) of the Act as behavior that "... may pose, or has posed, a threat to the property, safety, or welfare of the alien or others"

Aliens Required to Have a Medical Examination . Because section 212(a)(1)(A) of the Act states that all medical-related grounds of inadmissibility are determined "... in accordance with regulations prescribed by the Secretary of Health and Human Services," the applicant's own admission is not sufficient to uphold a finding of inadmissibility on medical grounds. A medical examination performed by panel physician designated by the Department of State or a civil surgeon designated by the district director is required. *Hill v. INS*, 714 F 2d. 1470 (9 th Cir. 1983).

In the present case, the record reflects that the applicant was examined by a designated civil surgeon on August 18, 2008 and August 21, 2008. The civil surgeon's initial Report of Medical Examination and Vaccination Record (Form I-693), dated August 26, 2008, states that the applicant did not have a Class A or Class B physical or mental disorder. The record of proceedings shows that counsel for the applicant made repeated attempts to have the Form I-693 amended by the civil surgeon. In a January 22, 2009 letter to the civil surgeon, counsel stated, "Your office failed to list [REDACTED] schizophrenia as a mental disorder, rendering the exam incomplete. . . . USCIS Mt. Laurel would like you to correct the exam for resubmission." On April 23, 2009, the civil surgeon amended the Form I-693 citing to an April 23, 2009 letter issued [REDACTED] and [REDACTED] of the Family Service Behavioral Health & Wellness center. However, the civil surgeon's amended Form I-693 does not reflect that the applicant has a physical/mental disorder, with associated harmful behavior, a Class A medical condition. The report instead shows that the civil surgeon determined that the applicant has a physical/mental disorder (schizophrenic affective disorder), without associated harmful behavior, a Class B medical condition. As noted in the adjudicator's field manual, a civil surgeon or panel physician must certify a medical condition as Class A in order for the applicant to be inadmissible on medical grounds. The applicant is not inadmissible for a Class B medical condition under section 212(a)(1)(A) of the Act. Therefore, the AAO does not find that the applicant is inadmissible under section 212(a)(1)(A)(iii)(II) of the Act, as an alien having a mental disorder with associated harmful behavior.

Finally, the AAO observes that the director initially found the applicant inadmissible under section 212(a)(6)(G) of the Act as a student visa abuser in the NOID. This determination was not included in the final denial notice.

Section 212(a)(6)(G) of the Act states the following:

Student visa abusers. – An alien who obtains the status of a nonimmigrant under section 101(a)(15)(F)(i) and who violates a term or condition of such status under section 214(l) is inadmissible until the alien has been outside the United States for a continuous period of 5 years after the date of the violation.

Subsequent to the enactment of present section 212(a)(6)(G), the section of law referred to as section 214(l) of the Act was moved to section 214(m) of the Act. Thus, section 212(a)(6)(G) of the Act renders an applicant inadmissible for violations under section 214(m) of the Act.

Section 214(m) of the Act provides the following:

(1) An alien may not be accorded status as a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study –

(A) at a public elementary school or in a publicly funded adult education program; or

(B) at a public secondary school unless -

(i) the aggregate period of such status at such a school does not exceed 12 months with respect to any alien, and

(ii) the alien demonstrates that the alien has reimbursed the local educational agency that administers the school for the full, unsubsidized per capita cost of providing education at such school for the period of the alien's attendance.

(2) An alien who obtains the status of a nonimmigrant under clause (i) or (iii) of section 1101(a)(15)(F) of this title in order to pursue a course of study at a private elementary or secondary school or in a language training program that is not publicly funded shall be considered to have violated such status, and the alien's visa under section 1101(a)(15)(F) of this title shall be void, if the alien terminates or abandons such course of study at such a school and undertakes a course of study at a public elementary school, in a publicly funded adult education program, in a publicly funded adult education language training program, or at a public secondary school (unless the requirements of paragraph (1)(B) are met).

Section 212(a)(6)(G) of the Act renders an individual inadmissible when he violates a narrow set of conditions of F-1 status. Specifically, section 212(a)(6)(G) of the Act, through section 214(m) of the Act, prohibits an individual who entered the United States in F-1 status to study at a privately-funded

school from then transferring to a publicly funded school. In essence, section 212(a)(6)(G) of the Act prevents foreign nationals from entering the United States under the claim that their course of study will be funded by them or private sources, and then transferring into programs that involve funding from U.S. federal, state, or local government sources.

The record contains the applicant's Departure Record (Form I-94), which reflects that he entered the United States on August 3, 2000 as an F-1 student, admitted for duration of status. U.S. government records show that the applicant was issued an F-1 visa at the U.S. Embassy in Monrovia to attend Augsburg College in Minneapolis, Minnesota. In rebuttal to the NOID, counsel presented a copy of the applicant's high school diploma from Trenton Central High School in Trenton, New Jersey, dated June 2001. Counsel stated, "[redacted] presented at Augsburg [sic] College shortly after admission. While [redacted] recollections of this encounter were not entirely clear, it seems he was deemed not ready for college level work at the age of 23 and was referred to a more appropriate environment, high school." The evidence furnished by counsel indicates that the applicant is inadmissible under section 212(a)(6)(G) of the Act for entering the United States as an F-1 student to study at a private college and then transferring to Trenton Central High School, an institution within the Trenton public school system.¹

An exemption to section 212(a)(6)(G) is available under section 214(m)(1)(B) of the Act to individuals who can show that the aggregate period of their status at a public school does not exceed 12 months and the individual has reimbursed the local educational agency that administers the school for the cost of providing the education. Since the ground of inadmissibility under section 212(a)(6)(G) of the Act was not raised by the director in the final denial notice, and the applicant's qualification for an exemption under section 214(m)(1)(B) has not been explored, the AAO will remand the matter to the Field Office Director for further action.

ORDER: The decision of the Field Office Director is withdrawn and the matter is remanded to the director for further action and consideration consistent with this decision. If the subsequent decision of the director is adverse to the applicant, the director shall certify the decision to the AAO for review.

¹ <http://www.trenton.k12.nj.us/>