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



U.S. Citizenship
and Immigration
Services

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DATE: Office: EL PASO, TX FILE: A [REDACTED]

JAN 20 2012

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, El Paso, 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 the Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses with aggregate sentences of confinement of five years or more. The applicant's mother is a lawful permanent resident. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant was convicted of an aggravated felony after having been lawfully admitted for permanent residence and he is not eligible to file for a section 212(h) waiver. *Decision of the Field Office Director*, dated February 11, 2009. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Id.*

On appeal, the applicant asserts that his mother is disabled and he is her only unmarried child, and he is in the process of beginning an alcohol rehabilitation program which would make him a better resident of the United States. *Form I-290B*, received March 17, 2009.

The record includes, but is not limited to, the Form I-290B and previously submitted documents. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was granted lawful permanent residence on December 1, 1990; he was ordered removed from the United States on December 29, 1999 and departed the United States on this date; he reentered the United States without inspection on December 5, 2008; his order of removal was reinstated on December 5, 2008; and he was removed on October 15, 2009.

The record reflects that the applicant was convicted of theft in Texas on April 27, 1992 and was confined for three days and had monetary penalties; he was convicted of driving while intoxicated under Texas [REDACTED] on December 21, 1993 and was sentenced to one year of confinement (suspended), 1 year of probation, 365 days of driver's license suspension and monetary penalties; he was convicted of driving while intoxicated under Texas PC Section 49.04 on March 3, 1997 and was sentenced to 30 days of confinement, 180 days license suspension and monetary penalties; he was convicted of driving while intoxicated, 3rd offense, under Texas PC Section 49.04 on April 27, 1999 and was sentenced to five years confinement (suspended), 5 years of probation, 10 days in jail, 180 days of driver's license suspension, and monetary penalties; he was convicted of purchasing/furnishing alcohol to a minor under Texas ABC Section 106.6 on December 3, 1999 and he was sentenced to 30 days confinement and monetary penalties; and he was convicted of driving under the influence on April 7, 2009 in Texas and was sentenced to two years of confinement.

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

- (B) Multiple criminal convictions.-Any alien convicted of 2 or 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 5 years or more is inadmissible.

Section 101(a)(48)(B) of the Act provides, in pertinent part, that:

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

In *Matter of S-S-*, 21 I. & N. Dec. 900, 902 (BIA 1997), the BIA stated:

In applying section 101(a)(48)(B) of the Act to determine whether the respondent's sentence satisfies the imprisonment components of the deportation charges, we begin by noting that the fact that his sentence was suspended is irrelevant to the analysis, as is the length of time actually served, if any. This is so even if the "imposition" of that sentence was suspended, as is asserted on appeal. Rather, the only relevant inquiry is the term to which the respondent was sentenced by the court.

Based on the foregoing, the AAO finds that the applicant has been convicted of two or more offenses for which the aggregate sentences to confinement were more than five years. Therefore, the AAO finds that the applicant is inadmissible under section 212(a)(2)(B).

The field office director found that the applicant was convicted of an aggravated felony after having been lawfully admitted for permanent residence, and therefore is not eligible for a section 212(h) waiver. The BIA addressed the issue of whether driving under the influence was an aggravated felony and held that, where the circuit court has ruled on the issue, the law of the circuit will be applied to cases arising in that jurisdiction. *In re Ramos*, 23 I. & N. Dec. 336, 346-347 (BIA 2002). The applicant's case arises in the 5th Circuit, which has held that Texas felony DWI is not a crime of violence and not an aggravated felony. *See United States v. Chapa-Garza*, 243 F.3d 921, 928 (5th Cir. 2001). Therefore, the AAO finds that the applicant has not been convicted of an aggravated felony. As such, the applicant is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act.

However, as stated above, the applicant was ordered removed from the United States on December 29, 1999 and departed the United States on that date. The applicant subsequently reentered the United States without inspection on December 5, 2008. The AAO also finds that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act for having been ordered removed from the United States and reentering the United States without being admitted. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Field Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 212(a)(9)(C)(i) of the Act states, in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.—Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

To seek an exception from a finding of inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, an applicant must file for permission to reapply for admission (Form I-212). However, consent to reapply under section 212(a)(9)(C)(ii) of the Act can only be granted to one who has left the United States, is currently abroad and is seeking admission to the United States at least ten years after the date of his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). The record does not reflect that the applicant in the present matter has met these requirements. Accordingly, the applicant is statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act and the AAO finds no purpose would be served in considering the merits of his Form I-601 waiver application under section 212(h) of the Act. The appeal will be dismissed.

ORDER: The appeal is dismissed.