



U.S. Citizenship
and Immigration
Services

H2

[REDACTED]

Date: **OCT 10 2012** Office: ST. LOUIS, MO FILE: [REDACTED]

IN RE: [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:

[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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Field Office Director, St. Louis, Missouri, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) 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 Mexico 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 seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) to reside in the United States with his family.

In a decision, dated September 25, 2008, the field office director denied the applicant's Waiver of Ground of Excludability (Form I-601) because he failed to obtain permission to reapply for admission when in 1979 he re-entered the United States without inspection two weeks after being deported.

In a Notice of Appeal to the AAO (Form I-290B), dated April 30, 2009, counsel requests that the applicant's waiver be approved so that he can remain in the United States, the country of his residence for thirty years, with his wife.

On December 15, 2011 the AAO issued a notice of intent to dismiss the applicant's appeal based on the reasons stated above and provided the applicant thirty days to respond. The applicant was then given two 90 day extensions to respond to the notice of intent to dismiss, the last extension expiring on September 12, 2012. Counsel indicated that the extensions were necessary because "the information obtaining from the Applicant is different from that quoted by the AAO and counsel would like the opportunity to examine such information." On September 21, 2012, counsel requested another extension indicating that he had yet to receive a copy of the applicant's file through his freedom of information request. However, USCIS records indicate that a copy of the file was mailed to the attorney at his address of record on August 27, 2012. Furthermore, although we included an account of the facts supporting the applicant's inadmissibility for alien smuggling, counsel has not provided any of the claimed information from his applicant to rebut that account. Accordingly, we consider the record complete and dismiss the appeal for the reasons stated in the notice of intent to dismiss, as repeated herein.

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).

In regards to the field office director's finding, the AAO notes that as a result of the applicant's deportation and re-entry he is subject to reinstatement of removal under section 241(a)(5) of the Act and requires the approval of an application for permission to reapply for admission (Form I-212). However, the AAO finds that the field office director erred in not adjudicating the applicant's waiver

on this basis. When an inadmissible alien files both a Form I-601 and a Form I-212, the *Adjudicator's Field Manual* provides the following guidance:

Chapter 43 Consent to Reapply After Deportation or Removal

43.2 Adjudication Processes:

(d) Of course, an alien might be applying for both consent to reapply and a waiver of inadmissibility, provided the particular ground(s) of inadmissibility applying to the alien are waivable. If the alien has filed both applications (Forms I-212 and I-601), adjudicate the waiver application first. If the Form I-601 waiver is approved, then consider the Form I-212 on its merits; if the Form I-601 is denied (and the decision is final), deny the Form I-212 since its approval would serve no purpose.

The AAO will review the entire record and the applicant's inadmissibility. The applicant has a long immigration record and criminal record in the United States dating back to 1974. The AAO will only discuss the applications and incidents relevant to this decision.

The record reflects that on November 12, 1974, in Torrance, California the applicant was convicted of driving while under the influence of alcohol under section 23102a of the California Vehicle Code and possession of an illegal weapon under 12020 of the California Penal Code. He was sentenced to 20 days in jail. On or about September 3, 1976 the applicant was convicted of disorderly conduct under 647(F) of the California Penal Code.

On September 11, 1979 the applicant was charged with entering the United States without inspection. The Record of Deportable Alien (Form I-213) in relation to this entry states that at about 2:00 A.M. the applicant was arrested driving a 1972 green Duster Plymouth near San Ysidro. The Form I-213 states that the occupants of the vehicle were the driver and four other illegal entrant aliens. The record states that the applicant, claiming to be a U.S. citizen from Cleveland, Ohio, drove the vehicle through the port of entry and met the four other entrants after they "jumped the line."

On September 14, 1979 the applicant was ordered deported as a result of this incident. The AAO notes that counsel states that on September 13, 1979 the applicant departed the United States voluntarily, but on June 16, 1998 during his adjustment interview the applicant testified that he was deported in 1979.

On or about January 28, 1981, in California, the applicant was convicted of forging a name on a credit card. He was fined and sentenced to two months probation for the offense. Finally, on or about August 14, 1989, in Colorado, the applicant was convicted of soliciting a prostitute. The applicant states he was given one year probation and fined for the offense.

The AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed at least one crime involving moral turpitude when he was convicted of forging a

name on a credit card. The Board of Immigration Appeals (BIA) and the 5th Circuit Court of Appeals has found forger to be a crime involving moral turpitude. *Matter of Seda*, 17 I. & N. Dec. 550 (BIA 1980), Georgia; *Animashaun v. INS*, 990 F.2d 234 (5th Cir. 1993), Alabama Criminal Code; *Balogun v. Ashcroft*, 270 F.3d 274 (5th Cir. 2001); *Morales-Carrera v. Ashcroft*, 74 F.3d Appx. 324 (5th Cir. 2003).

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 applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for having procured admission into the United States by fraud or willful misrepresentation in 1979 when he entered at the San Ysidro port of entry claiming to be a U.S. citizen from Cleveland, Ohio.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Finally, the AAO finds that the applicant is inadmissible under section 212(a)(6)(E)(i) of the Act for aiding and abetting an alien to enter the United States at a time and place other than as designated by an immigration officer.

Section 212(a)(6)(E) of the Act provides:

(i) Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible. . . .

(iii) *Waiver authorized.*-For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d)(11) of the Act, 8 U.S.C. § 1182(d)(11), provides:

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause

(i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

As stated above, the Form I-213, in relation to the applicant's September 11, 1979 entry states that the applicant was arrested driving a [REDACTED] near the San Ysidro port of entry and the occupants of the vehicle were the driver and four other illegal entrant aliens. The record states that the applicant, claiming to be a U.S. citizen from Cleveland, Ohio, drove the vehicle through the port of entry and met the four other entrants after they, "jumped the line." In addition, on June 16, 1998, during the applicant's adjustment interview he answered "yes" to Part 3, Question 3, which states in part, "Have you ever knowingly encouraged, induced, assisted, abetted, or aided any alien to enter the United States illegally." The officer's notes on the applicant's Form I-485 indicate that the applicant testified that his answer was related to the September 1979 smuggling arrest. Thus, the AAO finds that the record indicates and the applicant has testified that he knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

In *Matter of Martinez-Serrano*, 25 I&N Dec. 151 (BIA 2009), the BIA analyzed the scope of the smuggling ground of deportability under section 237(a)(1)(E)(i) of the Act and determined that "the statute was intended to cover a broad range of conduct, and direct participation in the physical border crossing is not required under section 237(a)(1)(E)(i)." 25 I&N Dec. at 154. Accordingly, the AAO finds that the applicant is inadmissible under section 212(a)(6)(E)(i) of the Act as an alien who has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

A section 212(d)(11) of the Act waiver of inadmissibility is dependent upon a showing that the alien (1) only aided an individual who, at the time of the offense, was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law; and (2) the alien either, had been admitted to the United States as a lawful permanent resident alien and did not depart the United States under an order of removal, or, is seeking admission as an eligible immigrant.

In the present case, the record does not show that the individuals the applicant attempted to smuggle are qualifying relatives for purposes of a section 212(d)(11) of the Act waiver of inadmissibility. The AAO, therefore, finds that the applicant's inadmissibility under section 212(a)(6)(E) cannot be waived.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility rests with the applicant. *See Section 291 of the Act.* Because the applicant has not met that burden, the appeal must be dismissed.

ORDER: The appeal is dismissed.