



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 01 2013** Office: SANTO DOMINGO

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Santo Domingo, Dominican Republic, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime involving moral turpitude.¹ The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen mother and U.S. lawful permanent resident father.²

On October 5, 2012, the Field Office Director denied the Form I-601 application for a waiver, stating that the applicant failed to establish extreme hardship to a qualifying relative. The Field Office Director did not consider whether the applicant established eligibility for a waiver under the rehabilitation section of section 212(h) of the Act.

On appeal, the applicant states that he has established that he has been rehabilitated and does not pose a threat to the United States. He also states that he has established extreme hardship to a qualifying relative.

In support of the waiver application, the record includes, but is not limited to: statements from the applicant; an affidavit from the applicant's mother; biographical information for the applicant and his family members present in the United States; medical records for the applicant's mother; documentation regarding the applicant's education and employment while he was present in the United States; and documentation of the applicant's criminal and immigration history.

We will first address the applicant's admissibility and eligibility for a waiver. The applicant was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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 –

¹ The Field Office Director's decision states that the applicant is inadmissible under section 212(a)(9)(B) of the Act; however, since 10 years have passed since the applicant's last departure from the United States on May 20, 1993, he is no longer inadmissible under that grounds.

² The applicant was ordered deported from the United States on October 19, 1992 and was also found to be inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A); however, 20 years have passed since the applicant's last departure from the United States on May 20, 1993, as such he no longer requires permission to reapply after deportation or removal (Form I-212).

(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.)

The record reflects that on June 18, 1987 the applicant was convicted in the Superior Court for Queens County, New York of Manslaughter in the 1st degree in violation of New York Penal Law § 125.20, a class B felony. He was sentenced to 5-15 years in prison.

At the time of the applicant's conviction, New York Penal Law § 125.20 stated:

Manslaughter in the first degree

A person is guilty of manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or
2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision; or
3. He commits upon a female pregnant for more than twenty-four weeks an abortifacient act which causes her death, unless such abortifacient act is justifiable pursuant to subdivision three of section 125.05.

...

As a result of his conviction, the applicant, who was admitted to the United States as a lawful permanent resident on February 19, 1984, was ordered deported from the United States as a lawful permanent resident who had been convicted of a crime involving moral turpitude within five years after entry and sentenced to a year or more of confinement under former section 241(a)(4)(A) of the Act, which has subsequently been reclassified under section 237 of the Act. The Immigration Judge found that the applicant had been convicted of a crime involving turpitude, the applicant does not challenge his inadmissibility on appeal, and the record does not show the finding of inadmissibility to be erroneous. As such, we will not disturb the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

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

Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if--

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 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; or

...

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. 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.

We must determine whether the applicant is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act. An alien lawfully admitted to the United States for permanent resident who has been convicted of an aggravated felony is ineligible for a waiver under section 212(h). *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010) *aff'd*, *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (2010).

Section 101(a)(43)(F) of the Act defines an aggravated felony as “a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed is at least 1 year.” The Second Circuit Court of Appeals has found that a conviction for first-degree manslaughter under section 125.20 of the New York Penal Law, the section under which the applicant was convicted, qualifies as a crime of violence as defined under section 101(a)(43)(F) of the Act. *Vargas-Sarmiento v. U.S. Dept. of Justice*, 448 F.3d 159, 168-73 (2nd Cir. 2006) (holding that a conviction for first-degree manslaughter under either subsections (1) or (2) of section 125.20 of the New York Penal Law is categorically a “crime of violence” under 18 U.S.C. § 16(b) because inherent in the nature of those offenses is a substantial risk that the perpetrator may intentionally use physical force in committing the crime); *see also Matter of Vargas*, 23 I&N Dec. 651 (BIA 2004). The record of conviction in this case indicates that the applicant’s conviction occurred under subsections (1) or (2) of section 125.20 and the applicant’s sentence to a term of imprisonment was at least 1 year. We find that the applicant was convicted of an aggravated felony after admission to the United States as a lawful permanent resident and as a result he is ineligible for a waiver of inadmissibility under section 212(h) of the Act. The applicant is statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(I) of the Act. The burden of proof is upon the applicant to establish he is admissible to the United States in accordance with the requirements at 8 C.F.R. § 103.2(b).

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.