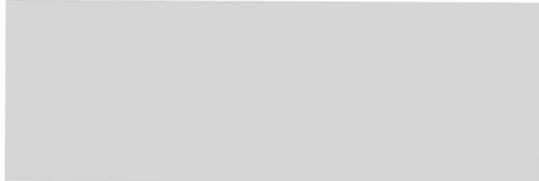




U.S. Citizenship  
and Immigration  
Services

(b)(6)

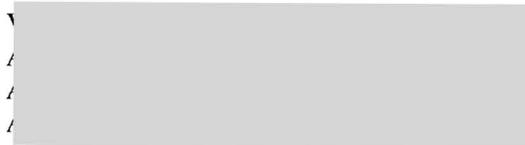


DATE: JUL 24 2015

FILE: [REDACTED]

APPLICATION RECEIPT: [REDACTED]

IN RE: Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the 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 Honduras who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I) for having been unlawfully present in the United States for more than one year, and pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having a conviction for a crime involving moral turpitude. The director further found that the applicant was inadmissible pursuant to section 212(a)(9)(A)(ii)(II), 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having been ordered removed.<sup>1</sup> The applicant now seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 212(h), 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen daughter and wife.

The director concluded that the applicant's conviction for rape in the third degree is an aggravated felony and that a waiver of inadmissibility under section 212(h) of the Act may not be approved for individuals convicted of an aggravated felony after admission as a lawful permanent resident and denied the application accordingly. *See Decision of Service Center Director*, dated October 28, 2013.

On appeal, the applicant, through counsel, asserts that the applicant's conviction does not qualify as an aggravated felony or a crime involving moral turpitude. He alternatively asserts that even if the conviction was for an aggravated felony, it does not render him inadmissible. The applicant asserts that even if his conviction is for a crime involving moral turpitude, he meets the petty offense exception.

The record contains a brief; identity and relationship documents; court records; medical records of the applicant's daughter; a psychological evaluation of the applicant's qualifying wife and daughter; and reports on conditions in Honduras. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

(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.

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<sup>1</sup> On October 28, 2013, the director also denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, which is required of individuals found inadmissible under this section of the law. We review the applicant's appeal of that denial in a separate decision.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record reflects that the applicant, a U.S. lawful permanent resident at the time, was convicted of rape in the third degree in violation of section 130.25 of the New York State Penal Code on August 13, 1996. He was sentenced on October 30, 1996, to six months' imprisonment and five years of probation. As a result of this conviction, on August 25, 1999, the applicant was charged with violating section 237(a)(2)(A)(iii) of the Act, because he had been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act; and section 237(a)(2)(A)(i) of the Act, because he was convicted of a crime involving moral turpitude.

On appeal, the applicant, through counsel, asserts that his conviction does not qualify as an aggravated felony or a crime involving moral turpitude. He alternatively asserts that even if the conviction was for an aggravated felony, it does not render him inadmissible. Furthermore, the applicant asserts that if his conviction is for a crime involving moral turpitude, he meets the petty offense exception.

Section 212(a)(9)(B) of the Act provides, in pertinent part,

Aliens unlawfully present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e) prior to the commencement of proceedings under section 235(b)(1) or section 240), and again seeks admission within 3 years of the date of such alien's departure or removal, or. . .

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(v) Waiver.-The Attorney General [now Secretary of the Department of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the [Secretary] regarding a waiver under this clause.

The record reflects the applicant initially entered the United States without inspection in 1989. On [REDACTED], 1992, he was served with an Order to Show Cause and Notice of Hearing. He was charged as subject to deportation pursuant to section 241(a)(1)(B) of the Act, 8 U.S.C. 1231(a)(1)(B), for having entered the United States without inspection. The applicant filed an application for asylum on September 2, 1992. He was placed in deportation proceedings on October 10, 1992. He subsequently adjusted his status to that of lawful permanent resident. After being placed into immigration proceedings again because of his criminal conviction, he was ordered removed on July 30, 2004 and was removed on July 7, 2007. His appeal to the Board of Immigration Appeals (BIA) was dismissed on December 6, 2005. He filed a motion to reopen and reconsider, which the BIA dismissed as untimely on July 5, 2007.

The record also reflects that the applicant married his U.S. citizen spouse on [REDACTED]. She filed a Form I-130, Petition for Alien Relative, on his behalf that was approved on April 6, 1995. The applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status that was approved on October 24, 1995.

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

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, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record shows that the applicant reentered the United States without inspection on October 11, 2013 and was apprehended and taken into custody on October 21, 2013. In addition, his prior order of removal was reinstated on October 21, 2013. On December 6, 2013, the applicant petitioned the U.S. Court of Appeals for the Second Circuit for a stay of removal. The record does not reflect the outcome of his petition

Based on his reentry without inspection in October 2013 after his prior removal order, we find the applicant inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II). He also is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), because he accrued over one year of unlawful presence before his reentry without admission in 2013.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States and USCIS has consented to the applicant's reapplying for admission.

The applicant thus is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under sections 212(a)(9)(B)(v) and 212(h) of the Act.

Moreover, the applicant's deportation order was reinstated on October 21, 2013, making him statutorily ineligible for relief. According to section 241(a)(5) of the Act:

If the [Secretary] finds that an alien has reentered the United States illegally after having been removed . . . under an order of removal, the prior order of removal is reinstated from its original date and . . . the alien is not eligible and may not apply for any relief under this Act.

Having found the applicant statutorily ineligible for relief at this time, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen spouse or whether he merits a waiver as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.