



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]
Date: **MAR 16 2015**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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:
[REDACTED]

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,

f. Maria Yeh

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application for a waiver of inadmissibility was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of India who was admitted to the United States as a lawful permanent resident on October 3, 1995. As a result of a criminal conviction for an aggravated felony, the applicant was placed in removal proceedings, ordered removed by an immigration judge on June 8, 2006, and subsequently removed from the United States on June 26, 2006. In applying for an immigrant visa based on an alien relative petition filed by his U.S. citizen spouse, the applicant was found to be inadmissible to the United States 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)(I), for having been convicted of a crime involving moral turpitude. 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 spouse and mother.

The director found the applicant ineligible for a waiver under section 212(h) of the Act because he had been convicted of an aggravated felony committed subsequent to his admission to the United States as a lawful permanent resident. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *See Decision of the Director* dated April 10, 2014.

The applicant asserts that his crime was not sexual abuse of a minor and therefore not an aggravated felony pursuant to Section 101(a)(43)(A) of the Act and that his deferred adjudication was not a conviction, thus not a conviction for a crime involving moral turpitude that would lead to removal proceedings. The record contains a statement, financial documentation, medical documentation for the applicant's spouse, psychological evaluations of the applicant and of his mother, and other evidence submitted in support of the waiver application. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any 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, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(b)(6)

The record indicates that on [REDACTED] 2006, the applicant was convicted in the [REDACTED] Texas, for Solicit Minor Sexual Assault, a third degree felony, in violation of section 15.031 of the Texas Penal Code. The applicant was given a deferred adjudication order sentencing him to eight years' of community supervision, which included that he register as a sex offender, undergo counselling, and have restrictions imposed on his contacts, in addition to a \$2,500 fine.

At the time of the applicant's conviction Section 15.031 of the Texas Penal Code stated:

Criminal Solicitation of a Minor

(a) A person commits an offense if, with intent that an offense listed by Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, be committed, the person requests, commands, or attempts to induce a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense listed by Section 3g(a)(1), Article 42.12, or make the minor a party to the commission of an offense listed by Section 3g(a)(1), Article 42.12.

(b) A person commits an offense if, with intent that an offense under Section 21.11, 22.011, 22.021, or 43.25 be committed, the person by any means requests, commands, or attempts to induce a minor or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense under one of those sections or would make the minor or other believed by the person to be a minor a party to the commission of an offense under one of those sections.

Section 101(a)(43)(A) of the Act states:

43) The term "aggravated felony" means-
(A) murder, rape, or sexual abuse of a minor;

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(1) (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 [Secretary] 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 and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such

terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status. . . .

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 seven 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.

The applicant asserts that his crime did not involve contact with a minor and therefore was not sexual abuse of a minor pursuant to Section 101(a)(43)(A) of the Act, and therefore does not come under the definition of an aggravated felony. The applicant further contends that sexual abuse of a minor requires a sexual act, a component of which is contact, and that the statute under which he was convicted does not involve contact. The applicant also asserts that a deferred adjudication is not a conviction and he is therefore not inadmissible for a conviction for a crime of moral turpitude. He contends that the Department of Homeland Security erred in claiming that he was deportable because of his conviction and that a successfully completed deferred adjudication is not an affirmation of guilt, that he was not found guilty, and that he has not been convicted.¹

We find the applicant's assertions unpersuasive. In *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 992 (BIA 1999), where the alien was convicted under a Texas statute of indecency with a child by exposure and sentenced to 10 years' imprisonment, the Board held that the crime constituted sexual abuse of a minor and was therefore an aggravated felony. In its analysis the Board noted that a crime of child abuse includes actions and inactions that do not require contact with the victim, citing the Black's Law Dictionary definition—"[a]ny form of cruelty to a child's physical, moral, or mental well-being." The Board further stated, "Congress did not direct that crimes of sexual abuse be limited to crimes requiring contact as an element, and we do not interpret the term in that manner." *Id.* at 996.

In *United States v. Ramos-Sanchez*, 483 F.3d 400 (5th Cir. 2007) the Fifth Circuit Court of Appeals found that soliciting or enticing a minor to perform an illegal sex act pursuant a Kansas statute constitutes sexual abuse of a minor because the elements of the offense constitute "sexual abuse of a minor" as the term is understood by its ordinary, contemporary, and common meaning.

In *Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. 2007) and in *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005) the Seventh Circuit Court of Appeals found that solicitation of a sex act pursuant to Illinois statutes constitutes sexual abuse of a minor. The Seventh Circuit Court of Appeals found in *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763 (7th Cir. 2005), that indecent solicitation of a child in

¹ The record indicates that the applicant was charged with deportability under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating to sexual assault of a child, and ordered removed by an immigration judge.

contravention of an Illinois is an aggravated felony (sexual abuse of a minor) despite the impossibility of completing the offense as the crime involved an adult investigator posing as a child on the internet.

Here we find, in view of the above, that the applicant's conviction is an aggravated felony. The applicant also asserts that deferred adjudication is not a conviction. 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.

See INA 101(a)(48)(A).

The record indicates that the applicant entered a plea of guilty to soliciting an individual he believed to be a minor in order to commit sexual assault and was then placed on probation for a period of eight years and ordered to pay a fine of \$2500. Where an alien pleads guilty or nolo contendere, or is found guilty, but entry of the judgment is deferred by the court to allow for a period of probation and/or completion of a diversion program, the alien has been convicted for immigration purposes even if the charges are later dismissed. See *Matter of Marroquin-Garcia*, 23 I&N Dec. 705, 714-15 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999).

In *Matter of Punu*, 22 I&N Dec. 224 (BIA 1998) the Board found a deferred adjudication under article 42.12, § 5 of the Texas Code of Criminal Procedure is a conviction for immigration purposes. In *Garnica-Vasquez v. Reno*, 40 F.Supp.2d 398, the United States District Court, W.D. Texas, El Paso Division., found that a petitioner met both prongs under Section 101(a)(48)(A) of the Act in that (1) he pleaded guilty to charges of indecency with a minor and (2) he was fined and placed on eight years of community service, among other forms of punishment.

In view of the above, we find the applicant has been convicted of a crime as there was a finding of guilt by a judge and the applicant received a sentence that involved punishment, penalty, and restraint on his liberty. Because the applicant was convicted of an aggravated felony subsequent to his admission as a lawful permanent resident of the United States, he is statutorily ineligible for a waiver under section 212(h) of the Act. Given that the applicant is statutorily ineligible for a waiver, no purpose would be served in determining whether his qualifying relatives are experiencing extreme hardship as a result of his inadmissibility or whether he would merit a waiver in the exercise 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.