



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF V-A-A-

DATE: JUNE 1, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

**APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY**

The Applicant, a native and citizen of Honduras, seeks a waiver of inadmissibility for unlawful presence and for having been convicted of a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(h) of the Act, 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant had been convicted of a crime involving moral turpitude and that he was statutorily ineligible for a waiver under section 212(h) of the Act because he had been convicted of an aggravated felony after having adjusted to lawful permanent resident status. The Director further stated that favorable discretion is not accorded to those convicted of violent or dangerous crimes except in extraordinary circumstances.

The Applicant appealed the Director's decision to this office, which dismissed the appeal on July 24, 2015. The Director's decision was issued on October 28, 2013. Unbeknownst to the Director at the time of the decision, the Applicant had reentered the United States without inspection on October 21, 2013. In our dismissal of the appeal we found the Applicant inadmissible for entering the United States without being admitted after having accrued unlawful presence in the United States for more than one year and after having been removed. *See* section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), and section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

The matter is now before us on motion to reopen and reconsider. In the motion, the Applicant submits additional evidence and claims his waiver application was denied based on a legal error and that if his application had not been wrongfully denied he would have been granted the waiver based on extreme hardship to his spouse and daughter.

We will deny the motion.

(b)(6)

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I. LAW

The Applicant is seeking admission as an immigrant and has been found inadmissible for unlawful presence. Specifically, the record reflects that the Applicant entered the United States without inspection in 1989. The Applicant was ordered removed on November 20, 2000, which became a final order of removal on December 6, 2005, after the Board of Immigration Appeals (Board) dismissed his appeal, but he did not depart the United States until July 7, 2007. Thus, the Applicant accrued unlawful presence from December 7, 2005, until he was removed on July 7, 2007, a period over one year. Section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), provides that a foreign national who 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 departure or removal from the United States, is inadmissible.

The Applicant has also been found inadmissible for a crime involving moral turpitude. Specifically, the record indicates the Applicant has been convicted of Rape in the Third Degree, in violation of New York Penal Law section 130.25, on [REDACTED] 1996, in [REDACTED] New York. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible.

We dismissed the Applicant's appeal on July 24, 2015, finding that the Applicant was inadmissible under section 212(a)(9)(C) of the Act. Specifically, the Applicant accrued unlawful presence between December 6, 2005, and July 7, 2007, when he departed the United States under an order of removal. The Applicant then reentered the United States without inspection in 2013. Section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), provides, in pertinent parts:

Section 212(a)(9) 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, 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.

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* the Secretary of Homeland Security has consented to the Applicant's reapplying for admission.

II. ANALYSIS

The issues in this case are whether the Applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act and whether the Applicant is eligible to apply for a waiver under section 212(h) of the Act. The Applicant claims that he is not inadmissible pursuant to section 212(a)(9)(C) of the Act because his waiver application was erroneously denied and because he applied for permission to reapply for admission prior to the reinstatement of his removal order. The Applicant states that, in the alternative, if he is found inadmissible pursuant to section 212(a)(9)(C) of the Act, he is eligible to file for permission to reapply for admission in the United States.

The record demonstrates that the Applicant is now eligible to file for a waiver under section 212(h) of the Act, but would remain inadmissible under section 212(a)(9)(C) of the Act. We find that no purpose would be served in granting the Applicant's waiver application under section 212(h) of the Act because he is statutorily ineligible for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act and would thus remain inadmissible.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(9)(C) of the Act, specifically, for having reentered the United States without inspection after accruing more than one year of unlawful presence and after having been removed.

The Applicant claims section 212(a)(9)(C) of the Act does not apply to him because his waiver application was erroneously denied. The Director's decision was not erroneous, however, because it correctly applied precedent decisions of the Board at the time it was issued. In his decision, the Director had found that the Applicant was not eligible to seek a waiver under section 212(h) because

the Applicant had been convicted of an aggravated felony after having adjusted to lawful permanent residence status, and cited to *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). Subsequently, the Board determined that an alien who adjusted status in the United States, and who had not entered as a lawful permanent resident, is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act as a result of an aggravated felony conviction. *Matter of J-H-J-*, 26 I&N Dec. 563, 564-5 (BIA 2015) (citing *Matter of Small*, 23 I&N Dec. 448, 450 (BIA 2002)). The Board held that section 212(h) of the Act only precludes aliens who entered the United States as lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction, withdrawing from its decisions in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), and *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). The record establishes that the Applicant adjusted status in the United States rather than entering the United States as a lawful permanent resident. Thus the Applicant would now be eligible for a waiver of inadmissibility under section 212(h) of the Act.¹

In the present matter, the Applicant's last departure from the United States occurred on July 7, 2007. The Applicant reentered the United States without admission in October 2013. The Applicant is currently in the United States and has not remained outside the United States for 10 years since his last departure. A foreign national who is inadmissible under section 212(a)(9)(C) of the Act may not apply for permission to reapply for admission unless they have been outside the United States for more than 10 years since the date of their last departure. 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). The Applicant is thus currently statutorily ineligible to apply for permission to reapply for admission.

B. Discretion

The Applicant has not remained outside the United States for a period of ten years since his last departure, and he is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(h) or 212(a)(9)(B)(v) of the Act because granting a waiver would not result in his admissibility. The motion will be denied as a matter of discretion.

III. CONCLUSION

¹ The Applicant also states that he was eligible for a stand-alone waiver, regardless of having permission to reapply for permission, and that the waiver application should not have been denied. The Applicant cites to *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980), for the premise that it is permissible to file for a stand-alone waiver, but he does not need a stand-alone waiver because he has applied for a waiver in conjunction with an immigrant visa application. In addition, the Board has since concluded that its decision in *Sanchez* is no longer valid in light of amendments to section 212(h). See *Matter of Rivas*, 26 I&N Dec. 130, 131-132 (BIA 2013).

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The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we deny the motion.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of V-A-A-*, ID# 16167 (AAO June 1, 2016)