

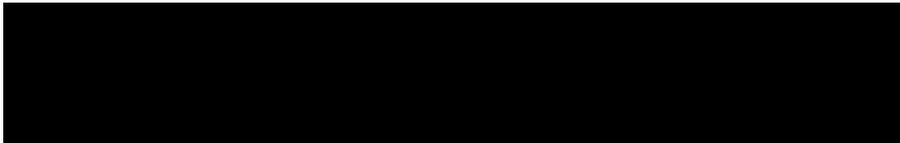


U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H14



FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 05 2006

IN RE:

Applicant:



APPLICATION: Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the application declared unnecessary.

The applicant is a native and citizen of Haiti who on July 27, 1987, was granted Lawful Permanent Resident (LPR) status. On August 3, 1992, in the Supreme Court of the State of New York, County of Kings, the applicant was convicted of the offense of criminal possession of a weapon in the third degree, to wit: a loaded firearm, in violation of section 265.02 of the New York State Penal Law. On August 25, 1992, the applicant was sentenced to a minimum of one-year and maximum of three-years imprisonment. On December 15, 1992, an Order to Show Cause (OSC) for a removal hearing before an immigration judge was issued. On March 8, 1994, an immigration judge ordered the applicant deported from the United States pursuant to section 241(a)(2)(C)¹ of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(C), as an alien who had committed a firearms offense. Consequently, on March 31, 1994, the applicant was deported to Haiti. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He now seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to travel to the United States and reside with his U.S. citizen father.

The Acting Director determined that the applicant's conviction was an aggravated felony and that the applicant is not eligible for a waiver. In addition, the Director determined that the applicant is statutorily inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, and not eligible for any waiver. The Acting Director then denied the Form I-212 accordingly. *See Acting Director's Decision* dated November 4, 2004.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(ii) Other aliens. - Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

¹ Now section 237(a)(2)(C) of the Act.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The AAO finds that the Director erred in stating that the applicant's conviction is an aggravated felony and no waiver is available to him since he was previously admitted as a LPR. In addition, the Director erred in stating that the applicant cannot receive a waiver for his inadmissibility pursuant to section 212(a)(9)(A)(ii) of the Act. A waiver for an inadmissibility under section 212(a)(9)(A)(ii) of the Act is available pursuant to section 212(a)(9)(A)(iii) of the Act.

Section 101(a)(43) of the Act defines the term "aggravated felony" as it relates to firearms as:

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title)

. . . .

(E) an offense described in-

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

The applicant in the present case was convicted of criminal possession of a weapon in the third degree and not as an illicit trafficker in firearms. A criminal possession of a weapon in the third degree in violation of section 265.02 of the New York State Penal Law is a class D felony. N.Y. Penal Law § 265.02 (*McKinney* 1988). In addition, the applicant's conviction is not an offense described in section 101(a)(43)(E) of the Act and, therefore, not an aggravated felony.

The AAO notes that the applicant may be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude. Since the applicant was not convicted of an aggravated felony, he may be eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(h) of the Act, 8 U.S.C. § 1182(h). The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's possible inadmissibility under other sections of the Act.

On appeal, the applicant states that at the time he was deported he was told that he could apply for admission after five years and that his conviction was a misdemeanor and not an aggravated felony. In addition, the

applicant states that it has now been over 10 years since his deportation. He is older and more mature and wants to reenter the United States in order to attend school, gain an education and make a better life for himself.

The AAO notes that the applicant was deported from the United States on March 31, 1994. The record of proceedings reveals that the applicant has been residing in Haiti since the date of his removal. It has now been more than ten years since the applicant's date of removal. Therefore, the applicant is no longer inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act. Accordingly, the Acting Director's decision will be withdrawn, the appeal will be dismissed and the Form I-212 will be declared unnecessary.

ORDER: The Acting Director's decision is withdrawn, the appeal is dismissed and the application declared unnecessary.