

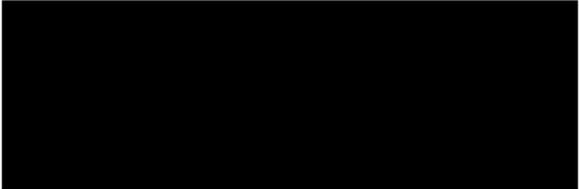
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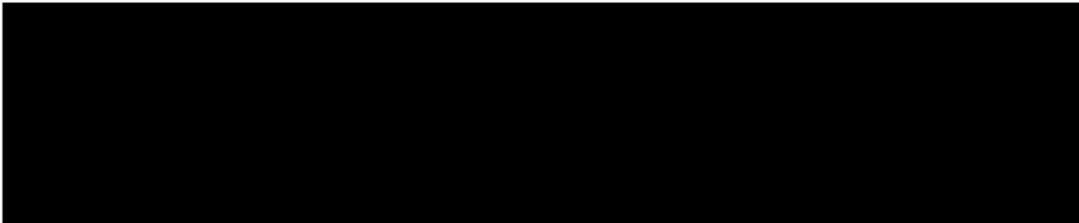
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



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 after removal 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.

The applicant is a native and citizen of El Salvador who initially entered the United States without inspection on November 30, 1985. On February 6, 1992, the applicant filed an Application for Temporary Protected Status (TPS), which was approved on March 31, 1992. On March 31, 1992, an Order to Show Cause (OSC) was issued against the applicant. On May 24, 1992, the applicant was arrested for simple assault on a law enforcement officer, in violation of New Jersey Code of Criminal Justice (NJCCJ) 2C:12-1(b)(5)(a), which was amended to simple assault, in violation of NJCCJ 2C:12-1a(1), and resisting arrest, in violation of NJCCJ 2C:29-2(b), which was amended to fleeing a law enforcement officer, in violation of NJCCJ 2C:29-2b. Additionally, the applicant was charged with reckless driving, careless driving, violating a direction of an officer, and driving without a license. On June 15, 1995, the applicant filed an Application for Asylum and for Withholding of Deportation (Form I-589). On November 8, 1996, the applicant's son, [REDACTED], was born in New Jersey. On August 18, 1999, the applicant filed an Application for Suspension of Deportation or Special Rule Cancellation of Removal (NACARA) (Form I-881). On August 21, 2000, the applicant's was convicted of violating a loitering ordinance, careless driving, and driving with an expired license, for his May 24, 1992 arrest. On November 13, 2000, the applicant's NACARA application was approved, and on the same day, the applicant became a lawful permanent resident. On December 2, 2002, the applicant was arrested for aggravated assault, in violation of NJCCJ 2C:12-1b(5)(a), disarming a law enforcement officer, in violation of NJCCJ 2C:12-11a, throwing bodily fluid at an officer, in violation of NJCCJ 2C:12-13, obstructing the administration of law, in violation of NJCCJ 2C:29-1, and resisting arrest, in violation of NJCCJ 2C:29-2a. The applicant departed the United States and returned on January 19, 2004. On April 23, 2004, the applicant was convicted of aggravated assault, in the third degree, in violation of NJCCJ 2C:12-1b, and was sentenced to eighteen (18) months probation. On May 18, 2004, a Notice to Appear (NTA) was issued against the applicant, based on the applicant's conviction for a crime involving moral turpitude. On June 17, 2004, an immigration judge ordered the applicant removed *in absentia* from the United States. On the same day, a Warrant of Removal/Deportation (Form I-205) was issued against the applicant. On July 6, 2004, the applicant, through counsel, filed a motion to reopen the immigration judge's decision. On July 26, 2004, an immigration judge denied the motion to reopen. On August 20, 2004, the applicant filed an appeal with the Board of Immigration Appeals (BIA) and a request for stay of removal. On November 3, 2004, the BIA dismissed the applicant's stay of removal. On November 13, 2004, the applicant was removed from the United States. On November 21, 2004, the BIA affirmed the immigration judge's decision. The applicant is inadmissible to the United States under sections 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i), and 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). 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 reside with his wife and United States citizen son.

The Acting Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for being ordered removed under section 240 or any other provision of law, and section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for being convicted of a crime involving moral turpitude. Additionally, the Acting Director found the applicant statutorily ineligible for waiver because of his conviction for an aggravated felony. Furthermore, the Acting Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and he denied the applicant's Application for

Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Acting Director's Decision*, dated January 25, 2006.

The applicant asserts that the Acting Director failed to address which of his offenses are aggravated felonies and he states "none of [his] offenses fall within the ambit of the aggravated felony definition." *Form I-290B*, filed February 27, 2006. The AAO notes that the only conviction that the Acting Director may have considered to be an aggravated felony is the applicant's conviction for aggravated assault, in the third degree, in violation of NJCCJ 2C:12-1b, for which he was sentenced to eighteen (18) months probation.

Section 101(a)(43)(F) of the Act states "aggravated felony" means:

(F) 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 at least 1 year.

An aggravated felony requires that the actual sentence imposed is at least one year; therefore, the applicant's aggravated assault conviction is not an aggravated felony. *See Alberto-Gonzalez v. INS*, 215 F.3d 906, 909 (9th Cir. 2000); *see also United States v. Graham*, 169 F.3d 787, 789-90 (3d Cir. 1999), *cert. denied*, 528 U.S. 845, 120 S.Ct. 116, 145 L.Ed.2d 99 (1999). The AAO finds that none of the applicant's convictions are for crimes of violence; and therefore, he has not been convicted of an aggravated felony.

However, the AAO finds that the applicant has been convicted of a crime involving moral turpitude. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (An aggravated assault against a peace officer, which results in bodily harm to the victim and which involves knowledge by the offender that his force is directed to an officer who is performing an official duty, constitutes a crime involving moral turpitude). The applicant was convicted of violating NJCCJ 2C:12-1b in the third degree. The AAO notes that the criminal judgment is not clear on which subsection of NJCCJ 2C:12-1b the applicant was convicted of violating. However, since an aggravated assault under NJCCJ 2C:12-1b requires either recklessly causing bodily injury, or purpose or knowledge that serious bodily injury may be caused, the applicant has committed a crime involving moral turpitude. Additionally, the AAO notes the applicant's conviction was in the third degree, which establishes that the victim suffered bodily injury. *See Partyka V. Attorney General of U.S.*, 417 F.3d 408, 416 (3d Cir. 2005) ("...if we can determine from Partyka's record of conviction that he was convicted of violating a subsection of the statute requiring intentional, knowing, or reckless infliction of bodily injury, then *Matter of Danesh* would apply, and we would agree with the IJ's finding of moral turpitude.").

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

(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...

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

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E).—The Attorney General [now the Secretary of Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I)...of subsection (a)(2) if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(i)...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 established to the satisfaction of the [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...

(2) the [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.

The AAO finds that the Acting Director erred in finding the applicant inadmissible under section 212(a)(9)(A)(ii) of the Act, because the applicant was an arriving alien. Therefore, the applicant is inadmissible under section 212(a)(9)(A)(i) of the Act.

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

(A) Certain alien previously removed.-

(i) Arriving Aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien’s arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the

case of an alien convicted of an aggravated felony) is inadmissible.

(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.

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

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant asserts that the Acting Director "abused in [sic] discretion in denying [the Form I-212]...The Service did not take into account a large number of positive equities that were present in [his] case. The Service Center did not take into account the extensive family ties that [he has] in the United States. The Service disregarded the numerous copies of [his] family members' identification documents as evidence of their residence in the U.S. The Service did not give enough weight to [his] lengthy residence in the U.S. The Service did not give enough weight to the emotional and financial hardship that has resulted from [his] separation from [his] son. The Service completely ignored [his] prior employment history in the United States as evidenced by [his] tax filings." *Form I-290B, supra*. The AAO notes that the applicant has had employment authorization since 1992, when he filed for TPS; however, the applicant was working before 1992 without authorization and that is an unfavorable factor. The applicant submitted numerous documents establishing that he has many family members who are lawful permanent residents or United States citizens, and that his son is a United States citizen. However, the AAO notes there are no letters of recommendations from any of the applicant's family members or friends, or any documentation establishing that the applicant's son is suffering any hardship from being separated from his father. Additionally, unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply

for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's son, but it will be just one of the determining factors. The AAO notes that the applicant claims he is married to a lawful permanent resident; however, there is no marriage license or marriage certificate in the record. The applicant contends that he was not convicted of an aggravated felony; however, he was convicted of a crime involving moral turpitude which demonstrates his lack of respect for the laws of the United States. Additionally, there was no evidence submitted establishing that the applicant is rehabilitated.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

The favorable factors in this matter are the applicant's family ties to a United States citizen, his son, and general hardship he may experience.

The AAO finds that the unfavorable factors in this case include the applicant's criminal convictions, his initial entry without inspection, and periods of unauthorized presence and employment.

The applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.