

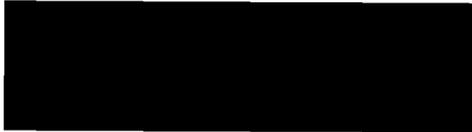
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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



H4

FILE: [REDACTED] Office: HARLINGEN, TX

Date: DEC 06 2010

IN RE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director, Harlingen, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on November 27, 1985, was admitted to the United States as a lawful permanent resident. On August 14, 2002, the applicant pled guilty to indecency with a child, a second degree felony in violation of section 21.11(a)(1) of the Texas Penal Code. The applicant was sentenced to deferred adjudication and ten years of community supervision. On July 25, 2003, the applicant was placed into immigration proceedings under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony, specifically under section 101(a)(43)(A) of the Act. On December 17, 2003, the immigration judge administratively closed proceedings due to a pending Application for Naturalization (N-400). On August 19, 2005, the N-400 was denied. On October 5, 2005, immigration proceedings against the applicant were reopened and re-calendared. On November 3, 2005, the immigration judge ordered the applicant removed from the United States as an aggravated felon. On November 4, 2005, the applicant was removed from the United States and was returned to Mexico.

On March 12, 2009, the applicant filed the Form I-212 indicating that he resided in Mexico. On November 30, 2010, immigration officers encountered the applicant in relation to an outstanding arrest warrant. The applicant testified that he had entered the United States without inspection on October 1, 2010. The record also reflects that the applicant was present in the United States without inspection on February 25, 2008, when he verified his registration as a sexual offender in Texas. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant requests 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 in the United States with his U.S. citizen spouse, two U.S. citizen children and two U.S. citizen stepchildren.

The acting field office director determined that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I), of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The acting field office director determined that the applicant was convicted of a felony and denied the Form I-212 accordingly. *See Acting Field Office Director's Decision* dated July 29, 2009.

On appeal, the applicant contends that he is a good man, dedicated father and good provider. *See Applicant's Letter*, dated August 28, 2009. In support of his contentions, the applicant submits the referenced letter, letters of recommendation and criminal documentation. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens 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 five 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 who 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 alien 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 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. [emphasis added]

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested.

Section 101(a) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

(A) murder, rape, or *sexual abuse of a minor* (emphasis added)

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

(1) Criminal and related grounds. —

(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 . . . is inadmissible.

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

The Attorney General [now Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

. . . .
No waiver shall be provided 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 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. . . .
[emphasis added]

The record reflects that the applicant pled guilty to “with intent to arouse or gratify the sexual desire of [the applicant], intentionally or knowingly engage in sexual contact with [the victim] by touching the breast of [the victim], a child younger than 17 years and not the spouse of [the applicant] with [his] hand” in violation of section 21.11(a)(1) of the Texas Penal Code. The record reflects that the applicant’s victim was thirteen years of age and the AAO finds that the applicant knew or reasonably should have known the victim’s age at the time he engaged in sexual contact.¹ The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having pled guilty to and received deferred adjudication for indecency with a child, a crime involving moral turpitude. *See Matter of Cristoval Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008).

The Act makes it clear that a section 212(h) waiver is not available to an alien convicted of an aggravated felony after he had been admitted to the United States as a lawful permanent resident. The AAO finds that the applicant had been convicted of indecency with a child, an aggravated felony under section 101(a)(43)(A) of the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is

¹ The AAO notes that the applicant was issued a request for further evidence to establish that he was not convicted of a crime involving moral turpitude, to which the applicant failed to respond. As such, the applicant has failed to meet his burden.

mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(I) of the Act, which are very specific and applicable. No waiver is available to a lawful permanent resident who has been convicted of an aggravated felony. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed.

Beyond the decision of the acting field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for reentering the United States without admission after having been removed, and does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Therefore, the applicant is statutorily ineligible to apply for permission to reapply for admission into the United States.²

ORDER: The appeal is dismissed.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).