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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

PUBLIC COPY

#4

[REDACTED]

FILE:

Office: DALLAS, TX
RELATES)

Date:

MAR 24 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)

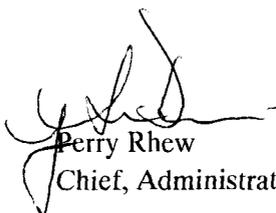
ON BEHALF OF APPLICANT:

[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Dallas, 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 May 3, 1982, pled guilty to second degree assault in Missouri. The applicant was sentenced to three years in jail, which were suspended, and three years of probation. On March 16, 1985, the applicant was admitted to the United States as a lawful permanent resident based upon his marriage to a U.S. citizen,¹ [REDACTED]. On June 17, 1994, the applicant was convicted of felony unlawful use of a weapon. The applicant's sentence was suspended and he was granted two years of probation. On July 14, 2005, the applicant pled guilty to and was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The applicant was sentenced to five months in jail and two years of supervision.

On June 26, 2006, the applicant was placed into immigration proceedings under section 237(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(C), for having been convicted of possessing a firearm in violation of any law after admission as a lawful permanent resident. On July 10, 2006, the immigration judge ordered the applicant removed from the United States subject to a Stipulated Request for Removal Order and Waiver of Hearing. On July 13, 2006, the applicant was removed from the United States and returned to Mexico.

On July 31, 2007, the applicant filed the Form I-212 indicating that he resided in Mexico. The applicant is permanently 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), for being an alien convicted of an aggravated felony. 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 and two U.S. citizen adult children.

The field office director determined that the applicant was mandatorily inadmissible because of his aggravated felony conviction and that no purpose would be served in adjudicating the application for permission to reapply for admission. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision* dated March 17, 2008.

On appeal, counsel contends that the field office director misstated the law and that there is no ground of inadmissibility for conviction of an aggravated felony and that the applicant's conviction is not a crime involving moral turpitude.² Counsel contends that the applicant and his spouse have submitted evidence to support a grant of permission to reapply for admission. *See Form I-290B*, dated March 26, 2008. In support of his contentions, counsel submits the referenced Form I-290B and a memorandum of law. The entire record was reviewed in rendering a decision in this case.

¹ The AAO notes that the record does not reflect that the applicant obtained the appropriate waiver for his conviction for second degree assault.

² The AAO finds that the field office director failed to fully state the basis for her denial of the applicant's Form I-212, but that the record clearly reflects that the applicant has been convicted of a crime involving moral turpitude and that the applicant's separate aggravated felony conviction renders him permanently inadmissible.

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.

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)(43) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

(E) an offense described in-

....
....

(ii) section 922(g)(1) . . . of Title 18 (relating to firearms) . . .

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]

Title XXXVIII, Chapter 565 of the Missouri Revised Statutes provides that:

565.060. Assault, second degree, penalty

1. A person commits the crime of assault in the second degree if he:

- (1) Attempts to kill or knowingly causes or attempts to cause serious physical injury to another person under the influence of sudden passion arising out of adequate cause; or
- (2) Attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument; or
- (3) Recklessly causes serious physical injury to another person; or
- (4) While in an intoxicated condition or under the influence of

controlled substances or drugs, operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause physical injury to any other person than himself; or

(5) Recklessly causes physical injury to another person by means of discharge of a firearm; or

(6) Operates a motor vehicle in violation of subsection 2 of section 304.022, RSMo, and when so operating, acts with criminal negligence to cause physical injury to any person authorized to operate an emergency vehicle, as defined in section 304.022, RSMo, while such person is in the performance of official duties.

2. The defendant shall have the burden of injecting the issue of influence of sudden passion arising from adequate cause under subdivision (1) of subsection 1 of this section.

3. Assault in the second degree is a class C felony.

Because the Missouri statute at issue in this case encompasses a number of offenses, some of which constitute crimes involving moral turpitude, in order to determine whether the crime of which the applicant was convicted involves moral turpitude, the AAO must consult the record of the applicant's conviction. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n.1, 706 (A.G. 2008).

A criminal offense involves "moral turpitude" if the relevant statute defines the offense in such a manner that it necessarily entails conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of the immigration laws, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involved some aggravating dimension that significantly increases the culpability of the offense, such as the perpetrator's use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (use of deadly weapon); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996) (domestic partner as victim); *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969) (child as victim); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (peace officer as victim).

The record reflects that the applicant was charged with "class A felony of assault, first degree . . . attempted to kill or cause serious physical injury to [the victim] by stabbing and [the applicant] committed this offense by means of a dangerous instrument." The plea agreement documents reflect that the applicant pled guilty to "assault with deadly weapon." While the documentation does not reflect under which subsection of 565.060 the applicant was convicted, it clearly reflects that the applicant was not convicted under subsections 4, 5 or 6. As such, the applicant was, at a minimum, convicted under subsection 3 of section 565.060. Generally a reckless mental state, without more,

does not give rise to a finding of moral turpitude; however, the record before the AAO reflects that the applicant's crime involved serious physical injury and a deadly weapon, both aggravating factors which render the conviction a crime involving moral turpitude. *See Godinez-Arroyo, v. Mukasey*, 540 F. 3d 848, at 851 (8th Cir. 2008).

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of second degree assault, a crime involving moral turpitude.

The Act makes it clear that a section 212(h) waiver is not available to an alien who had been admitted as a lawful permanent resident, if he or she had, since admission as a lawful permanent resident, been convicted of an aggravated felony. In this case, the applicant, after he had been admitted to the United States as a lawful permanent resident, had been convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), an aggravated felony. The applicant is, therefore, ineligible for waiver consideration.

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 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 as a matter of discretion.

ORDER: The appeal is dismissed.