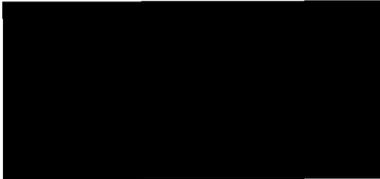


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



H4

Date: FEB 14 2012 Office: LONDON, ENGLAND

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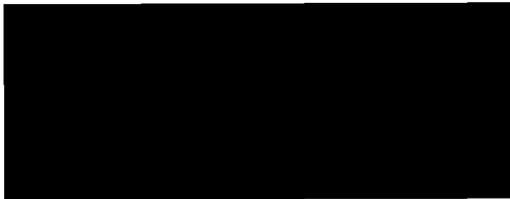
IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and 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:

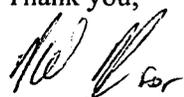


INSTRUCTIONS:

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 waiver application was denied by the Field Office Director, London, England, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Kenya and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant's spouse and two children are U.S. citizens. He seeks a waiver of inadmissibility in order to reside in the United States.

The field office director found that the applicant was convicted of an aggravated felony and that he is not eligible for a section 212(h) waiver as he was previously admitted to the United States as a lawful permanent resident and was convicted of an aggravated felony since the date of his admission. *Field Office Director's Decision*, dated May 14, 2009.

On appeal, counsel asserts that the field office director's decision was arbitrary, unreasonable and contrary to law and fact; and he was not convicted of an aggravated felony. *Form I-290*, received June 8, 2009.

The record includes, but is not limited to, counsel's brief, the applicant's statement, and the applicant's criminal record. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant was convicted on October 31, 1997 of two counts of sexual contact under New Jersey Statutes 2C:14-3b, which states, in pertinent part:

- b. An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through (4).

The record reflects that New Jersey Statutes 2C:14-2c states, in pertinent part:

- c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

- (1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
- (2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;
- (3) The victim is at least 16 but less than 18 years old and:

- (a) The actor is related to the victim by blood or affinity to the third degree; or
 - (b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or
 - (c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;
- (4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

The AAO notes that New Jersey Statutes § 2C:14-3b refers to four subsections in New Jersey Statutes 2C:14-2c. The record of conviction reflects that the applicant was convicted under New Jersey Statutes 2C:14-2c(1) as he committed an act of sexual contact on two different 9 year old girls using physical force or coercion. The AAO notes that New Jersey Statutes § 2C:14-2c(1) does not refer to the age of the victim.

New Jersey Statutes § 2C:14-1(d) defines "sexual contact" to mean "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present." "Intimate parts" under New Jersey Statutes § 2C:14-1(e) is defined to mean "the following body parts: sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person."

We note that in *State in Interest of M.T.S.*, 129 N.J. 422, 443 (N.J. 1992), the Supreme Court of New Jersey indicates that in the sexual assault statute, New Jersey Statutes § 2C:14-2, the Legislature redefined rape and "other sexual crimes less serious than and derivative of traditional rape" to be consistent with the law of assault and battery. *Id.* The Court further states that the Legislature redefined the Code such that the offense of criminal sexual contact under New Jersey Statutes § 2C:14-1(d) was intended "to emphasize the involuntary and personally-offensive nature of the touching." Moreover, the Court states that "just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact." *Id.*

In *Matter of S-*, 5 I&N Dec. 686 (BIA 1954), the Board held that the crime of indecent assault on a female under section 292(a) of the Canadian Criminal Code, although not statutorily defined, involved moral turpitude because the crime denotes depravity. 5 I&N Dec. 686, 688. Furthermore, in *Matter of Z-*, 7 I&N Dec. 253, 255 (BIA 1956), the Board found indecent assault in violation of section 6052 of the General Statutes of Connecticut, Revision of 1930, involved moral turpitude. An indecent assault is described as consisting "of the act of a male person taking indecent liberties with the person of a female or fondling her in a lewd and lascivious manner without her consent and against her will, but with no intent to commit the crime of rape."

The AAO finds that the applicant's conviction was for a crime involving moral turpitude and he is therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

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

(i) [A]ny 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 may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

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

- (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 is established to the satisfaction of the Attorney General [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 . . . ; and

(2) the Attorney General [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.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted 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. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Section 101(a)(43) of the Act states in pertinent part, that:

(43) The term "aggravated felony" means-

(A) murder, rape, or sexual abuse of a minor;

The record reflects that the applicant was a lawful permanent resident at the time of his conviction. Counsel cites to case law in asserting that under the categorical approach the applicable statute should be read to ascertain the least culpable conduct necessary to sustain a conviction; the criminal statute and the record of conviction, not the alien's conduct, must be looked at; New Jersey Statutes 2C:14-3b does not contain an element specifying the age of the victim therefore the conviction cannot be construed as an aggravated felony based on case law; and the federal definition of sexual abuse of a minor does not cover touching through clothing, the state statute covers this conduct, the state offense is broader than the federal offense, and a waiver is not needed based on this. *Brief in Support of Appeal*, dated June 4, 2009.

Counsel refers to *Singh v. Ashcroft*, 383 F. 3d 144 (3rd Cir. 2004) to further support his claim that the applicant was not convicted of an aggravated felony, which would bar him from seeking a section 212(h) waiver. In this case, the court found that a prior Delaware conviction for unlawful sexual contact in the third degree was not an aggravated felony under section 101(a)(43) of the Act as the statute of conviction did not mention anything about the age of victim. *Singh v. Ashcroft*, at 153. However, the AAO notes that third circuit precedent does not apply as the applicant's case was decided by the London Field Office.

In considering whether the respondent's conviction is an aggravated felony, we first apply the "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 601 (1990). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act,

8 U.S.C. § 1101(a)(43). Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *Id.*

However, if the criminal statute of conviction could be applied to conduct that would constitute an aggravated felony and conduct that would not, we then see if there is “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In applying this approach, the alien “may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” *Id.*

If the alien demonstrates a “realistic probability” that the statute would be applied to conduct that falls outside the generic definition of the crime, we then apply a modified categorical approach. Under the modified categorical approach, we conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. *Shepard v. U.S.*, 544 U.S. 13 (2005). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. 544 U.S. at 26.

First, the AAO must look to the statute under which the applicant was convicted and compare its elements to the definition of “sexual abuse of a minor” in Section 101(a)(43) of the Act. The BIA discussed the definition of “sexual abuse” in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-996 (BIA 1999). The BIA looked at 18 U.S.C. § 3509 which defines sexual abuse as “the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of exploitation of children, or incest with children.” In *In re V-F-D-*, 23 I&N Dec. 859 (BIA 2006), the BIA states that a “minor” for purposes of Section 101(a)(43) of the Act includes anyone under 18 years of age. Based on these definitions, the statute under which the applicant was convicted could be applied to conduct that would constitute an aggravated felony and conduct that would not constitute an aggravated felony.

Second, the AAO will conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that the alien was convicted of the elements of the generically defined crime. In this case, the charging documents state that the victim was nine years old. The age of the victim was sufficient to establish that there was “physical force or coercion.” Therefore, showing the age of the victim would satisfy an element of the offense. See *State v. Lee*, 417 N.J. Super 219, 225 (NJ Super. A.D. 2010)(discussing cases involving sexual offenses against minors and stating “Because of the age of the victims, these cases did not require proof of physical force or coercion under *N.J.S.A. 2C:14-2c(1)*.” In addition, the record reflects that, as a condition of his probation, the applicant was required to register as a sex offender under Megan’s Law, NJ Stat. 2C:7-2. Under this law, individuals who have been convicted of sexual contact under section 2C:14-3b must register as a sex offender if the victim is a minor. Therefore, the record indicates that the applicant was convicted of sexual abuse of a minor. The burden of

proof in these proceedings is on the applicant. He has failed to meet his burden that he has not been convicted of an aggravated felony. As such, he is not eligible to file a section 212(h) waiver as he was a lawful permanent resident who has been convicted of an aggravated felony since the date he was granted (admitted as a) lawful permanent resident.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not established that he is eligible to file a section 212(h) waiver. Accordingly, the appeal will be dismissed.

The AAO notes that the field office director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. *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. As the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.