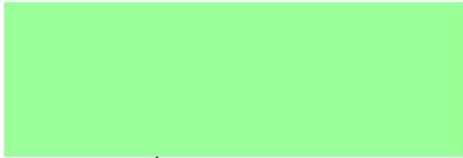


(b)(6)

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

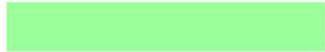


Date: JUN 19 2013

Office: ROME, ITALY

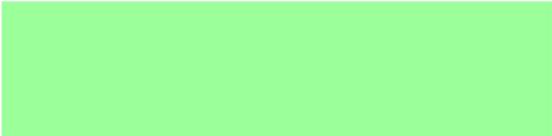


IN RE:



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:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Field Office Director, Rome, Italy, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, a native and citizen of Italy, was admitted to the United States as a lawful permanent resident on November 3, 1955. He was 13-years-old. On February 13, 1962 the applicant was convicted of manslaughter in the second degree and sentenced to five years in prison. As a result of this conviction the applicant was placed in removal proceedings. The immigration judge found that the applicant had been convicted of an aggravated felony under §101(a)(43)(F) of the Immigration and Nationality Act (the Act), as a crime of violence (defined in 18 U.S.C. §16) for which the term of imprisonment is one year or more and ordered him removed on August 19, 2004. The applicant appealed to the Board of Immigration Appeals (BIA), who on March 31, 2005, affirmed the immigration judge's decision to remove the applicant after it was discovered that he left the United States on February 15, 2005 to depart on a cruise to the Bahamas, effectively withdrawing his appeal. The applicant attempted to enter the United States on February 20, 2005 with his now invalidated lawful permanent resident card. The applicant was transferred to the Krome Detention Center in Miami, Florida until his departure to Italy on June 20, 2006. In applying for an immigrant visa the applicant was found to be inadmissible to the United States under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). The applicant is applying for permission to reapply for admission, in order to reside in the United States where his three U.S. citizen children reside.

In her decision, dated May 31, 2012, the field office director found the applicant inadmissible under section 212(a)(9)(A)(ii) of the Act. She then found that because the applicant's Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied, there was no purpose in granting the applicant permission to reapply for admission. The Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) was denied accordingly.

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 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 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.

On appeal, counsel states that the applicant was not convicted of an aggravated felony under § 101(a)(43)(F) of the Act as a crime of violence. Counsel asserts and cites to several court decisions indicating that when a manslaughter conviction involved only reckless, negligent, or accidental conduct, the crime did not rise to the level of a crime of violence as defined in 18 U.S.C. § 16. Specifically, in *Jobson v. Ashcroft*, 326 F.3d 267 (2nd Cir. 2003), the U.S. Court of Appeals for the Second Circuit found that manslaughter in the second degree under N.Y.P.L. § 125.15 was not a crime of violence under 18 U.S.C. §16(b) and was not an aggravated felony. In *Jobson v. Ashcroft*, a lawful permanent resident had pled guilty to recklessly causing the death of his infant son. Similarly, counsel cites to three cases where the courts have found that unintentional, negligent, or accidental conduct did not constitute crimes of violence. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004), *Bejarano-Urrutia v. Gonzales*, 413 F.3rd 444 (4th Cir. 2005), and *Lara-Cazares v. Gonzales*, 408 F. 3d 1217 (9th Cir. 2005).

18 U.S.C. § 16 states:

The term "crime of violence" means—

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

As stated above, on February 13, 1962 the applicant was convicted of manslaughter in the second degree under N.Y.P.L. § 1052(3) and was sentenced to five years in prison. We note that in 2004 the immigration judge erroneously stated that the applicant had been convicted of manslaughter under N.Y.P.L. § 125.15, a version of the N.Y.P.L. that was not enacted until 1965, three years after the applicant's conviction.

Section 1052(3) of N.Y.P.L. stated, in pertinent part:

Such homicide is manslaughter in the second degree, when committed without a design to effect death: ...

3. By any act, procurement or culpable negligence of any person, which, according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree.

We find that the applicant has not been convicted of an aggravated felony under section 101(a)(43)(F) of the Act because his conviction involved as elements of the offense the unintentional and negligent death of another. Thus, the applicant is not permanently subject to having to apply for permission to reapply for admission under section 212(a)(9)(A) of the Act.

In his brief, counsel asserts that the applicant is only subject to section 212(a)(9)(A)(i) of the Act as an arriving alien because of his attempted entry on February 20, 2005 and subsequent removal on June 20, 2006. Counsel asserts that because the applicant is subject to section 212(a)(9)(A)(i) of the Act and the five year bar, he is no longer inadmissible as a result of his 2006 removal.

The record suggests that the applicant was treated as an arriving alien in 2005, but this entry does not remove his 2004 deportation order. Thus, the applicant continues to be subject to section 212(a)(9)(A)(ii) as a person who has a record of two removals and is subject to the 20-year bar. Nevertheless, we find that the applicant warrants a favorable exercise of discretion.

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.

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The unfavorable factors in the applicant's case include: his conviction for manslaughter in the second degree in 1962; the applicant's failure to pay child support for two of his children for a period of time; and a protection order that was taken out against the applicant by the applicant's ex-wife in April 2003.

The favorable factors in the applicant's case include: the applicant's 51 years of residence in the United States; the fact that it has been 52 years since the applicant's crime was committed and that the applicant was 19-years-old when he committed this crime; his extensive family ties to the United States, including three U.S. citizen children; his record of consistent employment (when he was able to work) in the United States as a mason and as a business owner; his record of paying income tax; his volunteer activities with his church and a support group for divorced or separated families; and, as referenced by eight letters of recommendation, the applicant's attributes as a hard worker, community member, trusted friend, and supportive father.

We note that the applicant's crime is serious in nature, but the passage of more than 50 years, the applicant's age at the time of his conviction, and the applicant's rehabilitation as a productive and contributing member of society diminish the weight of this unfavorable factor. The protection order against the applicant issued in 2003 and the applicant's lack of child support payments for a period of time have been considered as unfavorable factors in the applicant's case. However, more currently, the record contains statements, dated August 2011, from two of the applicant's sons stating that they are struggling financially and emotionally without their father in the United States. The statements indicate that they have a loving and close relationship with the applicant and make references to their mother, the applicant's ex-wife, suffering as a result of the applicant's absence. Thus, in fully weighing both the unfavorable and favorable factors in the applicant's case, we find that the applicant warrants a favorable exercise of discretion.

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

ORDER: The appeal is sustained.