

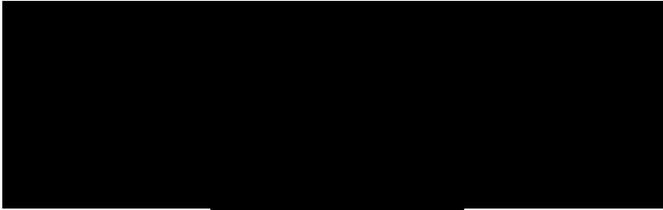
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:

(CDJ 2004 857 145)

Office: MEXICO CITY, MEXICO
(CIUDAD JUAREZ)

Date:

MAY 11 2010

IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 1182(a)(9)(B)(v), and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. section 1182(h).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more and seeking admission within ten years of his last departure. The applicant was also found to be 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 (CIMT). He is married to a United States citizen.¹ He seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

The District Director concluded that the applicant had failed to establish that the bar to his admission would impose extreme hardship on a qualifying relative, his U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on May 29, 2007.

On appeal, the applicant's spouse states that the District Director's decision contained incorrect information, and asks that her husband be given a second chance to reside in the United States.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

¹ The applicant asserts that he has three U.S. citizen children. The record, however, does not contain evidence to support his assertion.

The record indicates that the applicant entered the United States without inspection in 1987 and remained until he was deported on December 23, 2000. Therefore, the applicant was unlawfully present in the United States for over a year, from April 1, 1997, the effective date of the unlawful presence provisions of the Act until October 2005, and is now seeking admission within ten years of his last departure. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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

(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:

(h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if –

(A) (i) [T]he 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 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

The applicant is also inadmissible to the United States under section 212(a)(2)(A)(i)(I) of Act for having been convicted of a CIMT. The record reflects that on August 7, 1984, the applicant was convicted of aggravated assault on a peace officer under Texas state law. Section 22.02 of Texas Statutes defined aggravated assault as follows:

- (a) A person commits an offense if the person commits assault as defined in Section 22.01 of this code and the person:

(2) threatens with a deadly weapon or causes bodily injury to a peace officer . . . when the person knows or has been informed the person assaulted is a peace officer . . . :

- (A) while the peace officer . . . is lawfully discharging an official duty; or
- (B) in retaliation for or on account of the injured person's having exercised an official power or performed an official duty as a participant in a court proceeding; or

Aggravated assault involving the use of a deadly weapon has generally been considered to be a CIMT. *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974). Aggravated assault resulting in bodily harm to a peace officer whom the perpetrator knows to be performing an official duty is also a CIMT. *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). An examination of Section 22.02 of Texas Statutes establishes that assault with a deadly weapon against a peace officer or assault that results in bodily harm to a peace officer and knowledge that the victim is performing an official duty are the elements of Aggravated Assault on a Peace Officer and necessary for a conviction under the statute. As such, the applicant's conviction for Aggravated Assault on a Peace Officer constitutes a CIMT. The applicant's four year sentence was suspended and he was placed on parole for four years. On September 13, 1988, the applicant, having successfully completed his probation, had his verdict set aside and his indictment dismissed.²

The AAO notes that the applicant was previously admitted to the United States as a lawful permanent resident on April 29, 1957 and that based on his conviction for aggravated assault against a peace officer was placed into proceedings where, on December 21, 2000, an immigration judge determined that the applicant had been convicted of an aggravated felony and was subject to removal from the United States on this basis.

Section 212(h)(2) states in pertinent part:

. . . . 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

In that the applicant is subject to section 212(h)(2) of the Act and may not receive a waiver of his 212(a)(2)(A)(i)(I) inadmissibility, the AAO finds no purpose would be served in determining his

² The record indicates that the applicant's conviction was set aside following the successful completion of his parole. As the applicant's conviction was not set aside for a substantive or procedural defect, it remains a conviction for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Adamiak* 23 I&N Dec. 878 (BIA 2006).

eligibility for a waiver of his unlawful presence under section 212(a)(9)(B)(v) of the Act or in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.