(b)(6)

U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-A-U-

DATE: AUG. 17, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility for unlawful presence. *See* Immigration and Nationality Act (the Act) § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to that of a lawful permanent resident (LPR) must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant is ineligible for a waiver of inadmissibility because, in addition to being inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II) , the Applicant is also inadmissible under section 212(a)(3)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(3)(A)(ii), a ground for which no waiver is available.

The matter is now before us on appeal. On appeal, the Applicant submits a brief and additional evidence and states that he should not be found inadmissible under section 212(a)(3)(A)(ii) of the Act, as he was never, is not, and does not want to be a member of a gang. He also asserts that that he is eligible for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, to return to the United States to join his U.S. citizen spouse and U.S. citizen children.

Upon *de novo* review, we will dismiss the appeal, because the Applicant did not meet his burden to establish that he is not inadmissible under section 212(a)(3)(A)(ii), a ground of inadmissibility that cannot be waived.

I. LAW

The Applicant is seeking to adjust status to that of a lawful permanent resident and has been found inadmissible for unlawful presence, as well as inadmissible for security-related grounds, more specifically, affiliation with the

Section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i), provides that a foreign national who 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 departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(ii) of the Act provides that a foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), provides that section 212(a)(9)(B)(i) inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent.

Under section 212(a)(3)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(3)(A)(ii), a foreign national is inadmissible to the United States where a consular officer or the Secretary of Homeland Security knows or has reasonable ground to believe that the foreign national seeks to enter the United States to engage "solely, principally, or incidentally in" any unlawful activity. There is no waiver for this ground of inadmissibility.

A foreign national must establish admissibility "clearly and beyond doubt." Section 235(b)(2)(A) of the Act; *see also* section 240(c)(2)(A) of the Act.

II. ANALYSIS

The Applicant states that he is not inadmissible pursuant to section 212(a)(3)(A)(ii) of the Act, as he is not associated with any gang or gang activity and has never been in a gang, which he states is evidenced by the removal of his tattoos. He asserts he is eligible for a waiver of inadmissibility for his unlawful presence pursuant to section 212(a)(9)(B)(v) of the Act, because his U.S. citizen spouse is experiencing extreme hardship without him in the United States.

We must first determine if the Applicant has met his burden of proof that he is not inadmissible under section 212(a)(3)(A)(ii) of the Act. The Applicant attended an interview for an immigrant visa at the U.S. Consulate General in [redacted] Mexico, after which the consular officer claimed to have reasonable grounds to believe that the Applicant seeks to enter the United States to engage in unlawful activity as a member of a [redacted] The record indicates that the Applicant had multiple tattoos with the markings associated with the gang [redacted] in different places on his body, including the back of his neck, shoulder, arm, and his hand. A Form I-213, Record of Deportable/Inadmissible Alien, issued in 2010 after the Applicant was arrested during a traffic stop, indicates that the Applicant stated that he was a gang member at the time. The Form I-213 also states that in addition to the tattoos that identified the Applicant with the [redacted] he possessed a blue bandana and blue belt with a belt buckle that also had the marking of the [redacted] The Applicant has presented no evidence to show that the Form I-213 is inaccurate or otherwise unreliable. *See Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (citing *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976))(a Form I-213 is generally considered "inherently trustworthy and admissible" as evidence of alienage and deportability, absent any indication that it contains incorrect information or that it was obtained by coercion or duress).

The Applicant states that he obtained his tattoos when he was young and immature and although they made him look like a criminal, he is not a gang member; he is simply a father trying to return to his family.[1] He states that he has had 19 laser procedures to remove his tattoos and that he has never been and is not now affiliated with a gang. The record also contains two letters from a retired police officer, who states that he worked as a police officer from 1991 to 2006 in various counties in southern California. He states that, having worked in a "gang unit" for 6 years, he is familiar with various gangs and names a few gangs, but he does not list the as one with which he is familiar. He states that he has testified as an expert concerning gangs and taught classes to other law enforcement officers concerning gang investigations. The retired officer states that he has only seen photographs of the areas of an individual's skin where tattoos were removed, said to be the Applicant's, and that he has not met the Applicant. Based on these photographs, he concluded that the tattoos "did not appear to be gang specific" and instead were "common tattoos from the southern California area." He also stated generally that if a gang member had tattoos removed, that would indicate that the person "was no longer a gang member or was ever affiliated with a gang." He further stated that removing tattoos would put a person "in jeopardy of gang retaliation," including severe punishment or death. The other letter from the retired police officer generally addresses gang initiation and does not reference the Applicant.

In her most recent letter, the Applicant's spouse states that the Applicant is a good man and that he is sorry for having entered the United States without inspection, but he did so to provide a better life for himself and his parents. She does not mention the Applicant's tattoos or gang affiliation, focusing instead on the Applicant's role as a good father and protector of the family when he was in the United States. In the Applicant's spouse's declaration before the Immigration Court in bond proceedings in 2010, however, she states that the Applicant had gang affiliations before they met but that he was never officially in a gang and never participated in gang activities.

The Applicant provided numerous letters from family, friends of the family, and coworkers to show his good moral character. Two individuals, in letters from 2010 submitted in connection with the Applicant's Immigration Court proceedings, directly address the issue of the Applicant's tattoos and state that the Applicant was once a gang member but has not been a gang member as long as those individuals have known him. Others, including family members, coworkers, and friends, in their letters from 2010, state that they do not know of the Applicant having any association with a gang or criminal activities. One friend states in his letter that if the Applicant was previously a member of a gang, he does not believe that the Applicant has been one as long as he has known him. A letter from the Applicant's coworker in 2010 also states that he does not believe that the Applicant is a gang member. Other letters of support in the record are also over 5 years old and do not mention the Applicant's tattoos, tattoo removal, gang affiliation, or lack thereof. The individuals generally describe the Applicant as a hard worker, good father, and husband, but they do not provide details concerning the relevant issue: the Applicant's gang-related tattoos or affiliation with the

[1] The Applicant also states that he does not have a criminal record in one letter, but in another apologizes for having been arrested on two occasions for driving under the influence. The record indicates that the Applicant was arrested for driving under the influence and that he completed alcohol and substance abuse courses in 2004 in Oklahoma and in 2001 in Utah.

In addition, the Applicant submitted a criminal clearance letter from the attorney general's office of the state of [redacted] dated 2012, and letters of support for the Applicant written by individuals in Mexico. The Applicant submits no documents from Mexico concerning his affiliations and activities there, which are dated after 2012.

Although the Applicant has submitted documentation depicting his role as a father and hard worker during the last years that he lived in the United States, he has not explained sufficiently why, during his 2010 arrest, he had a belt and bandana associated with gang membership, tattoos associated with gang membership, and why he told the officer that he was a member of a gang. The Applicant's statements that he obtained the tattoos when he was young and immature and has never been associated with a gang are not credible in light of the Form I-213's information. The retired police officer's testimony concerning the pictures of what are said to be of the areas of the Applicant's skin, where he removed his tattoos, while taken into consideration, does not meet the Applicant's burden of proof on the issue of his gang affiliation, in particular because of the contradictory statements that the Applicant has made regarding his gang affiliation. Moreover, the retired police officer did not state that he was familiar with the [redacted] or that he saw photographs of the Applicant's tattoos before they were removed.

We find that the Applicant's inadmissibility under section 212(a)(3)(A)(ii) of the Act is a proper basis for denying the Form I-601 as a matter of discretion, as no purpose is served in adjudicating a waiver application when an immigrant visa application cannot be approved due to a separate non-waivable ground of inadmissibility. Because no purpose would be served in adjudicating a waiver application under section 212(a)(9)(B)(v) of the Act, as the Applicant would remain inadmissible under another ground, the Form I-601 was properly denied. The appeal will therefore be dismissed.

III. CONCLUSION

The Applicant has the burden of proving admissibility. Section 235(b)(2)(A) of the Act; *see also* section 240(c)(2)(A) of the Act. The Applicant has not met that burden, as he has not established that he is not inadmissible under section 212(a)(3)(A)(ii) of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of O-A-U-*, ID# 11013 (AAO Aug. 17, 2016)