



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF H-D-H-M-

DATE: SEPT. 27, 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 a crime involving moral turpitude and for unlawful presence. *See* Immigration and Nationality Act (the Act) §§ 212(h) and 212(a)(9)(B)(v), 8 U.S.C. §§ 1182(h) and § 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 was 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 was also inadmissible under section 212(a)(3)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(3)(A)(ii), for security-related grounds, a ground for which no waiver is available.

The matter is now before us on appeal. On appeal, the Applicant submits a brief, contesting he is inadmissible under section 212(a)(3)(A)(ii) of the Act, and he also submits additional evidence.

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 a gang.

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 1 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

(b)(6)

*Matter of H-D-H-M-*

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 concedes that he is inadmissible under section 212(a)(9)(B)(i) of the Act for having accrued unlawful presence, a finding supported by the record.<sup>1</sup> The Applicant states that he is not inadmissible pursuant to section 212(a)(3)(A)(ii) of the Act, because he has never been in a gang, he never committed any gang-related criminal acts, and he has no gang-related arrests. He further asserts that the absence of recent criminal history, his marriage of 8 years, his employment history, and letters attesting to his good moral character prove that he is not currently a gang member. The Applicant also claims that the Act does not specify a gang-related inadmissibility ground and that it is difficult to prove a negative, namely, that he never was in a gang or is not in one now. He claims that, contrary to the Director’s statement in the denial decision, the law does not require a presumption of gang membership for life; rather, the inadmissibility is permanent for active members of such groups. The Applicant asserts that if he had been a gang member, he had ceased his affiliations by the time of his consular interviews in 2008 and 2015. He further asserts that if he had been in a gang, he was never more than a marginal member and as such, he would have been able to leave the gang more easily than a core member.

The Applicant also 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 will experience extreme hardship if the application is denied.

---

<sup>1</sup> The Applicant testified that he entered the United States at the age of [redacted] and remained unlawfully in the United States until September 2008. He began to accrue unlawful presence in 1999, when he became [redacted] years old. The Applicant also indicated on his Form I-601 that he was inadmissible for a crime involving moral turpitude. The Director did not make a finding of the Applicant’s inadmissibility for a crime involving moral turpitude. We need not address this ground of inadmissibility, because the Applicant is inadmissible under two other grounds, including one for which no waiver is available.

*Matter of H-D-H-M-*

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 U.S. consular officer claimed to have reasonable grounds to believe that the Applicant sought to enter the United States to engage in unlawful activity as a member of “a Central American transnational organized street gang.” The record indicates that the Applicant had multiple tattoos with markings associated with the gang [REDACTED] on his arms. At his immigrant visa interview, according to the record, the Applicant admitted that he had at least one [REDACTED] tattoo, which he had attempted to conceal with overlapping tattoos. According to the Department of State’s records, the Applicant had admitted that his high school friends were members of this gang and he would participate in gang-related activities after school. The consular officer did not find the Applicant’s claims that his gang membership had ended to be credible.

The Applicant asserts that the Director erred in stating that membership in the [REDACTED] gang is presumed for life, absent compelling evidence to the contrary. He submitted several articles to corroborate his claim that members have been known to leave gangs. One article cites research indicating that marginal and short-term gang members generally are able to leave gangs without serious consequences. Another article states that members do not make lifetime commitments to gangs and leaving gangs can happen easily. He also submitted a letter from a retired California State Corrections Department warden who states he was assigned to specialized units working with gang members and leaders and that he has played a key role in helping gang members to disassociate themselves from gang activities.

The Applicant provided numerous letters from family and friends to demonstrate his good moral character. One friend states in his letter that the Applicant began to drift towards the gang culture during his high school years and decided to get tattoos that represented the gang to fulfill a sense of belonging. Another school friend stated that the Applicant acquired tattoos, believing this would help him fit in, but when the Applicant became a father, he quickly distanced himself from his trouble-making friends. Several letters indicate that the Applicant had never been a gang member.

To demonstrate that he was never a gang member, the Applicant submitted a 2014 letter his wife wrote and sent to the [REDACTED] Gang Investigation Unit, seeking verification that the Applicant was not in their database of gang members. The Applicant submitted a response from the [REDACTED] Gang Investigation Unit stating that they did not find a file for the Applicant and that files are purged after 5 years.

We have taken into consideration the letters and articles the Applicant has submitted, but the evidence does not satisfy his burden of proof concerning his gang affiliation. The letters from the retired corrections warden and [REDACTED] Investigation Unit do not specifically concern the Applicant or address his connection to gangs and gang activity. Although the Applicant has submitted documentation depicting his positive roles as a husband and a father, his testimony that he had participated in gang-related activities and his admission that he had gang-related tattoos is sufficient to find the Applicant is inadmissible for security-related grounds.

The Applicant asserts that his having no gang-related arrests is evidence that he has never been a gang member. The record shows that the Applicant was convicted of driving while under the influence in violation of California Vehicle Code § 14601.2(a); obstructing a police officer under section 148(a) of the California Penal Code; and battery in violation of section 243(e)(1) of the California Penal Code. The record does not contain sufficient information about the Applicant's conviction for obstructing a police officer to determine whether that conviction was gang-related. The absence of gang-related arrests, however, would not, without more, establish that the Applicant is not or never was affiliated with a gang.

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 291 of the Act; 8 U.S.C. § 1360. 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 H-D-H-M-*, ID# 122745 (AAO Sept. 27, 2016)