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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: SEP 25 2001

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Peru who was lawfully admitted for permanent residence on October 5, 1981. The applicant was found deportable by an immigration judge *in absentia* on December 31, 1986, under former section 241(a)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1231(a)(4), now codified as section 237(a)(2) of the Act, 8 U.S.C. 1227(a)(2), for having been convicted at any time after entry of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. He was removed to Peru on January 18, 1993. Therefore he is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. 1182(a)(9)(A)(ii). The applicant seeks permission to reapply for admission under section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii), to rejoin his parents and siblings in the United States.

Citing Matter of J-F-D-, 10 I&N Dec. 694 (Reg. Comm. 1963), and Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964), the director determined that the applicant is mandatorily inadmissible to the United States for not having lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of removal proceedings. The director then denied the application accordingly.

The director further determined that the applicant had been convicted on August 14, 1992, of Attempted Physical Abuse of a Child and Felony Bail Jumping. The defendant in that case was named [redacted] who was born on March 21, 1956. The applicant, who was born on June 15, 1956, indicates on his application that he and [redacted] are the same person. Therefore, the Associate Commissioner will not address that matter on appeal.

On appeal, counsel states that the effective date of IIRIRA was September 30, 1996. Therefore, the definition of aggravated felony in this matter does not apply. Counsel states that a section 212(h) waiver is available. Counsel asserts that the applicant was a resident of the United States for more than 18 years having arrived in 1974.

The record reflects that the applicant was convicted of the following:

(1) On December 2, 1981, the applicant was convicted of Theft of Services. He was sentenced to time served.

(2) On April 13, 1982, the applicant was convicted of Retail Theft. He was sentenced to serve two days in jail.

(3) On June 16, 1983, the applicant was convicted of Retail Theft. He was sentenced to two day in jail.

(4) On October 1, 1992, the applicant was convicted of the offense of Attempted Physical Abuse of a Child and Felony Bail Jumping. He was sentenced to two and one-half years imprisonment for the first count and five years imprisonment for the second count to be served concurrently. The sentence was stayed and he was placed on probation.

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

(i) Except as provided in clause (ii), any 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.

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), is inadmissible.

(B) Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Section 212(h) of the Act provides that the Attorney General may, in his discretion, waive 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 if-

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

(i)...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 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, 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 for 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 348 of IIRIRA amended section 212(h) of the Act to preclude a lawful permanent resident from being granted a waiver under this provision if either since the date of admission as a lawful permanent resident 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 removal proceedings. This provision applied to any alien in exclusion or deportation proceedings on the date of enactment unless a final administrative order has already been entered prior to the enactment date.

The applicant's case became administratively final pursuant to 8 C.F.R. 243.1, in effect at that time, and a Warrant of Deportation was executed on January 18, 1993.

Section 321 of IIRIRA amended definition of the term "aggravated felony" by adding the crimes of rape and sexual abuse of a minor, and it applies to offenses that occurred before, on, or after the

date of enactment. From the sparse documentation in the record, the Associate Commissioner cannot determine whether Attempted Physical Abuse of a Child is equivalent to Sexual Abuse of a Minor which is an aggravated felony. However, the burden of proof is on the applicant to establish his eligibility for the benefit sought and to show that Attempted Physical Abuse of a Child is not an aggravated felony.

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 convicted of violating a law which renders him mandatorily inadmissible to the United States, and no purpose would be served in granting the application.

The record reflects that the applicant is inadmissible to the United States for having been convicted of a violation deemed to be an aggravated felony in addition to his other convictions for crimes involving moral turpitude. Evidence has not been provided to show that the applicant's offense is not considered to be an aggravated felony. Since there is no waiver available for such a violation, the favorable exercise of discretion in this matter is not warranted.

In discretionary matters, the applicant bears the full burden of proof. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.