

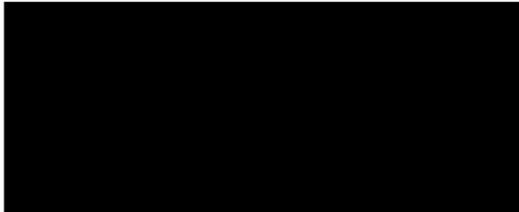
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U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER
[consolidated therein]

Date: OCT 28 2008

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) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Guyana who was lawfully admitted to the United States on November 22, 1970. On August 9, 1979, the applicant was convicted of robbery and attempted petit larceny, and sentenced to one (1) year probation. On October 9, 1979, the applicant was convicted of attempted petit larceny, and was sentenced to one (1) month in jail. On February 6, 1980, the applicant was convicted of violating his parole, and was sentenced to thirty (30) days in jail. On February 15, 1980, the applicant was convicted of petit larceny, and was sentenced to forty-five (45) days in jail. On December 19, 1980, the applicant was convicted of attempted robbery, and was sentenced to one (1) to three (3) years in jail. On May 26, 1983, the applicant was convicted of attempted burglary, and was sentenced to one (1) to three (3) years in jail. On June 8, 1981, an Order to Show Cause (OSC) was issued against the applicant. On November 30, 1989, an immigration judge granted the applicant a waiver under section 212(c) of the Immigration and Nationality Act (the Act), and terminated the proceedings against the applicant. On May 14, 1992, the applicant was convicted of criminal possession of a weapon in the fourth degree – firearm, and was sentenced to six (6) months in jail. On July 2, 1992, an OSC was issued against the applicant. On November 25, 1992, the applicant filed an Application for Permanent Residence (Form I-485). On February 4, 1993, an immigration judge denied the applicant's second request for a waiver under section 212(c) of the Act, and ordered the applicant deported from the United States. On February 16, 1993, a Warrant of Deportation (Form I-205) was issued, and on March 6, 1993, the applicant was deported to Guyana. On November 3, 1998, the applicant filed an Application for Certificate of Citizenship (Form N-600). On July 2, 2002, the applicant's Form N-600 was denied. On January 11, 2003, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On September 26, 2003, the Center Director denied the applicant's Form I-212 for abandonment. On February 6, 2007, the applicant filed another Form I-212. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He now seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside with his United States citizen mother and child.

The Center Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being ordered removed under section 240, that the unfavorable factors outweigh the favorable factors, and he denied the applicant's Form I-212 accordingly. *Center Director's Decision*, dated February 6, 2007.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

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(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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, asserts that the Center Director "erred in denying the applicant's [Form I-212] as he has numerous positive factors which would support a favorable decision." *Attachment to Form I-212*, filed March 2, 2007. Counsel claims that the applicant's parents need the applicant in the United States, and the applicant is rehabilitated. *Appeal Brief*, filed March 2, 2007. Counsel states since the applicant's "conviction predates IIRIRA and AEDPA [he] would have qualified for an INA§212(c) waiver." *Id.* The AAO notes that on November 30, 1989, an immigration judge granted the applicant a waiver under section 212(c) of the Act, which waived his theft convictions prior to November 30, 1989. On May 14, 1992, the applicant was convicted of criminal possession of a weapon in the fourth degree – firearm, and was sentenced to six (6) months in jail. The applicant filed an application for a waiver pursuant to section 212(c) of the Act in an attempt to waive his firearm offense; however, on February 4, 1993, an immigration judge denied the applicant's request for a section 212(c) waiver. Therefore, counsel's assertion that the applicant would have qualified for a section 212(c) waiver is without merit, since the applicant did file for waivers pursuant to section 212(c) of the Act.

The AAO notes that the Center Director erroneously determined that the applicant's May 14, 1992 conviction for criminal possession of a weapon in the fourth degree, in violation of New York Penal Law section 265.01(1), is an aggravated felony.

New York Penal Law section 265.01 provides, in pertinent part, that:

Section 265.01 *Criminal possession of a weapon in the fourth degree.*

A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He possesses any firearm...

....

Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

New York Penal Law section 70.15 provides in pertinent part, that:

Section 70.15 *Sentences of imprisonment for misdemeanors and violation.*

1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed one year; provided, however, that a sentence of imprisonment imposed upon a conviction of criminal possession of a weapon in the fourth degree as a defined in subdivision one of section 265.01 must be for a period of no less than one year when the conviction was the result of a plea of guilty entered in satisfaction of an indictment...except that the court may impose any other sentence authorized by law upon a person who has not been previously convicted in the five years immediately preceding the commission of the offense for a felony or a class A misdemeanor defined in this chapter...

The AAO notes that on May 14, 1992, the applicant pled guilty to criminal possession of a weapon in the fourth degree; however, the criminal court judge sentenced the applicant to six (6) months in jail. For the applicant's conviction to be considered an aggravated felony under section 101(a)(43)(E)(ii), the applicant would have had to be sentenced to a term of imprisonment exceeding one year. *See* 18 U.S.C.A. section 922(g)(1). The AAO finds that since the applicant's actual sentence imposed was less than one year, his conviction for criminal possession of a weapon is not an aggravated felony. However, the AAO finds the applicant inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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 5 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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant, through counsel, states the applicant has remained outside of the United States since he was deported on March 6, 1993. *Appeal Brief*, undated. Counsel states that the applicant is needed in the United States to help his ailing parents. The applicant states his parents "are not as strong as they used to be." *Letter from the applicant*, dated January 29, 2006. The AAO notes that in the letter provided by the applicant's mother, she made no reference to needing the applicant's help. *Letter from [REDACTED]* undated. [REDACTED] states the applicant's father "needs home attendant 4 hrs/day 7 days/wk because he can no longer care for himself due to his worsening Parkinson's Disease." *Note from [REDACTED]*, dated May 9, 2006. The AAO notes that the applicant's siblings reside in the United States and there is no evidence that they cannot help care for their father. *See Appeal Brief, supra; see also letter from the applicant, supra.* Additionally, the AAO notes that the applicant's father states that he returns to Guyana every year; therefore, the applicant can provide help to his father when he is in Guyana. *See letter from [REDACTED]* undated. Furthermore, unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying

family member if the application were denied. The AAO will consider the hardship to the applicant's family, but it will be just one of the determining factors. Counsel states that the applicant "is a reformed, responsible person." *Appeal Brief, supra*. The applicant's mother states that she "admire[s] [the applicant] very much, he is among the most respectable person[s] in his community. [He] work[s] very hard to become successful. He has made considerable improvement in his life. His life is now reformed, and as a matter of fact, he is now an elder in his church." *Letter from [REDACTED], supra*. The applicant's father states the applicant "was a kid when he was sent back to Guyana because of his misbehavior. Since he went back to Guyana he kept himself employ[ed].... He also met and marry his wife and they have a daughter." *Letter from [REDACTED] supra*. The applicant's siblings state the applicant has turned his life around and wants a second chance to return to the United States. *See letters from [REDACTED], and [REDACTED] undated*. The applicant's brother states the applicant was taking care of his daughter before he was deported and "[he] would like to see him get another chance to see his daughter." *Letter from [REDACTED], undated*. The AAO notes that there is no documentation establishing that the applicant's daughter is suffering any hardship from being separated from her father. The applicant himself states that "for the last few years [he has] lost contact with [her]." *Statement from the applicant, undated*.

The record of proceeding reveals that on March 6, 1993, the applicant was deported from the United States. Based on the applicant's previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

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.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

The favorable factors in this matter are the applicant's family ties to United States citizens, his parents and daughter, general hardship they have been experiencing, letters of recommendations, the recency of his deportation, his lack of any additional convictions since his last conviction in 1992, evidence of his reformation and rehabilitation, and no other grounds of inadmissibility. The AAO notes that the applicant has a criminal record, but he has not been convicted of any crimes in over sixteen (16) years, which is a favorable factor.

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.