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



U.S. Citizenship
and Immigration
Services

DATE: NOV 05 2013

Office: CLEVELAND

FILE: [REDACTED]

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Cleveland, Ohio, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) for having been removed and having been convicted of an aggravated felony. The applicant seeks permission to reapply for admission into the United States (Form I-212) under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii). The applicant was also found to be inadmissible under section 212(a)(6)(E) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E) for knowingly encouraging, inducing, assisting, abetting any other alien to try to enter the United States in violation of law.

On February 8, 2013, the Field Office Director concluded that no purpose would be served in approving the application for permission to reapply as the applicant was previously admitted to the United States as a lawful permanent resident and subsequently convicted of an aggravated felony.

On appeal, counsel for the applicant states that the applicant should be eligible to apply for a waiver of inadmissibility as “212(h) does not bar an alien who adjusted post-entry to legal permanent resident status from seeking a waiver of inadmissibility for having been convicted of an aggravated felony” and that the applicant’s family “continue to suffer unusual and/or extreme hardship due to his inability to legally reenter the U.S.”

In support of the application, the record includes, but is not limited to: biographical information for the applicant, his spouse, and their children; financial documentation for the applicant’s spouse; letters of support; educational records for the applicant’s children; and documentation of the applicant’s criminal and immigration history.

The applicant was found inadmissible under section 212(a)(9)(A)(ii) of the Act. Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens 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 five 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 who 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 alien 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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

...

The record reflects that a stipulated removal order was entered in the applicant's case on March 2, 2001 and the applicant was physically removed from the United States on March 3, 2001. The Form I-862 Notice to Appear (NTA) in the applicant's case indicates that the applicant's status was adjusted to that of lawful permanent resident on July 19, 1988 and that the applicant was removable under section 237(a)(2)(A)(iii) for having been convicted of an aggravated felony. The NTA and the applicant's criminal records further indicate that on September 3, 1999 in the United States District Court, [REDACTED] the applicant was convicted of violating 18 U.S.C. section 371, Conspiracy to Commit the following offenses against the United States: 8 U.S.C. section 1324(a)(2)(B)(i) and (ii), to knowingly bring in, and to aid and abet the bringing in of undocumented aliens with reason to believe that such aliens will commit an offense against the United States and for purpose of commercial advantage and private financial gain; 8 U.S.C. section 1324(a)(1)(A)(i), (ii), (iii), (iv) and (v)(II), to bring in, transport harbor, and encourage the entry of aliens, and aid and abet the same; and 18 U.S.C. section 1546(a), to falsely make, utter, use, attempt to use, possess, obtain, and receive alien registration receipt cards, knowing them to be forged, counterfeited, altered, falsely made, and otherwise obtained unlawfully and by fraud. The applicant was sentenced to serve 18 months of incarceration with the U.S. Bureau of Prisons.

Based on the applicant's status as a former lawful permanent resident who had been convicted of a crime that was determined to be an aggravated felony under section 237(A)(2)(iii) of the Act, the Field Office Director found that the applicant was ineligible for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. section 1182(h), and that as a result the applicant was "not eligible for admission into the United States" after deportation. On appeal, counsel states that the applicant is eligible for a waiver under section 212(h) of the Act, as the applicant acquired lawful permanent status without admission into the United States at a port-of-entry and is not affected by the clause under section 212(h) of the Act that states that a waiver under that section is unavailable to "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if...since the date of such admission the alien has been convicted of an aggravated felony" based on the line of U.S. Circuit Court cases concerning this section of law. *See Martinez v. Mukasey*, 519 F.3d 532, 544-45 (5th Cir. 2008); *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir. 2010); *Lanier v. United States AG*, 631 F.3d 1361, 1366-67 (11th Cir. 2011); *Hanif v. Attorney Gen.*, 694 F.3d 479, 484-88 (3d Cir. 2012). The applicant, however, does not reside within the territorial limits of the United States and any of the circuits that have so interpreted section 212(h) of the Act. When in removal proceedings, a petition for review is filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. *See* 8 U.S.C. § 1252 (Judicial review of orders of removal). In the applicant's case, removal proceedings have been completed. The present appeal before the AAO is not part of or a

continuation of the applicant's removal proceedings, but rather is an appeal of an application filed after the conclusion of the applicant's removal proceedings while the applicant resided abroad. In cases in which an applicant resides overseas, such as in the present case, the AAO applies the decisions of the Board of Immigration Appeals for uniformity and consistency in our decisions. Accordingly, in view of *Matter of E.W. Rodriguez*, in which the Board of Immigration Appeals held that section 212(h) relief is unavailable to any alien who has been convicted of an aggravated felony subsequent to acquiring lawful permanent resident status, regardless of the manner in which such status was acquired, the applicant in the instant case would be statutorily ineligible for relief under section 212(h) of the Act, if he were seeking such a waiver. 25 I&N Dec. 784, 787 (BIA 2012).

In the present application, however, the applicant is not seeking a waiver under section 212(h) of the Act and the applicant was not explicitly been found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude or for any other provision would require a waiver under section 212(h) of the Act. As the applicant is also inadmissible for alien smuggling, we need not address this further.

The applicant is seeking permission to reapply for admission into the United States after deportation or removal (Form I-212) as a result of his inadmissibility under section 212(a)(9)(A)(ii) of the Act. As an individual who has been convicted of an aggravated felony, the applicant must obtain permission to reapply for admission at any time after his removal from the United States. He may seek permission to reapply under section 212(a)(9)(A)(iii) regardless of his status as a former lawful permanent resident. Here, however, the applicant has also been found to be inadmissible under section 212(a)(6)(E) of the Act, which states, in relevant part:

(E) Smugglers

(i) In general. Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is inadmissible.

(ii) Special rule in the case of family reunification. Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized. For provision authorizing waiver of clause (i), see subsection (d)(11) of this section.

The applicant was found to be inadmissible under this section of the Act as a result of his

activities that form the basis of his September 3, 1999 conviction. The Act states that an individual is inadmissible if they “at any time knowingly ha[ve] encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.” The record indicates that the applicant “encouraged, induced, assisted, abetted, or aided” at least one individual to enter the United States in violation of the law. As a result, he is inadmissible under section 212(a)(6)(E) of the Act. The Act provides a limited waiver for this ground of inadmissibility.

Section 212(d)(11) States, in relevant part:

(11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) of this section in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 1181(b) of this title and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 1153(a) of this title (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of such action was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

The record does not indicate that the applicant is eligible for a section 212(d)(11) exception to a section 212(a)(6)(E)(i) of the Act. Thus, on this basis, the applicant remains inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964). As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the Field Office Director as a matter of discretion.

In application proceedings, the burden of proving eligibility remains entirely 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.