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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

FILE [redacted] Office: California Service Center Date: MAR 12 2003

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)

ON BEHALF OF APPLICANT: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who states that he was admitted to the United States in 1977 as a nonimmigrant visitor and remained longer than authorized. The applicant states that he was deported on September 23, 1978, but that evidence is not in the record. The applicant states that he unlawfully reentered the United States after two months. On August 14, 1981, the applicant was convicted of the offense of Possession of Marijuana (less than one ounce). Therefore, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II).

In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the Board of Immigration Appeals held that no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure....Although that conviction was vacated on November 9, 1983, the applicant remains convicted for immigration purposes.

The applicant was deported from the United States on April 11, 1980, 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 was present in the United States again without a lawful admission or parole two months later and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony).

The applicant states that after his third deportation in September 1981, also not present in the record for review, he remained in Nicaragua for three months and reentered the United States unlawfully on January 7, 1982.

The applicant is the beneficiary of an approved Petition for Alien Relative filed by his naturalized U.S. citizen mother. The applicant 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).

The director reviewed the applicant's arrest record and concluded that the applicant was inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as an illicit trafficker and under section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of more than 180 days.

Section 212(a)(2) of the Act states in pertinent part, that:

(A)(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.

(C) Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible.

Section 212(h) of the Act provides, in part, that:-The Secretary, Department of Homeland Security may, in his discretion, waive the application of subparagraph (A)(i)(I),...or 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 Secretary 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 Secretary 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 Secretary, 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.

On appeal, counsel states the finding that the applicant is inadmissible under section 212(a)(9)(B) of the Act is contrary to law because he only accrued 162 days of unlawful presence after April 1, 1997, and September 9, 1997, when he filed his application for adjustment of status.

The provisions of section 212(a)(9)(B) became effective on April 1, 1997. No one will have accrued 180 days of unlawful presence before September 27, 1997, and no one will have accrued 1 year of unlawful presence until April 1, 1998. Bureau officers should not consider any waiver application under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), filed by an alien who has not yet triggered the 3- or 10-year bar by departing the United States. Additionally, for the purposes of section 212(a)(9)(B) of the Act and for no other purpose or benefit, the Bureau has designated certain instances as periods of stay authorized by the Secretary, including a properly filed, affirmative application for adjustment of status under section 245 of the Act. The applicant also filed an application for adjustment of status on September 9, 1997, and he is not subject to the provisions of section 212(a)(9)(B).

Section 212(a)(9)(A) of the Act provides, in part, that:

> (i) 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.
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> (ii) Any alien not described in clause (i) who-
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> > (I) has been ordered removed under section 240 of the Act or any other provision of law, or
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> > (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.
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> (iii) 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.

Section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgements or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress's desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. *See Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). *See also Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1997).

On appeal, counsel states that the applicant's inadmissibility under section 212(a)(2)(C) of the Act is not supported by substantial evidence. Counsel asserts that the applicant was arrested but a criminal complaint was not filed by the District Attorney's Office.

The record reflects that the applicant was arrested on August 30, 1978, and on August 10, 1979, and charged with Sell or Transport of Marijuana in the United States. No complaint was filed, but the director had reason to believe that the applicant has been an illicit trafficker in a controlled substance.

In *United States v. Washington*, 586 F.2d 1147, 1153 (7th Cir. 1978), the court held that proof of possession of a small amount of a controlled substance, standing alone, is an insufficient basis from which an intent to distribute may be inferred. However, in that matter, the police arrest report specifically stated that the applicant actually sold a quantity of cocaine to a police officer. That overt action of actually selling a quantity of cocaine, whatever the amount, goes well beyond mere possession of a small amount. Such an action is sufficient, reasonable, substantial, and probative evidence to find the applicant is an alien for whom there is reason to believe is or has been an illicit trafficker in a controlled substance.

In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board of Immigration Appeals (the Board) held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act.

Although a complaint was not filed against the applicant as a result of his arrests in 1978 and 1979, it is incumbent upon him to provide a copy of the police report relating to each arrest to determine what actually happened and how he participated in the events. Absent this evidence, the AAO agrees with the director's finding that there is reason to believe he has been an illicit trafficker.

In *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), it was 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 relating to illicit trafficking, since he is mandatorily excludable from the United States under present sections 212(a)(2)(A)(i)(II) or 212(a)(2)(C) of the Act, and no purpose would be served in granting the application.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.