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**U.S. Citizenship  
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Services**

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H14

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: NOV 15 2005

IN RE:

Applicant:



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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) 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 Mexico who on October 14, 1994, was ordered deported by an Immigration Judge pursuant to sections 241(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act) for having been convicted of an aggravated felony, 241(a)(2)(B)(i) of the Act for violation of any law relating to a controlled substance, and 241(a)(1)(B) of the Act for having entered the United States without inspection. Consequently, on October 14, 1994, the applicant was removed from the United States. The record reflects that the applicant reentered the United States in May 1995 without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). On April 21, 1998, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and the applicant was removed to Mexico on April 29, 1998. The record further reflects that the applicant reentered the United States in August 1998 without a lawful admission or parole and without permission to reapply for admission. On October 21, 1999, in the United States District Court, District of Arizona, the applicant was convicted of the offense of re-entry after deportation pursuant to 8 U.S.C. § 1326(a)&(B)(2). The applicant was sentenced to 45 months imprisonment. On January 18, 2000, a Form I-871 was issued. On October 31, 2003, the applicant was granted a temporary stay of removal. On January 28, 2004, the applicant withdrew his request for a stay of removal, and the temporary order of removal was cancelled. On February 20, 2004, the applicant was removed from the United States pursuant to section 241(a)(5) of the Act. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 travel to the United States to reside with his U.S. citizen spouse and children.

The Director determined that section 241(a)(5) of the Act, applies in this matter and the applicant is not eligible for any relief or benefit from his Form I-212. The Director denied the Form I-212 accordingly. *See Director's Decision* dated November 1, 2004.

Section 241(a) detention, release, and removal or aliens ordered removed.-

(5) reinstatement of removal orders against aliens illegally reentering.- if the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

On appeal, the applicant's spouse submits a letter in which she states that even though the applicant has a criminal record he is a good person with good moral character and he truly regrets the mistakes he made in the past. In addition, the applicant's spouse states that the applicant has been residing in Mexico since February 2004 and that she and their three U.S. citizen children suffer from his absence. Finally, the applicant's spouse requests that the applicant be given another opportunity.

The AAO finds that the Director erred in finding that section 241(a)(5) of the Act applies in this case since the record of proceeding does not reflect that the applicant re-entered the United States after the reinstatement of his removal order and his removal on February 20, 2004. The applicant's spouse states that he lives in Mexico and there is no documentary evidence to show otherwise. Although the applicant is not subject to section 212(a)(5) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and therefore must receive permission to reapply for admission.

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

. . . .

(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 . . . [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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Before the AAO can adjudicate the appeal and weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for any relief under the Act. To recapitulate, the record reveals that the applicant has the following convictions:

November 14, 1990, in the Superior Court of the State of Arizona, in and for the County of Maricopa, the applicant was convicted of the offense of possession of marijuana in violation of Arizona Revised Statutes (A.R.S.) 13-3401, 3405, 701, 702, 707, 801, 802 and 812. The applicant was sentenced to three years probation that was revoked on January 13, 1994, and he was sentenced to one and one half years of imprisonment.

January 13, 1994, in the Superior Court of Arizona, Maricopa County, the applicant was convicted of the offense of attempted possession of narcotic drugs, to wit: cocaine, a class 5 felony in violation of A.R.S. 13-1001, 3408, 3401, 701, 702, 801, and 812. The applicant was sentenced to two years imprisonment.

Based on the above convictions the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

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

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(II) a violation of (or a conspiracy or attempt to violate) any law or regulations 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.

No waiver of the ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is available to an alien found inadmissible under this section except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception.

*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 who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

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. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.