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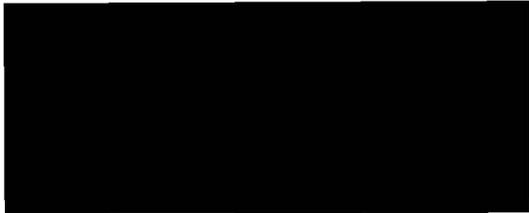
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date:

DEC 10 2001

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) 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, Vermont 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 Yugoslavia who was lawfully admitted to the United States on November 11, 1969. On January 7, 1984, the applicant married [REDACTED], in New York. On July 6, 1986, the applicant's son, [REDACTED] was born in New York. On November 4, 1987, the applicant's daughter, [REDACTED] was born in New York. On May 3, 1989, the applicant was convicted of criminal possession of a controlled substance in the seventh degree, a misdemeanor. On April 8, 1991, the applicant was convicted of forgery in the third degree, a misdemeanor. On July 24, 1991, the applicant was convicted of possession with intent to distribute cocaine. On November 19, 1992, the applicant's son [REDACTED] was born in New York. On May 12, 1995, an immigration judge ordered the applicant deported from the United States. On November 21, 1995, the applicant's wife became a United States citizen. On January 19, 1998, the applicant's son, [REDACTED], was born in New York. On January 11, 2003, the applicant was arrested for criminal possession of a controlled substance and unlawful possession of marijuana. On December 24, 2003, the applicant was removed from the United States. On November 22, 2004, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On March 14, 2005, the applicant's Form I-130 was approved. On March 29, 2007, the applicant was convicted of criminal possession of a controlled substance in the seventh degree, a misdemeanor, and unlawful possession of marijuana. The applicant is inadmissible to the United States under sections 212(a)(9)(A)(ii)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii); 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II); and 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C). 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 wife and four United States citizen children.

The Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II). Additionally, the applicant is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being convicted of a controlled substance trafficking offense, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating any law or regulation relating to a controlled substance.

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

(2) Criminal and related grounds

(A)(i) [A]ny 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...or an attempt or conspiracy to commit such a crime, or
- (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) Controlled substance traffickers.-

Any alien who the consular officer or the Attorney General [now, Secretary, Department of Homeland Security] knows or has reason to believe-

(i) is or has been an illicit trafficker in any controlled substance...

is inadmissible.

(9) Aliens previously removed.-

(A) Certain alien 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, 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' recmbarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the [Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On appeal, the applicant, through counsel, asserts that since the applicant's convictions are misdemeanors, he has not been convicted of aggravated felonies. However, under section 101(a)(43)(B) of the Act, illicit trafficking in a controlled substance is an aggravated felony. The applicant was convicted of possession with intent to distribute cocaine. Therefore, the applicant has been convicted of an aggravated felony. The fact that New York's legal taxonomy classifies the applicant's offense as a misdemeanor is simply not relevant to the fact that under United States immigration law, any conviction for illicit trafficking of a controlled substance is an aggravated felony.

In addition, counsel contends that the applicant is eligible for a waiver under 212(h) of the Act, because the convictions for which the applicant is inadmissible are from over fifteen years ago and the applicant has been rehabilitated. The AAO notes that while the majority of the applicant's convictions are from over fifteen years ago, he has drug convictions that are not waivable even with the passage of 15 years. In any event, on January 11, 2003, the applicant was arrested for criminal possession of a controlled substance and unlawful possession of marijuana, and on March 29, 2007, the applicant was convicted of criminal possession of a controlled substance in the seventh degree, a misdemeanor, and unlawful possession of marijuana. This conviction, in addition to being a drug offense, is less than 15 years ago.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) 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...(emphasis added.)

The AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for being in possession of a controlled substance and section 212(a)(C) of the Act, 8 U.S.C. § 1182(a)(C), for trafficking. To qualify for a waiver pursuant to section 212(h) of the Act, he must have been convicted of a single offense of simple possession of 30 grams or less of marijuana. Since the applicant was not convicted of a single offense of simple possession of 30 grams or less of marijuana, there is no waiver of the applicant's ground of inadmissibility. The applicant is inadmissible under sections 212(a)(2)(A)(i)(II) and (C) of the Act, and therefore, he is statutorily ineligible for a waiver of inadmissibility.

Additionally, eligibility for a waiver under section 212(h) is limited, in that:

....
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...

Since the applicant was convicted of an aggravated felony after he was lawfully admitted for permanent residence to the United States, this is an additional reason why he is ineligible for a waiver under section 212(h) of the Act.

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.

The applicant is subject to the provisions of section 212(h) of the Act. No waiver is available to an alien who has been convicted of drug related crimes or 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, therefore, 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. As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the Director.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he 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.