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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

AUG 07 2008

IN RE:

[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]

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 Director, Vermont Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Dominican Republic who, on April 13, 1994, was admitted to the United States as a lawful permanent resident. On February 3, 1999, the applicant pled guilty to and was convicted of possession of a controlled substance in the second degree, cocaine, in violation of section [REDACTED] of the New York Penal Code (NYPC) under the name [REDACTED]. The applicant was sentenced to three years to life in jail. On March 2, 2000, the applicant was paroled. On April 18, 2003, the applicant was discharged from probation. On September 24, 2005, the applicant attempted to enter the United States at the Philadelphia International Airport. The applicant presented his lawful permanent resident card, at which time it was determined that he might be inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), as an alien convicted of a violation of law related to a controlled substance. The applicant's inspection was deferred for further investigation of the relating criminal conviction. On October 14, 2005, the applicant was placed into proceedings after it was determined that the criminal conviction related to the applicant. On November 2, 2005, the immigration judge ordered the applicant removed from the United States. On November 30, 2005, the applicant was removed from the United States and was returned to the Dominican Republic, where he has since resided. On January 17, 2006, the applicant's U.S. citizen spouse, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on March 6, 2006. On March 15, 2006, [REDACTED] filed a Petition for Alien Fiancé (Form I-129F) on behalf of the applicant. On June 19, 2006, the applicant filed the Form I-212. On January 24, 2007, the Form I-129F was approved. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) as an alien removed from the United States. The applicant requests 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 in the United States with his U.S. citizen spouse, two U.S. citizen children and two U.S. citizen step-children.

The director found that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, as an alien convicted of a violation of law related to a controlled substance. The director determined that the applicant was statutorily ineligible for a waiver and denied the Form I-212 accordingly. *See Director's Decision* dated December 7, 2006.

On appeal, counsel contends that the director erred in denying the applicant's Form I-212. She contends that the director failed to consider relevant case law and did not permit submission of additional requested documentation. She also contends that the director made a decision that was not based on all the facts in evidence. *See Counsel's Brief*, dated January 24, 2007. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9)(A) 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — 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 —
 - (II) a violation of (or 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.

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

The Attorney General 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.]

Counsel contends that the Attorney General, pursuant to 8 U.S.C. § 1182(a)(9)(B)(v), has the power to waive the statute's general prohibition upon readmission to the United States for aliens subject to an order of removal. The AAO notes that counsel refers to the Secretary's (formerly Attorney General) power to waive an applicant's inadmissibility as an alien who has been unlawfully present in the United States for either more than 180 days or more than one year and is seeking admission to the United States either *within three or ten years of his or her last departure*. See INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B). Since the director did not find the applicant to be inadmissible pursuant to section 212(a)(9)(B) of the Act, counsel's assertions with regard to a waiver pursuant to section 212(a)(9)(B)(v) of the Act are not relevant to the applicant's case. Additionally, the section to which counsel refers does not pertain to inadmissibility stemming from an order of removal.

Counsel also contends that, because the applicant is seeking a nonimmigrant fiancée or K visa he may be considered for a waiver under section 212(d)(3) of the Act, 8 U.S.C. § 1182(d)(3), for his inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act. However, the regulations at 22 C.F.R. § 41.81 and 8 C.F.R. 212.7(a)(1) specifically provide that K visa applicants shall file the same inadmissibility waiver as immigrant visa applicants. 8 C.F.R. § 212.7(a)(1) (66 Fed. Reg. 42587, Aug. 14, 2001). The supplemental information published in the *Federal Register* along with the amendment to 212.7(a)(1) states, in pertinent part:

Although the new K-3/K-4 is a nonimmigrant classification, the alien spouse will still be required to meet certain State Department requirements and regulations as though they [sic] were applying for an immigrant visa. . . . Although entering as nonimmigrants, these aliens plan to ultimately stay in the United States permanently. . . . [A]pplicants for the new K-3/K-4 classification are subject to section 212(a)(9)(B) of the Act. . . . [I]n order to ensure that the K-3/K-4 nonimmigrants have the opportunity to apply for the same waiver provisions as do the K1/K-2's, 8 C.F.R. 212.7 is amended to include them.

66 Fed. Reg. 42587 (August 14, 2001). The visa and waiver application process established by regulation ensures that the Department of Homeland Security will not admit to the United States, even temporarily, an individual who is ineligible to fulfill the purpose of his or her admission. Further, the immigration process for eligible individuals is streamlined. Since under 8 C.F.R. § 212.7(a)(4) the waiver of inadmissibility is valid indefinitely, the alien's eventual application for adjustment of status will be adjudicated in the United States in light of the already-approved waiver of any identified grounds of inadmissibility.

While the above noted regulations refer to a Form I-601, the same principle also applies to the applicant's Form I-212. The AAO, therefore, finds that the applicant must apply for waivers as an immigrant applicant pursuant to sections 212(h) and 212(a)(9)(A)(iii) of the Act.

The Act makes it clear that a section 212(h) waiver is available only for controlled substance convictions that involve a single offense of *possession* of 30 grams or less of *marijuana*. In this case, the applicant was convicted of possession of a controlled substance, cocaine, and is ineligible for waiver consideration.

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(a)(2)(A)(i)(II) of the Act, which are very specific and applicable. No waiver is available to an alien who has been convicted of more than simple possession of marijuana in an amount less than 30 grams. 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 mandatorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.