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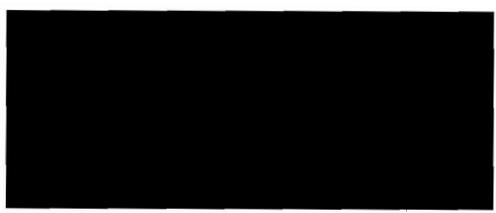
U.S. Department of Homeland Security
20 Massachusetts Avenue, N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:  Office: EL PASO, TEXAS Date: **JUL 29 2008**

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: 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, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, El Paso, Texas, 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 was granted lawful permanent resident status on August 30, 1990. On August 18, 1991, the applicant applied for admission to the United States, and during secondary inspection, 30.5 pounds of marijuana were discovered concealed in the applicant's vehicle. On August 21, 1991, the applicant was convicted of unlawful possession of marijuana. On December 7, 1998, the applicant's criminal case was dismissed in the interest of justice. On June 26, 1999, a Notice to Appear (NTA) was issued against the applicant. On July 27, 1999, an immigration judge ordered the applicant removed from the United States and a Warrant of Removal/Deportation (Form I-205) was issued. On the same day, the applicant was removed from the United States. 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)(I); 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).

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(I), for being ordered removed under section 240 or any other provision of law, section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being an illicit trafficker in any controlled substance, 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. The District Director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *District Director's Decision*, dated October 19, 2006.

Section 212(a)(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' reembarkation 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.

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

(A) Conviction of certain crimes. -

(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.

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 notes that the applicant provided documentation establishing that his conviction for unlawful possession of marijuana was dismissed in the interest of justice on December 7, 1998; however, he has still been convicted of a crime for immigration purposes. Section 101(a)(48) of the Act states that when an alien

enters a plea of guilty, or is found guilty, and a formal judgment of guilt is entered by a court, where a judge has ordered some form of punishment, penalty, or restraint on the alien's liberty, there has been a conviction for immigration purposes. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), the Board of Immigration Appeals (Board) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, i.e., in the interest of justice, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). The AAO finds that even though the applicant's conviction for unlawful possession of marijuana was dismissed in the interest of justice, the applicant has still be convicted of a crime, and he is clearly inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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 violating any law relating to a controlled substance. In order for the applicant to qualify for a waiver pursuant to section 212(h) of the Act, he must have been convicted of only 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 pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(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...

The AAO notes that under section 101(a)(43)(B) of the Act, illicit trafficking in a controlled substance is an aggravated felony. Since the applicant was convicted of an aggravated felony after he was lawfully admitted for permanent residence to the United States, he is ineligible for a waiver under section 212(h) of the Act. Additionally, the applicant is statutorily ineligible for relief under section 212(h) based on his controlled substance conviction.

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 District 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.