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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: ST. PAUL, MN

Date: JUN 27 2008

IN RE:



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:



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 Field Office Director, St. Paul, Minnesota, 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 Mexico. On May 11, 1992, the applicant's lawful permanent resident father filed a Petition for Alien Relative (Form I-130) on his behalf. The Form I-130 was approved on July 9, 1992. On April 5, 1992, immigration officers apprehended the applicant at Sierra Blanca, Texas, as he was attempting to depart the United States after he had entered without inspection. The applicant was issued a Notice of Action (Form I-210) indicating that he was permitted to voluntarily depart the United States by April 7, 1992. The applicant reentered the United States (by making a false claim to U.S. citizenship) on an unknown date, but prior to January 11, 1996, the date on which he filed an Application for Voluntary Departure Under the Family Unity Program (Form I-817). The applicant was granted voluntary departure from February 8, 1996 until February 7, 1998 and September 15, 1998, until September 14, 2000, under the family unity program. On September 18, 2000, the applicant pled guilty to and was convicted of possession of methamphetamines in violation of section 124.401(5) of the Iowa Code (IC). The applicant was sentenced to one year of probation¹. On September 4, 2002, the applicant's probation was revoked. On March 18, 2003, the applicant's third Form I-817 was denied. On January 31, 2005 the applicant was placed into proceedings. On February 10, 2005, the immigration judge ordered the applicant removed from the United States. On February 16, 2005, the applicant was removed from the United States and was returned to Mexico, where he has since resided. On December 12, 2006, the applicant filed the Form I-212. 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 lawful permanent resident father.

The field office director found that the applicant was 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 field office director determined that the applicant was statutorily ineligible for a waiver and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated February 27, 2007.

On appeal, counsel contends that the applicant's conviction qualifies for federal first offenders treatment and his conviction does not disqualify him for permission to reapply for admission. *See Counsel's Brief*, dated April 24, 2007. In support of his 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.-

¹ The applicant's conviction is evidenced by an FBI fingerprint inquiry. This fingerprint inquiry indicates that the applicant has been arrested and charged with a number of crimes. The fingerprint inquiry does not show the outcome of all of the criminal charges filed against the applicant, but it does indicate that the applicant was convicted of possession of a controlled substance on September 18, 2000, in connection with a charge of possession of methamphetamines. On August 12, 2002, Citizenship and Immigration Services (CIS) requested the applicant file additional evidence in association with his Form I-817, including his conviction records. However, to this date, the applicant has failed to provide his conviction records.

- (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.]

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Counsel contends that the reasoning set forth in the Ninth Circuit Court of Appeals (Ninth Circuit) decision, *Lujan-Armendariz v. INS*, 222 F.3d 740 (9th Cir. 2000), should be applied in the applicant’s case because the applicant’s 2000 guilty plea was to a charge of simple possession of methamphetamine and it was his first and only drug conviction. The Ninth Circuit Court of Appeals stated in *Lujan* that “if (a) person’s crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation.” *Id.* at 738.

However, the limited FFOA exception discussed in *Lujan* applies only to cases arising within the jurisdiction of the Ninth Circuit. The applicant’s case is within the jurisdiction of the Eighth Circuit Court of Appeals. In cases arising outside the Ninth Circuit, a state expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for FFOA treatment. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002); *see also Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999). Moreover, the record does not contain evidence to establish that the applicant’s conviction was expunged under Iowa law. Counsel’s contention that the reasoning set forth in *Lujan* should be applied to the applicant’s case is unpersuasive in light of the above precedent decisions and law.

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of a controlled substance, methamphetamine.

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 methamphetamine 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 statutorily inadmissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.