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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER, CA Date:

IN RE: Applicant: [redacted]

MAR 01 2004

APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(ii)

ON BEHALF OF APPLICANT:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 after removal 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. On April 2, 1996 in the superior Court of the State of California, County of San Diego, the applicant was convicted of possession for Sale of a Controlled Substance (cocaine). The record shows that the applicant was granted lawful permanent resident status as of December 1, 1990. On January 20, 1998 the applicant was removed from the United States at the Calexico California Port of Entry under section 237(a) of the Immigration and Nationality Act (the Act). In addition, the record reflects that the applicant reentered the United States sometime prior to February 14, 2001, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). On February 14, 2001, his deportation order was reinstated pursuant to section 241(a)(5) of the Act and the applicant was again removed to Mexico. The applicant is inadmissible to the United States because he falls within the purview of section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) and section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 spouse and stepchild.

The director determined that the applicant is not eligible for any relief or benefit from this application and denied the application accordingly. *See Director Decision* dated June 20, 2003.

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.

A review of the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping

aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel asserts that CIS erred in denying the application because the applicant intends to expunge or otherwise vacate his conviction and his numerous equities and hardships weight in favor of his application and because he is eligible for relief under the *St. Cyr case [sic]*. No additional documentation or brief has been submitted as of this date.

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-
>
> > (I) a crime involving moral turpitude (other than a purely political offense) 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 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.

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

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D) and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relate to a single offense of simple possession of 30 grams of less of marijuana if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
>
> > (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or
> >
> > (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

> (2) The Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment o status....

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 or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien form the United States. No court shall have jurisdiction to review a decision of the Attorney General [Secretary] to grant or deny a waiver under this subsection.

Section 101(a)(43) defines the term aggravated felony and states:

> The term "aggravated felony" means-
>
> > (B) Illicit trafficking in a controlled substance (as described in section 102 of the Controlled Substance Act), including a drug trafficking crime (as defined in Section 942(C) of Title 18, United States Code):

Based on the circumstances surrounding the applicant's conviction and the quantity of the controlled substance involved, CIS has reasonable grounds to believe that the applicant was involved in the trafficking of a controlled substance. Thus, the applicant's conviction for Possession for Sale of Controlled Substance is an aggravated felony for immigration purposes. In addition, the director found him excludable under Section 212(a)(2) of the Act.

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

> (C) Controlled substance traffickers.-
>
> any aliens who the consular officer of the Attorney General knows or has reasons to believe-
>
> > (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (ad defined is section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with other in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to dot so.....is inadmissible.

On appeal, counsel argues that the applicant is entitled to seek relief under *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (June 25, 2001). *INS v. St. Cyr*, supra, decision is distinguishable from the case at hand in both the law and the facts. First, the Supreme Court decision specifically addressed the application of section 212(c) of the Act, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The Supreme Court determined that the ultimate repeal of section 212(c) was not retroactive and that section 212(c) relief remains available to those aliens that entered into plea agreements prior to the repeal. The current matter is based on an application for relief under section 212(a)(9)(A)(iii) of the Act, which was made more restrictive by IIRIRA. *INS v. St. Cyr, supra,* specifically relates to the settled expectations of individual aliens who enter

into plea agreements with the government. As there is no evidence that the applicant in the current matter plead guilty as a result of a plea bargain, the reasoning of *St. Cyr* is not applicable to the case at hand.

Notwithstanding the arguments on the appeal section 212(a)(2)(A)(i)(II) of the Act is very specific and applicable. 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. 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. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.