U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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

IN RE: Applicant: [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, 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 who on November 22, 1996, was convicted in the Superior Court of Arizona, Maricopa County, for the offense of conspiracy to possess dangerous drugs for sale, to wit: metahmphetamine in violation of Arizona Revised Statutes (A.R.S.) 13-1003, 3401, 3407, 3418, 7101, 702 and 801 and was sentenced to five years imprisonment. Consequently, on March 11, 1998, the applicant was removed from the United States pursuant to sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act). The applicant is inadmissible to the United States because he falls within the purview of sections 212(a)(2)(A)(i)(II), 212(a)(2)(C) and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(C), and 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 and reside with his family.

The Director determined that the applicant is not eligible for any exception or waiver of the Act and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated February 4, 2004.

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-
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> (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 states that the applicant's previous attorney, who was disbarred on May 23, 2000, forced him to plea guilty. In addition counsel submits a decision from the Superior Court of Arizona, Maricopa County, vacating the judgment of guilt, dismissing the charges and restoring the applicant's civil rights. Based on the above counsel requests that the appeal be granted.

Before the AAO can adjudicate the appeal it must be determined if the applicant is considered convicted for immigration purposes. Notwithstanding the court's decision to vacate the applicant's offense, he was convicted of conspiracy to possess dangerous drugs for sale. 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 Appeal (BIA) 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, the respondent remains "convicted" for immigration purposes. *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003).

In the present case the applicant applied for relief under A.R.S. 13-905, Restoration of Civil Rights; Persons Completing Probation and 13-912, Restoration of Civil Rights for First Offenders. Based on the above the AAO finds that the court's decision to vacate the applicant's conviction was not based on a defect in the conviction or in the proceedings underlying the conviction. Thus this office finds that the applicant has a "conviction" for conspiracy to possess dangerous drugs for sale within the meaning of section 101(a)(48)(A) of the Act and therefore his is inadmissible under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act.

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-
>
> . . . .
>
> > (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.

Based on the circumstances surrounding the applicant's conviction and the quantity of the controlled substance the Director found that the applicant was involved in the trafficking of a controlled substance and he is inadmissible under Section 212(a)(2)(C) 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 do so.....is inadmissible.

In the instant case the applicant's inadmissibility is an aggravated felony for immigration purposes.

Section 101(a)(43) of the Act defines the term "aggravated felony":

> (B) illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)

Section 212(h) of the Act provides, in pertinent part, 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 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 from the United States.

The record reflects that the applicant was granted lawful permanent resident status on November 20, 1974. Since the applicant was previously admitted for lawful permanent residence and he has been convicted of an aggravated felony no waiver is available to him 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.

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.