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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 27 2007

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, California 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 Mexico who, on August 18, 1977, was placed into proceedings after he attempted to enter the United States by making a false claim to U.S. citizenship. On August 31, 1977, the applicant was removed from the United States and returned to Mexico under the name "[redacted]". On May 28, 1981, the applicant was placed into proceedings after he entered the United States without inspection. On June 26, 1981, the applicant was removed from the United States and returned to Mexico. On May 26, 1993, the applicant pled guilty to and was convicted of sale of a controlled substance, cocaine base, in violation of section 11352(a) of the California Health and Safety Code (CHSC). The applicant was sentenced to three years in jail. On January 6, 1998, a Notice of Intent/Decision to Reinstate Prior Order was issued to the applicant. On January 6, 1998, the applicant was removed from the United States and returned to Mexico. On July 13, 1999, a second a Notice of Intent/Decision to Reinstate Prior Order was issued to the applicant after he had reentered the United States without inspection. On August 18, 2001, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On October 9, 2001, the applicant filed the Form I-212. On April 3, 2006, the Form I-130 was approved. The applicant is inadmissible pursuant to section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A) as an alien convicted of an aggravated felony who seeks admission to the United States after being ordered removed. 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 and son.

The director found that the applicant was inadmissible pursuant to section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), for reentering the United States without being admitted after having been removed. The director determined that the applicant was statutorily ineligible for a waiver pursuant to section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii) because it had been less than ten years since the applicant's last departure from the United States. The director denied the Form I-212 accordingly. *See Director's Decision* dated September 16, 2003.

On appeal, counsel contends that the reasons set forth for denial of the applicant's Form I-212 are in error and the application should be approved. Counsel contends that the applicant was wrongly removed from the United States in January 1998. Counsel contends that the crimes attributed to the applicant were committed by another person. *See Form I-290B and Attachment,* dated October 15, 2003. The Form I-290B indicated that counsel would submit a separate brief or evidence on appeal within 30 days. On December 10, 2007, the AAO informed counsel that he had five days in which to submit additional documentation to support the appeal. As of this date, counsel has not provided a brief and/or additional evidence to support the appeal. The record is, therefore, considered complete.

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. [emphasis added]

Section 101(43) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

. . . .

(B) illicit trafficking in a controlled substance . . .

Counsel asserts that the applicant did not commit the crimes attributed to him and that the conviction record reflects that the person who committed the crime was named "Jorge Antonio Morales" and had a date of birth different from the applicant's. Counsel's assertions are unpersuasive. A fingerprint-based Federal Bureau of Investigations (FBI) inquiry reflects that the applicant was convicted of sale of a controlled substance as detailed above. Moreover, the FBI inquiry reflects that the applicant has been convicted of various crimes and has been removed from the United States under several different aliases and various dates of birth.

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.)

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 sale of a controlled substance, cocaine base, a violation related to a controlled substance.

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 sale of a controlled substance, cocaine base, i.e., trafficking, and is ineligible for waiver consideration.

Section 212(a)(2)(C) provides:

> CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--
>
> (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in 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 others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so
>
> . . . . .
>
> is inadmissible

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, for having been convicted of sale of a controlled substance, cocaine base, under section 11352(a) of the CHSC, a violation reflecting involvement in the illicit trafficking of a controlled substance. No waiver is available to individuals found inadmissible under section 212(a)(2)(C) 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.

The applicant is subject to the provisions of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) 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. No waiver is available to an alien who is a trafficker in any controlled substance. 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.