U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

#4

[redacted]

FILE: [redacted] Office: SAN DIEGO, CA Date: DEC 03 2009
; AND
RELATE)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, California, 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 March 23, 1996, appeared at the San Ysidro, California port of entry. The applicant presented a photo altered Mexican passport containing a U.S. nonimmigrant visa bearing the name [redacted]" The applicant was referred to secondary inspection. The applicant admitted that she was not the true owner of the document and that she did not have valid documentation to enter the United States. The applicant failed to provide her true identity to immigration officers. On the same day, the applicant was placed into immigration proceedings. On March 28, 1996, the immigration judge ordered the applicant removed from the United States under the name "[redacted]" On March 28, 1996, the applicant was removed from the United States and returned to Mexico.

On February 12, 2000, the applicant married her U.S. citizen spouse in San Bernardino, California. On July 26, 2000, the applicant was arrested for possession of a controlled substance for sale. On October 24, 2000, the charges against the applicant were amended to reflect a violation of section 11366.5(a) of the California Health and Safety Code. On the same day, the applicant pled guilty to and was convicted of rent/etc. for storage/sale/etc. of a controlled substance in violation of section 11366.5(a) of the California Health and Safety Code. The charge of possession of a controlled substance for sale was dismissed. The applicant was sentenced to thirty-six months of probation and sixty days in jail.

On September 18, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen spouse. On August 10, 2004, the Form I-485 was denied. On August 3, 2007, the applicant filed the Form I-212 indicating that she continued to reside in the United States. The applicant is inadmissible indefinitely 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). 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 her U.S. citizen spouse and two U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated May 13, 2009.

On appeal, counsel contends that the applicant was not convicted of an aggravated felony. Counsel contends that the district director should have granted the applicant's application for permission to reapply for admission due to the hardship to her U.S. citizen husband and U.S. citizen children, one of whom suffers greatly from anger outbursts and who is currently under medical and psychological therapy. *See Counsel's Brief,* dated June 10, 2009. In support of his contentions, counsel submits the referenced brief, copies of medical and psychological documentation, copies of financial documentation and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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 on a 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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission. [Emphasis added]

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to

be readmitted from a foreign contiguous territory, the [Secretary] has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

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

(43) The term "aggravated felony" means-

. . . .

(B) illicit trafficking in a controlled substance . . . including a drug trafficking crime . . .

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.)

On appeal, counsel contends that the applicant's conviction is not an aggravated felony. Counsel fails to cite to any case law to support his argument. Counsel contends that, because section 11366.5(a) is a divisible statute, the applicant is eligible to adjust status to a lawful permanent resident since her conviction did not exceed imprisonment in excess of six months. Counsel cites to section 212(a)(ii)(II) of the Act to support his contention; however the section to which counsel cites does not exist.

Counsel contends that the applicant's conviction was not a crime of violence because she was not sentenced to a term of imprisonment of at least one year. The AAO notes that the district director did not find the applicant to have been convicted of a crime of violence as described under section 101(a)(43)(F) of the Act and counsel's contention is thus irrelevant.

Counsel contends that the applicant's conviction does not fall under the enumerated grounds of a controlled substance as described under section 101(a)(43)(B) of the Act. Counsel contends that the applicant's conviction is not an aggravated felony because she was sentenced to sixty days in jail but only spent one night in jail due to the nature of the offense. The AAO finds counsel's contentions to be unpersuasive.

21 U.S.C. § 856(a) provides, in pertinent part, that:

> . . . it is unlawful to . . .
>
> (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

The record reflects that the applicant pled guilty to and was convicted of a violation of section 11366.5(a) of the California Health and Safety Code. Section 11366.5 of the California Health and Safety Code provides, in pertinent part, that:

> (a) Any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, who knowingly rents, leases, or makes available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, storing, or distributing any controlled substance for sale or distribution shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

Even though the statute under which the applicant was convicted is a divisible statute and encompasses a range of conduct, divisibility does not inherently mean that the statute under which the applicant was convicted is not an "aggravated felony." A state offense is an aggravated felony for immigration purposes if it would be punishable as a felony under federal drug laws, or if it contains a trafficking element. *Cazarez-Gutirrez v. Ashcroft,* 382 F. 3d 905, 912 (9th Cir. 2004). In determining whether a conviction is an aggravated felony under the Act, we apply the two-step test set forth in *Taylor v. United States,* 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). The AAO must look to the statute under which the person was convicted and compare its elements to the relevant definition of an aggravated felony in 8 U.S.C. § 1101(a)(43). An offense qualifies as an aggravated felony, if and only if, the full range of conduct covered by the statute of conviction falls within the meaning of that terminology. If the statute of conviction reaches both conduct that would constitute an aggravated felony and conduct that would not, a "modified categorical approach" is required. *See United States v. Corona-Sanchez,* 291 F. 3d 1201, 1211 (9th Cir. 2002).

The AAO finds that the full range of conduct covered by section 11366.5(a) falls within the meaning of 21 U.S.C. § 856(a)(2). In fact, conduct within the meaning of 21 U.S.C. § 856(a)(2) is more broad than the conduct found in section 11366.5(a) of the California Health and Safety Code. While counsel contends that the period of time the applicant served in jail is relevant to whether the crime is an aggravated felony, section 101(a)(43)(B) of the Act does not require a minimum sentence for a finding that a crime is an aggravated felony under this section. As such, the applicant's conviction is an aggravated felony.

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 rent/etc. for storage/sale/etc. of a controlled substance, a crime related to a controlled substance.

The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a crime related to a controlled substance which is more than simple possession of 30g of marijuana. In this case, the applicant was convicted of more than simple possession of 30g or less of marijuana. The applicant is, therefore, 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 also finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, because her conviction for rent/etc. for storage/sale/etc. of a controlled substance, gives us reason to believe that the applicant has been involved in the illicit trafficking of a controlled substance. The AAO notes that section 11366.5(a) requires that the building, room, space, or enclosure managed or controlled by the applicant was used for unlawfully manufacturing, storing or distributing "any controlled substance for sale or distribution." The AAO notes that, even if the applicant's conviction was not a "drug trafficking crime" as required for a finding that the conviction is an aggravated felony, section 212(a)(2)(C) of the Act does not require a conviction. The evidence in the record reflects that there is sufficient evidence to reasonably believe that the applicant has been involved in 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 statutorily 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 a crime related to the controlled substance if the crime is for more than simple possession of 30g or less of marijuana. No waiver is available for 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 as a matter of discretion.

ORDER: The appeal is dismissed.