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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
*Administrative Appeals Office*
20 Massachusetts Avenue, N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

DATE: NOV 22 2011 OFFICE: CIUDAD JUAREZ FILE: [redacted]

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The Form I-601, Application for Waiver of Ground of Inadmissibility, was denied by the Field Office Director, Ciudad Juarez, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action consistent with this decision.

The applicant is a native and citizen of Mexico. He was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for admitting to having committed a crime involving a controlled substance. The applicant was also found to be inadmissible under section 212(a)(9)(B)(i)(II) of Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the U.S. for more than a year, and applying for readmission within 10 years of his last departure. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant seeks a waiver of his inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(i), so that he may live in the United States with his spouse.

In a decision dated March 12, 2009, the director determined the applicant was ineligible to apply for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), because he had admitted to committing a crime involving a controlled substance. The waiver application was denied accordingly.

The applicant asserts on appeal that the director erroneously found him to be statutorily inadmissible under section 212(a)(2)(A)(i)(II) of the Act for admitting to commission of a controlled substance related crime. He does not contest his inadmissibility for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. The applicant indicates that his U.S. citizen wife will experience extreme hardship if he is denied admission into the U.S. and that he is eligible for a section 212(a)(9)(B)(v) of the Act waiver of inadmissibility. In support of these assertions the record contains affidavits written by the applicant's wife, documentation relating to his wife and his stepdaughter's physical and emotional health, financial information, country conditions information for Mexico, photos, and affidavits attesting to the applicant's good character. The entire record was reviewed and considered in rendering a decision on the appeal

Section 212(a)(2)(A)(i)(II) of the Act provides in pertinent part that:

> (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 . . . 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. (Emphasis added.)

Section 212(h) of the Act, 8 U.S.C. §182(h) allows for a waiver of certain section 212(a)(2)(A)(i) offenses, however, inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is not covered by

the section 212(h) of the Act waiver. An alien found to be inadmissible under this provision is thus statutorily ineligible for a waiver of inadmissibility.

The Board of Immigration Appeals (BIA) held in *Matter of K-*, 7 I&N Dec. 594 (BIA 1957) ,that, in order for an admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission, and; 3) the admission must have been voluntary.

In the present matter, the record contains [redacted] police report information reflecting the applicant was arrested on August 3, 2003. He was advised of his rights and charged with a Class 4 felony, Section 13-3408 narcotic drug violation after he told police that a substance found in his possession was cocaine. Subsequent lab analysis results confirmed the substance was cocaine.

In addition to the police report and lab analysis information contained in the record, the record contains a Superior Court Order signed by a judge on February 22, 2005, reflecting that the charges against the applicant were dismissed based on successful completion of the Maricopa [redacted] Attorney/TASC (Treatment Assessment Screening Center) Drug Diversion Program. The record contains a March 7, 2005 letter from the Maricopa County Public Defender reflecting there are no further court dates in this matter, that the applicant no longer has a felony charge against him, and that the charges cannot be re-filed against him at a later date. The record additionally contains a January 24, 2008, Police Clearance letter from the [redacted] police department stating the department has no record of contact with the applicant.

Section 13-3408 of the Arizona Revised Statutes, Title 13, Criminal Code provides in pertinent part:

> *Possession, use, administration, acquisition, sale, manufacture or transportation of narcotic drugs: classification*
>
> A. A person shall not knowingly:
> 1. Possess or use a narcotic drug....
>
> B. A person who violates:
> 1. Subsection A, paragraph 1 of this section is guilty of a class 4 felony.

Arizona Revised Statutes section 11-365 provides in pertinent part:

> *Diversion and deferred prosecution of offenders*
>
> The county attorney has sole discretion to decide whether to divert or defer prosecution of an offender....

An offender in the drug diversion program is placed into treatment, usually at the court pre-filing stage, and the offender is not prosecuted if s/he successfully completes the program. *See* [redacted]

In the present matter, the record contains no evidence to indicate that police provided the applicant with the definition and essential elements of the offense he was arrested for, or that he admitted to committing the essential elements of the narcotic drug offense he was arrested for. There is no signed statement from the applicant himself regarding the matter, and no other evidence of the applicant's voluntary admission to possession of cocaine. Rather, it appears the director's section 212(a)(2)(A)(i)(II) of the Act inadmissibility finding was based on police report information indicating the applicant told the police he possessed cocaine. The third-party police report information is insufficient to establish that the applicant admitted to the essential elements of a crime relating to a controlled substance, as there is no evidence he was provided with the definition and essential elements of the crime prior to making the admission.

The record also fails to establish that the applicant was convicted of a crime involving moral turpitude. Section 101(a)(48)(A) provides that:

> [T]he term "conviction" means, with respect to an alien, 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.

There is no evidence that a judge or jury found the applicant guilty of a controlled substance offense in the present matter, nor is there evidence that the applicant entered a plea of guilt or nolo contendere for a crime relating to a controlled substance. We are unaware of any precedent for applying the restrictions on admissions from *Matter of K*, to the requirement that an alien admit "sufficient facts to warrant a finding of guilt" for a finding of a conviction under section 101(a)(48)(A) of the Act, but we need not resolve this issue as another element of section 101(a)(48)(A) has not been satisfied. The applicant's placement in the Maricopa County Drug Diversion Program was a restraint on his liberty that could satisfy the second prong of section 101(a)(48)(A) of the Act. However, section 101(a)(48)(A)(ii) requires that a judge order the restraint on the applicant's liberty, a requirement not met in this case. The applicant was therefore not convicted of a crime involving moral turpitude.

Because the applicant did not admit to committing a controlled substance violation, or admit to committing the essential elements of a controlled substance violation, in accordance with the

limitation on admissions imposed by the BIA, and he also was not convicted of such a violation, he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The record does reflect, however, that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. Section 212(a)(9)(B)(i) of the Act provides in pertinent part that any alien who:

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The applicant does not contest his inadmissibility under section 212(a)(9)(B)(i)(II) of the Act. Moreover, the applicant stated on two Form G-325, Biographic Information forms contained in the record that he entered the U.S. without inspection in February 1999, and that he remained in the U.S. until December 2007. The applicant accrued unlawful presence for over eight years, from February 1999 through December 2007. He is therefore inadmissible under section 212(a)(9)(B)(i)(II).

Because the director's decision found the applicant to be statutorily ineligible for a waiver of inadmissibility, the decision did not address or analyze the applicant's waiver of inadmissibility claim. Accordingly, the case will be remanded to the director for issuance of a new decision addressing the merits of the applicant's waiver application. If the director's decision is adverse to the applicant, the decision shall be certified to the AAO for review in accordance with the requirements found at 8 C.F.R. § 103.4.

**ORDER:** The case is remanded to the director for further action consistent with this decision.