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U.S. Citizenship  
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Services

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FILE:

Office: ATLANTA, GA

Date:

MAR 16 2007

IN RE:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Atlanta, Georgia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Honduras who was found to be inadmissible to the United States under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A), for having been previously removed from the United States. He was also found to be subject to the provisions of section 241(a)(5) of the Act. The applicant is married to a United States citizen and has two U.S. citizen children. The applicant seeks a waiver in order to remain in the United States with his spouse and children.

The district director concluded that the applicant was subject to reinstatement of his prior order of removal under section 241(a)(5) of the Act and no relief was, therefore, available. *Decision of the District Director*, dated April 26, 2005.

On appeal, counsel states that the applicant is admissible because the applicant obtained consent from the U.S. Consulate in Honduras to re-enter the United States. *Form I-290B*, received May 26, 2005.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering.-If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The AAO notes that the record establishes that the applicant was admitted to the United States on July 18, 1999 as a non-immigrant visitor. Section 241(a)(5) of the Act relates to aliens who reenter the United States illegally. There is no indication in the record that the applicant's visa was not valid.<sup>1</sup> The district director, therefore, erred in finding the subject to the reinstatement provisions of section 241(a)(5) of the Act.

The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

A review of the record indicates that the applicant is inadmissible under section 212(a)(2)(A)(i) of the Act for being convicted of a crime relating to a controlled substance. The record reflects that on December 17, 1991,

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<sup>1</sup> The AAO notes, as discussed below, that the applicant was convicted of a crime involving a controlled substance. It is not clear from the record whether this information, or information regarding his removal, was addressed in his application for the visa, so he may be inadmissible under section 212(a)(6)(C) for misrepresentation of a material fact. However, this ground of inadmissibility is not relevant as he is inadmissible under another ground without benefit of a waiver.

the applicant was convicted in Oregon of Delivery of a Controlled Substance, Schedule I, to wit: Heroin, in violation of ORS 475.992. He was removed from the United States on February 16, 1992.

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 —
      - (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 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 applicant is clearly inadmissible under Section 212(a)(2)(A)(i)(II) of the Act for having been convicted of crime relating to a controlled substance, heroin. There is no waiver in the Act for this ground of inadmissibility.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen wife and/or children or whether he merits a waiver as a matter of discretion.

In a separate decision the director denied the applicant's application for permission to reapply for admission (Form I-212) for the same reasons stated in the decision on the Form I-601. While, as discussed above, the applicant is not subject to reinstatement, the director correctly found the applicant subject to section 212(a)(9)(A) due to his removal from the United States.<sup>2</sup> Though he was granted a visitor's visa, there is no indication in the record that he was granted permission to reapply for admission prior to his reentry.

<sup>2</sup> Counsel's assertion that the issuance of the visa by the U.S. Department of State constitutes the consent of the U.S. Attorney General is not persuasive. The Department of State and the U.S. Attorney General (now, Secretary,

*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.

As the applicant is statutorily inadmissible to the United States and is not eligible for a waiver, the applicant's Form I-212 was properly denied.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

**ORDER:** The appeal is dismissed.

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Department of Homeland Security) have always been separate entities. The applicant's removal order specifically noted that as he had been convicted of an aggravated felony he could not reenter the United States within 20 years of his removal without the consent of the Attorney General. As previously noted, there is no indication that the embassy in Honduras was aware of his previous removal at the time the visa was issued, or that he had received consent from the Attorney General prior to his reentry.