

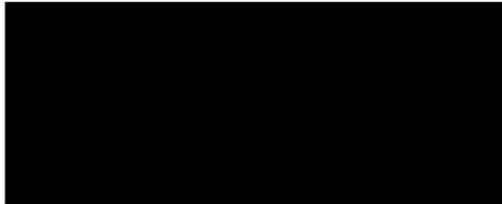
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**U.S. Citizenship  
and Immigration  
Services**

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FILE: 

Office: SAN ANTONIO, TEXAS

Date: **MAY 11 2006**

IN RE: Applicant: 

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: SELF-REPRESENTED

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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, San Antonio, Texas and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who was admitted to the United States as a Lawful Permanent Resident (LPR) on July 7, 1981. On October 27, 2000, in the 187<sup>th</sup> Judicial District Court of Bexar County, State of Texas, the applicant was convicted of the offense of Driving While Intoxicated (DWI) 3<sup>rd</sup>. The applicant was sentenced to six years imprisonment. The imposition of the sentence was suspended and the applicant was put on community supervision for a period of six years. The applicant was placed in removal proceedings and on February 22, 2001, an immigration judge ordered him removed to Mexico pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony at any time after admission. Consequently, the applicant was removed from the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 U.S. citizen spouse and children.

The District Director determined that the applicant did not submit English translations with the documents, as required pursuant to 8 C.F.R. § 103.2(b)(3), and denied the Form I-212 accordingly. *See District Director's Decision* dated August 18, 2004.

On appeal, the applicant resubmits all the documentation with certified English translations. As requested by the District Director the applicant submits proof of his residence in Mexico since the date of his removal.

In *United States v. Chapa-Garza* 243 F.3d 921 (5<sup>th</sup> Cir. 2001) the Fifth Circuit Court of Appeals ruled that a conviction for driving while intoxicated is not a "crime of violence" under 18 U.S.C. § 16 and hence is not an "aggravated felony" under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Since this case arises in the Fifth Circuit, *Chapa-Garza, supra*, is controlling. The applicant's conviction is no longer an aggravated felony.

The AAO notes that the applicant was deported based on an aggravated felony charge. This office does not have jurisdiction over the immigration judge's ruling and cannot change the ruling despite the Fifth Circuit Court decision. The applicant was deportable under section 237(a)(2)(A)(iii) of the Act at the time he was removed from the United States on February 22, 2001. Therefore, he is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and, therefore, must receive permission to reapply for admission.

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-

(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.

The AAO conducts the final administrative review and enters the ultimate decision for CIS 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 *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *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).

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to for any relief under the Act. To recapitulate, on October 27, 2000, the applicant was convicted of the offense of DWI.

The Texas Penal Code in § 49.01 defines "intoxicated" as not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance into the body.

The record of proceedings reveals that on May 6, 2000, the date the applicant was arrested for DWI, he was also found in possession of cocaine. In addition, the indictment states in pertinent part: "the defendant did not have the normal use of his mental and physical faculties by reason of the introduction of alcohol or a controlled substance namely; COCAINE, or a combination of both into HIS body;"

Based on the arrest record, the indictment against the applicant, his conviction and the definition of "intoxicated" in the Texas Penal Code, the AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a violation of any law or regulation relating to a controlled substance.

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 or attempt violation of (or a conspiracy 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.

No waiver of the ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is available to an alien found inadmissible under this section except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception.

*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.