identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 20 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: 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 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 April 28, 1992, was admitted to the United States as a lawful permanent resident. On February 13, 1999, the applicant presented himself at the San Ysidro, California Port of Entry. The applicant presented his lawful permanent resident card. Upon inspection approximately 128.7 pounds of marijuana was discovered in the vehicle, that the applicant was driving. On February 13, 1999, the applicant was paroled into the United States for the sole purpose of attending criminal proceedings against him. On March 4, 1999, the applicant pled guilty to and was convicted of possession of marijuana for sale in violation of section 11359 of the California Health and Safety Code (CHSC). The applicant's sentence was suspended in favor of three years of probation and 120 days in jail. On April 12, 1999, the applicant was placed into proceedings. On April 15, 1999, the immigration judge ordered the applicant removed. On the same day, the applicant was removed from the United States and returned to Mexico. On January 17, 2006, the applicant filed the Form I-212. The return address on the Form I-290B indicates that the applicant has reentered the United States without a lawful admission or parole and without permission to reapply for admission. 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 return to the United States as a lawful permanent resident.

The director determined that the applicant was inadmissible pursuant to sections 212(a)(2)(A)(i)(I), 212(a)(2)(A)(i)(II), 212(a)(2)(C) and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(2)(A)(i)(II), 1182 (a)(2)(C) and 1182(a)(9)(A)(ii), for having been convicted of a crime involving moral turpitude, having been convicted of a controlled substance violation that is not simple possession of marijuana less than 30 grams, for being an illicit trafficker of a controlled substance and for being an alien convicted of an aggravated felony who seeks admission to the United States after being ordered removed. In considering the Form I-212 filed by the applicant, the director found that the unfavorable factors in the applicant's case outweighed the favorable factors. The director denied the Form I-212 accordingly. *See Director's Decision* dated August 7, 2006.

On appeal, the applicant contends that he is a good, honest, trustworthy, hardworking man who resided in the United States for approximately 25 years. The applicant contends that he is innocent of the crime to which he pled guilty. *See Form I-290B,* dated September 6, 2006. In support of his contentions, the applicant submits only the referenced Form I-290B. The entire record was reviewed in rendering a decision in this case.

The applicant, on appeal, asserts that he is a law-abiding citizen of both the United States and Mexico who never had an intention to break the law. He asserts that upon returning to the United States from visiting his mother, immigration officers found drugs in the vehicle, he was driving, but that he did not know that the drugs were in the car. He asserts that, if he declared himself to be guilty of a crime he did not commit, it was because he was told that his sentence would be worse if he insisted on his innocence. This assertion is unpersuasive. "[C]ollateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *In Re Max Alejandro Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted.) Moreover, the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien. *See Id. Matter of Khalik,* 17 I&N Dec. 518 (BIA 1980), held that

Citizenship and Immigration Services (CIS) cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court system.

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]

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

> (43) The term "aggravated felony" means-

. . . .

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

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.)

. . . .

No waiver shall be provided under this subsection in the case of . . . an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of 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 possession of marijuana for sale, 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 possession of marijuana for sale, i.e., trafficking, and is ineligible for waiver consideration. The AAO also finds that the applicant in the instant case is not eligible for a waiver under section 212(h) of the Act because he was convicted of possession of marijuana for sale, an aggravated felony, after he had been admitted to the United States as a lawful permanent resident.

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 possession of marijuana for sale, 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 a lawful permanent resident who has been convicted of an aggravated felony in relation to a controlled substance violation. 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.