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U.S. Citizenship  
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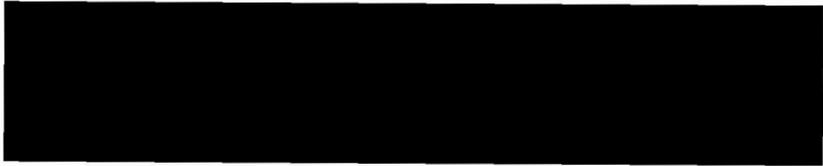


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 18 2008

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:



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.

On appeal, counsel requests oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

The applicant is a native and citizen of Mexico who, on July 23, 1999, was convicted of distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c) and 18 U.S.C. § 2. On May 2, 2000, the applicant was served with a Final Administrative Order of Removal pursuant to section 238(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1228(b), as an alien deportable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for being convicted of an aggravated felony. On May 17, 2000, the applicant was removed from the United States and returned to Mexico, where she has since resided. On September 3, 2002, the applicant married her U.S. citizen spouse, [REDACTED], in Mexico. On April 2, 2003, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on August 10, 2005. On February 26, 2007, the applicant filed the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) as an alien convicted of an aggravated felony who seeks admission to the United States at any time 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 reside in the United States with her U.S. citizen spouse and children.

The director determined that the applicant was inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182 (a)(2)(C), for having been convicted of a controlled substance violation that is not simple possession of marijuana less than 30 grams and for being an illicit trafficker of a controlled substance. The director found that the applicant was mandatorily inadmissible and denied the Form I-212 accordingly. *See Director's Decision* dated June 5, 2007.

On appeal, counsel contends that it is within the AAO's broad discretion to grant the applicant's waiver. *See Counsel's Brief*, dated June 25, 2007. In support of his contentions, counsel submits the referenced brief, family photographs and copies of previously provided documentation. The entire record was reviewed in rendering a decision in this case.

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]

Counsel contends that the applicant has waited the statutory time period in order to request permission to reapply for admission after having been removed from the United States under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). The AAO notes that the applicant is inadmissible under 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission at any time because she has been convicted of an aggravated felony and removed from the United States pursuant to section 237(a)(2)(A)(iii) of the Act. However, 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 (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18) . . .

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 asserts that the applicant is statutorily eligible for a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), as an alien who has been convicted of a crime involving moral turpitude and is only inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and not under section 212(a)(2)(A)(i)(II) of the Act. The AAO finds that the director erred in stating that the applicant had been convicted of a crime involving moral turpitude and the context in which the director made this statement makes it clear that the director found the applicant to have been convicted of a controlled substance violation. 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 distribution of heroin, 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 distribution of heroin and is ineligible for waiver consideration.

On appeal, counsel asserts that the director inaccurately describes the applicant's offense as one of illicit drug trafficking because 22 U.S.C. § 2291-4(d)(2) defines "illicit drug trafficking" as "illicit trafficking in narcotic drugs, psychotropic substances, and other controlled substances, as such activities are described by an international narcotics control agreement." Counsel asserts that the applicant's crime does not fall within this category of offenses because the incident wholly occurred within the state of Hawaii and involved no international aspects. However, for immigration law purposes, section 101(a)(43) defines "illicit trafficking" as crimes described in section 924(c) of Title 18, which states that the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) . . ." The applicant's conviction is for violations of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c), crimes, which are part of the Controlled Substances Act.

Finally, on appeal, counsel asserts that, as dictated by *Tostado v. Carlson*, 481 F.3d 1012 (8<sup>th</sup> Cir. 2007), the applicant's isolated offense of distribution of heroin does not rise to the level of "drug trafficking." Counsel's

assertion is unpersuasive. In *Tostado v. Carlson*, the Eighth Circuit Court of Appeals (Eighth Circuit) found that state law violations involving unlawful *possession* of cocaine and cannabis did not constitute a “drug trafficking crime” because the crimes were not felonies punishable by the Controlled Substances Act. As discussed above, the applicant was convicted of a felony under the Controlled Substances Act.

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 distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c) and 18 U.S.C. § 2, violations 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 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.