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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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HL4

FILE:

Office: SAN DIEGO, CALIFORNIA
[redacted]
consolidated therein]

Date: NOV 03 2008

IN RE:

Applicant: [redacted]

APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality
Act, 8 U.S.C. § 1182(a)(9)(A)

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 "R. P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the District Director, San Diego, California, and 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 December 10, 1996, attempted to enter the United States as a passenger in a vehicle with 53.6 pounds of marijuana. However, the applicant was not arrested and he was returned to Mexico. On June 25, 1999, the applicant entered the United States by presenting a Mexican passport in someone else's name. On June 26, 1999, the applicant was expeditiously removed from the United States. On an unknown date before October 14, 1999¹, the applicant reentered the United States without inspection. On an unknown date, the applicant departed the United States. On October 20, 1999, the applicant attempted to enter the United States as a passenger in a vehicle with 41.9 pounds of marijuana. However, the applicant was not arrested and he was returned to Mexico. On October 27, 1999, the applicant's wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On May 2, 2001, the applicant's wife filed a second Form I-130 on behalf of the applicant. According to this second Form I-130, the applicant reentered the United States without inspection on April 24, 2001. On May 2, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On an unknown date, the applicant departed the United States, and was paroled into the United States on June 17, 2001. On February 26, 2002, the applicant's second Form I-130 was approved. On the same day, the applicant withdrew his Form I-485. On January 30, 2003, the applicant's wife filed a third Form I-130 on behalf of the applicant, which was approved on September 15, 2003. On October 6, 2003, the applicant's wife filed a Petition for Fiancé(e) (Form I-129F) on behalf of the applicant. On February 13, 2004, the applicant's Form I-129F was approved. On July 28, 2004, the applicant filed an Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). On an unknown date, the applicant departed the United States. On March 30, 2005, the applicant entered the United States on a K-3 nonimmigrant visa with authorization to remain in the United States until March 29, 2007. On November 27, 2005, the applicant's wife filed a fourth Form I-130 on behalf of the applicant. On the same date, the applicant filed another Form I-485. On March 30, 2007, the applicant's fourth Form I-130 was approved. On August 15, 2007, the District Director denied the applicant's Form I-485 and Form I-212. The applicant is inadmissible to the United States under sections 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), and 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He now 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 reside with his wife and children.

The District Director determined that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being involved in the trafficking of a controlled substance, "without any exceptions or waivers considered," and he denied the applicant's Form I-212 accordingly. *District Director's Decision*, dated August 15, 2007.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

¹ On October 14, 1999, the applicant married
California.

a naturalized United States citizen, in San Diego,

(i) Arriving Aliens.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

Section 212(a)(2). Criminal and related grounds.-

(C) Controlled substance traffickers.-Any alien who the consular officer or the [Secretary] knows or has reason to believe-

(i) is or has been an illicit trafficker in any controlled substance 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.

Counsel asserts that "[t]he basis of the [Form I-212] denial was unsupported allegations that the [applicant] was somehow involved in trafficking of a controlled substance. The [applicant] has never been charged, detained, or convicted of any drug crimes." *Form I-290B*, filed September 13, 2007. The AAO notes that section

212(a)(2)(C) of the Act does not require a criminal conviction to demonstrate inadmissibility. *See Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1209 (9th Cir. 2004); *see also Matter of Rico*, 16 I&N Dec. 181, 184 (BIA 1977); *see also Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979). Counsel contends that “[h]ad [the applicant] been involved in any such activity or stopped for said violations, especially drug related, he would have at least been detained and charged with violating the penal code.... In the case at hand, there is absolutely no indicating, evidence or proof that [the applicant] knowingly assisted, abetted, conspired or colluded to smuggle drugs into the country.” *Attachment to Form I-290B*, filed September 13, 2007. 8 U.S.C. § 1182(a)(2)(C) explicitly states that an alien is inadmissible when the Secretary “knows or has reason to believe” that an alien is a drug trafficker, and this belief must be based on “reasonable, substantial, and probative evidence.” *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cr. 2000); *see also Matter of Rico*, 16 I&N Dec. at 185. The AAO finds that it is reasonable to believe that the applicant knew he was participating in drug trafficking based on evidence in the record of at least two separate incidents of the applicant being a passenger in a vehicle where significant amounts of marijuana were discovered. Additionally, the record establishes that the applicant’s wife was arrested at least twice for attempting to cross the United States-Mexico border with significant amounts of marijuana in the vehicle. The AAO finds that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), for knowingly being involved in the trafficking of a controlled substance.

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 AAO notes that the applicant is subject to the provisions of section 212(a)(2)(C) of the Act, and therefore, he is statutorily ineligible for a waiver of inadmissibility. The AAO finds that 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 Form I-212 was properly denied by the District Director.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary’s discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.