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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: SAN DIEGO, CALIFORNIA Date: **AUG 10 2009**
(RELATES)

IN RE:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Diego, California, 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 March 24, 1987, was admitted to the United States as a conditional permanent resident. On March 16, 1989, the applicant was admitted to the United States as a lawful permanent resident. On January 7, 1992, the applicant was convicted of possession of a controlled substance, cocaine, in violation of section 475.992 (renumbered 475.840 in 2005) of the Oregon Revised Statutes (ORS). The applicant was sentenced to eighteen months probation and ninety custody units, including thirty days in jail. On February 20, 1992, the applicant was convicted of rape in the third degree in violation of section 163.355 of the ORS. The applicant was sentenced to twenty-four months of probation. On March 13, 1992, the applicant was placed into immigration proceedings as a lawful permanent resident who had been convicted of a crime relating to a controlled substance. On May 11, 1992, the immigration judge ordered the applicant removed from the United States. The applicant waived his right to appeal and, on May 14, 1992, the applicant was removed from the United States and returned to Mexico.

On August 31, 1993, the applicant's probation was revoked in regard to his controlled substance violation and he was sentenced to an additional thirty days in jail. On September 2, 1993, the applicant's probation for rape in the third degree was extended by one year. On September 3, 1993, the applicant was placed into immigration proceedings for having reentered the United States without inspection. On September 13, 1993, the immigration judge ordered the applicant removed from the United States. On September 17, 1993, the applicant was removed from the United States and returned to Mexico.

On October 11, 1995, the applicant was stopped at the Nogales, Arizona port of entry while he was exiting the United States and traveling to Mexico. The applicant presented his lawful permanent resident card as identification. At that time, the applicant stated that he had reentered the United States on numerous occasions since his removal using this card. The applicant's lawful permanent resident card was lifted and retained within his file.

On February 6, 1996, the applicant's probation was revoked in regard to his conviction for rape in the third degree and he was sentenced to six months in jail. On the same day the applicant was placed into immigration proceedings for having entered the United States without inspection.¹ On September 27, 1996, the immigration judge ordered the applicant removed from the United States. The applicant appealed to the Board of Immigration Appeals (BIA). On July 2, 1996, the BIA dismissed the applicant's appeal. On July 8, 1997, a warrant for the applicant's removal was issued. On August 5, 1997, the applicant was removed from the United States and returned to Mexico.

¹ The AAO notes that, at the time the applicant was apprehended, he stated that he had reentered the United States utilizing his lawful permanent resident card but that he had lost the card. As discussed above, the applicant could not have reentered the United States utilizing his lawful permanent resident card because it had been lifted in 1995. Thus, the applicant was charged with entering the United States without inspection.

On January 7, 1998, the applicant was apprehended by immigration officials. The applicant was placed into immigration proceedings for having been previously removed from the United States and reentering the United States with his lawful permanent resident card.² On June 23, 1998, the applicant was convicted of illegally reentering the United States in violation of 8 U.S.C. § 1326(a). The applicant was sentenced to twenty-four months in jail and one year of supervised release. The immigration proceedings were canceled and, on November 4, 1999, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1231(a)(5). The applicant reentered the United States without inspection on August 5, 1997.³ On November 5, 1999, the applicant was removed from the United States and returned to Mexico.

On May 14, 2000, the applicant appeared at the Calexico, California port of entry. The applicant presented a counterfeit temporary resident alien card on an Arrival/Departure Record (Form I-94) bearing the name [REDACTED]. The applicant was placed into secondary inspections. The applicant was found to be inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(A)(ii) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(A)(ii), for attempting to enter the United States by fraud and for being an alien who has been removed from the United States. On May 15, 2000, the applicant was placed into immigration proceedings for attempting to enter the United States by fraud and for having been previously removed. On January 23, 2001, the applicant was convicted of reentering the United States after having been removed and for fraudulent reentry into the United States in violation of sections 8 U.S.C. §§ 1326 and 1546. The applicant was sentenced to concurrently serve thirty months in jail and three years of supervised release. The immigration proceedings were canceled and, on November 15, 2001, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act. On July 17, 2002 a second Form I-871 was issued. On July 23, 2002, the applicant was removed from the United States and returned to Mexico.

The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), for a period of twenty years and indefinitely inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for having illegally reentered the United States after having been removed. The applicant requests permission to

² The AAO notes that, at the time the applicant was apprehended, he stated that he had reentered the United States utilizing his lawful permanent resident card but that he had lost the card. As discussed above, the applicant could not have reentered the United States utilizing lawful permanent resident card because it had been lifted in 1995.

³ If an applicant illegally reenters the United States *at any time* after April 1, 1997, after having been removed, he or she is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is ineligible for permission to reapply for admission until he or she has remained outside the United States for a period of ten years. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007). Accordingly, the applicant's 1997 reentry subjects him to inadmissibility under section 212(a)(9)(C)(i) of the Act. The applicant must remain outside the United States for a period of ten years before he becomes eligible to apply for permission to reapply for admission. The applicant will be required to provide evidence to establish residence outside the United States for a period of ten years. The AAO notes, however, as discussed below, the applicant is otherwise mandatorily inadmissible and any Form I-212 filed after he has become eligible for permission to reapply for admission would be denied for the below discussed reasons.

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 his U.S. citizen spouse.

The director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Director's Decision* dated October 16, 2008.

On appeal, the applicant and his spouse contend that he is doing the best he can to live by the law. *See Form I-290B*, dated November 12, 2008. In support of his contentions, the applicant submits only the referenced Form I-290B and copies of documentation previously provided. 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]

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

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 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.) The

. . . .

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 either since the date of such admission the alien has been convicted of an aggravated felony or ***the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien*** from the United States [emphasis added]

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 a controlled substance, cocaine, 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 cocaine. The Act also makes it clear that the waiver is not available to an alien who had been admitted as a lawful permanent resident, if he or she, since admission as a lawful permanent resident, had not lawfully resided continuously in the United States for a period of at least seven years immediately preceding initiation of immigration proceedings. In this case, the applicant, after he had been admitted to the United States as a conditional resident, had only continuously resided in the United States in a lawful capacity for less than five years prior to initiation of immigration proceedings on March 13, 1992.⁴ The applicant is, therefore, ineligible for waiver consideration.

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

⁴ A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act. See 8 C.F.R. § 1216.1.

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 section 212(a)(2)(A)(i)(II) 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 not continuously and lawfully resided in the United States for a period of at least seven years prior to initiation of immigration proceedings. 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.