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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

174

[REDACTED]

AUG 10 2009

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

AND [REDACTED] RELATE)

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)

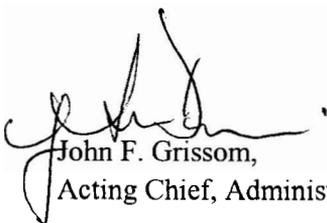
ON BEHALF OF APPLICANT:

[REDACTED]

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, as required by 8 C.F.R. 103.5(a)(1)(i).



John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 the Dominican Republic who, on September 10, 1992, was admitted as a conditional resident. On February 22, 1995, the applicant was convicted of criminal sale of a controlled substance, cocaine, in the first degree in violation of section 220.43 of the New York Penal Law (NYPL), and sale of a controlled substance, cocaine, in the third degree in violation of section 220.39 of the NYPL. The applicant was sentenced to seventeen years to life in jail for sale in the first degree violation and one year to three years in jail for the third degree violation. On April 21, 1995, the applicant was placed into immigration proceedings. On July 10, 1995, the immigration judge ordered the applicant removed from the United States. On October 15, 1996, the applicant was paroled from jail for purposes of deportation. On December 6, 1996, the applicant was removed from the United States and returned to the Dominican Republic. On September 8, 2000, the applicant filed a Form I-212, which was denied on June 11, 2001. On November 9, 2004, the applicant filed a second Form I-212, indicating that he resided in the Dominican Republic. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), indefinitely as an aggravated felon. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (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 was ineligible for relief under section 212(h) of the Act, 8 U.S.C. § 1182(h), as a lawful permanent resident convicted of an aggravated felony and as a trafficker under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C). The director denied the Form I-212 accordingly. *See Director's Decision* dated June 27, 2005.

On appeal, counsel contends that family unity should be taken into consideration in exercising discretion in the adjudication of the Form I-212. Counsel contends that the applicant's wife has been unable to obtain employment in the Dominican Republic with the equivalent pay of what she received in the United States. *See Counsel's Brief*, dated July 19, 2005. In support of his contentions, counsel submits only the referenced brief. 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]

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(a)(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.) 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 two counts of criminal sale of a controlled substance in the first and third degree, specifically cocaine, violations 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 criminal sale of a controlled substance in more than one instance and a controlled substance other than marijuana. The Act makes it clear that a section 212(h) waiver is not available to a lawful permanent resident who has been convicted of an aggravated felony. The applicant has been convicted of two counts of sale of a controlled substance, both aggravated felonies under section 101(a)(43) of the Act. 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 four years prior to initiation of immigration proceedings on March 13, 1992.¹ The applicant is, therefore, ineligible for waiver consideration.

Section 212(a)(2)(C) provides:

¹ 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.

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

Finally, the AAO also finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, for having been convicted of criminal sale of a controlled substance on two occasions, 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 for a lawful permanent resident convicted of an aggravated felony. 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. No waiver is available for 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.