



U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: SAN FRANCISCO, CA

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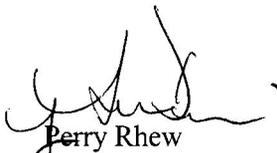
APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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.

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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Francisco, 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 April 7, 1985, pled guilty to and was convicted of sale of methamphetamine, felony, in violation of section 11379(a) of the California Health and Safety Code. The applicant's sentence was suspended in favor of ninety days in jail and thirty-six months of probation. On May 1, 1996, the applicant was placed into immigration proceedings. On June 27, 1997, the applicant's conviction was dismissed pursuant to section 1203.4 of the California Penal Code because he had completed his probation. On September 2, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. On June 16, 1998, the Form I-485 was denied. On July 17, 1998, the immigration judge ordered the applicant removed from the United States. On July 17, 1998, a warrant for the applicant's removal was issued. The applicant was removed from the United States and returned to Mexico on July 21, 1998.

On March 26, 2008, the applicant filed the Form I-212 indicating that he resided in the United States. The record reflects that the applicant last entered the United States without inspection on January 2, 2005. 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). 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 his U.S. citizen spouse and two U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated March 19, 2009.

On appeal, counsel contends that the applicant was not convicted of an aggravated felony and the statute under which he was convicted is not a law relating to a controlled substance. Counsel contends that the field office director's decision was fatally flawed in that it was based on a supposition that the applicant could never obtain relief. *See Counsel's Brief*, dated March 31, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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 on a 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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

....

(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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

- (I) the alien's battering or subjection to extreme cruelty; and
- (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

Section 212(a)(2) of the Act states in pertinent part:

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 contends that the applicant's conviction is not a drug offense or an aggravated felony under applicable Ninth Circuit Court of Appeals (Ninth Circuit) law. The record reflects that the applicant pled guilty to and was convicted of "transporting, selling, furnishing, administering, or giving away, or offering to transport, sell, furnish, administer, or give away, or attempting to transport a narcotic controlled substance, to wit, methamphetamine." Methamphetamine is a controlled substance listed in Schedule III of the Controlled Substances Act. While counsel contends that the Ninth Circuit has found comparable Arizona state law to not be a "law relating to a controlled substance," the Ninth Circuit has held that a generic conviction under section 11379(a) of the California Health and Safety Code, while not an aggravated felony, does render an alien deportable for having been convicted of a law relating to a controlled substance. *See Sandoval-Lua v. Gonzalez*, 499 F. 3d 1121 (9<sup>th</sup> Cir. 2007) and *Mielewczyk v. Holder*, 575 F. 3d 992 (9<sup>th</sup> Cir. 2009). 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 sale of methamphetamine, a crime related to a controlled substance.

The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a crime related to a controlled substance which is more than simple possession of 30g

of marijuana. In this case, the applicant was convicted of more than simple possession and for an amount greater than 30g of marijuana. The applicant is, therefore, ineligible for waiver consideration.

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 also finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, because his conviction for sale of methamphetamine, gives us reason to believe that the applicant has been involved in the illicit trafficking of a controlled substance. The AAO notes that, while the applicant's conviction is not a "drug trafficking crime" as required for conviction of an aggravated felony, section 212(a)(2)(C) of the Act does not require a conviction. The evidence in the record reflects that there is sufficient evidence to reasonably believe that the applicant has been involved in illicit trafficking of a controlled substance. No waiver is available to individuals found inadmissible under section 212(a)(2)(C) of the Act.

Finally, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed and is not eligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007).

*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 statutorily 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), 212(a)(2)(C) and 212(a)(9)(C)(i) of the Act, which are very specific and applicable. No waiver is available to an alien who has been convicted of a crime related to a controlled substance if the crime is for more than simple possession of 30g or less of marijuana. No waiver is available for an alien who is a trafficker in any controlled substance. An applicant is not eligible for permission to reapply for admission unless he or she is currently outside the United States and has remained outside the United States for

a period of ten years. 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.