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U. S. Citizenship and Immigration Services  
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U.S. Citizenship  
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FILE:

Office: PORTLAND, OR

Date: JUL 02 2009

[REDACTED] AND  
[REDACTED] (RELATE)

IN RE:

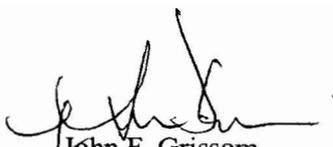
APPLICATION: Application for Permission to Reapply for Admission into the United States after  
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and  
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

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, Portland, Oregon, 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 July 10, 1986, married [REDACTED] a U.S. citizen. On September 6, 1986, immigration officials apprehended the applicant. The applicant was transporting his brother from San Diego, California to Portland, Oregon. The applicant admitted that both he and his brother were in the United States illegally. On September 8, 1986, the applicant was placed into immigration proceedings. On September 24, 1986, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on October 20, 1986. On March 9, 1987, the immigration judge granted the applicant voluntary departure until September 8, 1987. The applicant's voluntary departure was subsequently extended until October 2, 1987. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.<sup>1</sup>

On October 7, 1987, the applicant was admitted to the United States as a conditional resident. On January 27, 1989, [REDACTED] withdrew the Form I-130. On August 24, 1990, the applicant's conditional residence was terminated for failure to file a joint petition requesting removal of conditions. On July 23, 1991, the applicant was placed into immigration proceedings as a conditional resident who had failed to remove conditions and had his conditional residence terminated. On July 2, 1992, the immigration judge granted the applicant voluntary departure until August 1, 1992 *in absentia*. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On July 22, 1993, a warrant for the applicant's removal was issued. On July 31, 1993, the applicant was removed from the United States and returned to Mexico.

On July 25, 1995, the applicant was again placed into immigration proceedings for having reentered the United States after having been removed on July 31, 1993. The record reflects that the applicant returned to the United States without inspection nine days after he had been removed. On January 25, 1996, the immigration judge granted the applicant voluntary departure until January 26, 1996.<sup>2</sup>

On July 26, 1996, the applicant married his U.S. citizen spouse, [REDACTED]. On August 9, 1996, [REDACTED] filed a Form I-130 on behalf of the applicant, which was approved on November 14, 1996. On May 12, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant indicated that he had entered the United States without inspection on March 30, 1996. On September 4, 1997, the applicant was admitted to the United States as a conditional resident. On December 24, 1998, the applicant filed a Petition to Remove the Conditions on Residence (Form I-751). On January 7, 2000, the applicant's Form I-751 was approved and the applicant was admitted as a lawful permanent resident. On May 12, 1995, U.S. Citizenship and Immigration Services (USCIS (formerly the Immigration and Naturalization Service)) issued a Notice of Intent to Rescind Lawful Permanent Resident Status, due to the applicant's failure to reveal his prior

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<sup>1</sup> The AAO notes that the applicant previously asserted that he had left the United States prior to expiration of voluntary departure; however, there is no evidence in the record to establish that the applicant complied with voluntary departure in a timely fashion.

<sup>2</sup> There is no evidence in the record to establish that the applicant complied with voluntary departure in a timely fashion.

removal orders at the time of his previous applications. On August 8, 2002, an immigration judge rescinded the applicant's lawful permanent resident status. The applicant waived his right to appeal. On March 7, 2003, the applicant filed a Form I-485.

On November 10, 2003, the applicant was arrested for manufacturing or delivering a controlled substance. The applicant was charged with possession of a controlled substance with intent to deliver in violation of section 475.840 (formerly 475.992) of the Oregon Revised Statutes (ORS).<sup>3</sup>

On March 24, 2004, the applicant filed the Form I-212. The applicant is indefinitely 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), as an alien convicted of an aggravated felony. 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.

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 June 5, 2008.

On appeal, counsel contends that the applicant is not required to apply for permission to reapply for admission because it has been more than ten years since his removal.<sup>4</sup> Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, received September 9, 2008. In support of his contentions, counsel submits only the referenced brief.

On February 12, 2009, the AAO issued a Notice of Intent to Deny (NOID) and Request for Further Evidence (RFE). In the RFE the AAO noted the applicant's conviction in regard to a controlled substance and counsel's incomplete response to an earlier request for further evidence to establish the exact terms of the applicant's conviction. Counsel and the applicant were informed by the AAO, that pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), even if a conviction is expunged under state law, the conviction remains a conviction for immigration purposes if there has been some form of punish or restraint placed upon the alien as a result of a finding of guilt, plea of nolo contendere or guilty plea. Counsel and the applicant were informed that, without further evidence which had already been previously requested of them, the AAO would be unable to determine if the applicant was eligible for treatment as a first time offender under Ninth Circuit Court of Appeal case law or eligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). Counsel and the applicant failed to respond to either the NOID or the RFE.

Section 212(a)(9)(A) of the Act states in pertinent part:

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<sup>3</sup> The record contains an order to set aside this conviction, dated September 12, 2007, based on the applicant's good conduct since his conviction. The order to set aside conviction does not set forth the statute to which the applicant pled, the sentence which the applicant received or the drug for which the applicant was convicted.

<sup>4</sup> The AAO finds that counsel's contention is unpersuasive. In order for an applicant not to be found inadmissible under section 212 (a)(9)(A)(iii) of the Act, he or she must have remained outside the United States for the ten year period. The record reflects that the applicant failed to remain outside the United States for the ten-year period and is thus required to apply for permission to reapply for admission.

(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 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 AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime 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 has failed to establish that he was not convicted of criminal sale of a controlled substance, or that the controlled substance for which he was convicted was marijuana less than 30 g. Alternatively, the applicant has also failed to establish that he is eligible for treatment as a first-time offender under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000).<sup>5</sup>

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

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<sup>5</sup> The AAO gave the applicant ample opportunity to provide additional documentation to prove that the motion to set aside the applicant's conviction and his underlying conviction warranted treatment as a first time offender. The criminal records before the AAO conflict as to whether the applicant was convicted of possession of a controlled substance or criminal sale of a controlled substance. Computer generated criminal records reflect that the applicant was convicted of violating section 475.992 of the ORS, which is "criminal sale of a controlled substance," while the motion to set aside conviction indicates that the applicant was convicted of "possession of a controlled substance." The documentation requested by the AAO would be documentation submitted in seeking the motion to set aside conviction and is readily available to counsel and the applicant.

is inadmissible.

Finally, the AAO also finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as an illicit trafficker of a controlled substance, whether or not he was convicted of criminal sale of a controlled substance or simple possession and despite the possibility that he is eligible for treatment as a first time offender. The record contains evidence to establish the AAO's reasonable belief that the applicant is or has been involved in the illicit trafficking of a controlled substance. Besides the applicant's arrest for criminal sale of a controlled substance, as set forth in the AAO's NOID, the applicant was selling narcotics from his residence in McMinnville, Oregon in 1995. 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 a controlled substance violation, other 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.