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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

H4

FILE:

Office: NEW ORLEANS, LA

Date: JUL 17 2009

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, New Orleans, Louisiana, 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 May 4, 1992, was admitted to the United States as a lawful permanent resident. On September 14, 1992, the applicant pled guilty to and was convicted of conspiracy to possess with intent to distribute marijuana in violation of 12 U.S.C. §§ 841(a)(1) and 846. The applicant was sentenced to twenty-one months in jail and three years of probation. On April 15, 1993, the applicant was placed into proceedings as a lawful permanent resident who had been convicted of an aggravated felony and a violation of law relating to a controlled substance. On January 11, 1994, the immigration judge ordered the applicant removed from the United States. On February 7, 1994, the applicant was removed from the United States and returned to Mexico. On August 1, 2007, the applicant filed the Form I-212, indicating that he resided in the United States. 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 four U.S. citizen children.

The field office director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a violation related to a controlled substance. The field office director act determined that the applicant was ineligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The field office director to also 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 11, 2009.

On appeal, counsel contends that there was no meaningful consideration or discussion of the positive equities in the applicant's case. *See Form I-290B*, dated March 23, 2009. In support of his contentions, counsel submits only the referenced Form I-290B. 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 . . . since the date of such admission the alien has been convicted of an aggravated felony . . .

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 conspiracy to possess with intent to distribute marijuana, 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 with intent to distribute. The Act also makes it clear that the waiver is not available to a lawful permanent resident who has been convicted of an aggravated felony. In this case, the applicant was convicted of possession with intent to distribute, a trafficking crime and aggravated felony, after he had been admitted to the United States as a lawful permanent resident. 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

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 conspiracy to possess with intent to distribute marijuana, 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. No the

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 to a lawful permanent resident who has been convicted of an aggravated felony. 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.