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U. S. Citizenship and Immigration Services
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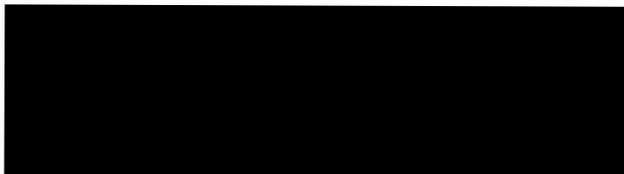
MAY 06 2009

FILE:  Office: CALIFORNIA SERVICE CENTER Date:

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).

F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 Mexico who, on July 18, 1992, was charged with possession of narcotics and use/under the influence of a controlled substance in violation of sections 11350(A) and 11550 of the California Health and Safety Code (CHSC). The applicant was originally granted diversion and proceedings were suspended against the applicant; however, on September 1, 1992, these charges were reinstated and diversion was terminated. On September 23, 1993, the applicant pled guilty to and was convicted of misprision of a felony. The applicant was sentenced to twelve months in jail. On December 14, 1993, the applicant was placed into immigration proceedings. On December 28, 1993, the immigration judge ordered the applicant removed. On December 29, 1993, the applicant was removed from the United States and returned to Mexico.

On January 3, 1996, the applicant was convicted of felony possession of narcotics, in violation of section 11350(a) of the CHSC. The applicant was sentenced to 63 days in jail and 36 months of probation. On December 14, 1997, the applicant married his lawful permanent resident spouse, [REDACTED], in Santa Ana, California. On December 30, 1997, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on August 15, 1998. On April 23, 2006, the applicant filed the Form I-212. 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 lawful permanent resident spouse and two U.S. citizen children.

The director determined that the applicant was inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The director determined that 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. The director determined that the applicant had failed to remain outside the United States for the required ten year period prior to apply for permission to reapply for admission and denied the Form I-212 accordingly. *See Director's Decision* dated April 9, 2007.¹

On appeal, counsel contends that the director's decision is harsh and unfair and that the applicant has substantiated new material facts since his removal. *See Attachment to Form I-290B*, dated May 7, 2007. In support of his contentions, counsel submits only the referenced attachment.

On March 11, 2009, the AAO issued a notice to the applicant and counsel informing the parties that it was this office's intent to dismiss the applicant's appeal based upon evidence establishing pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), that the applicant was

¹ The AAO notes that the record does not reflect whether the applicant has reentered the United States without inspection prior to or after April 1, 1997, the date on which section 212(a)(9)(C)(i) of the Act was enacted. The Form I-130 reflects that the applicant claimed a last date of entry into the United States on January 15, 1985, and did not provide the date of his subsequent reentry after removal in 1993. The AAO therefore finds that it cannot be determined from the record whether the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act.

inadmissible for having been convicted of a crime related to a controlled substance. The applicant and counsel were granted thirty days to provide evidence to overcome, fully and persuasively, these findings or to establish that the applicant is eligible to apply for a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). Counsel and the applicant failed to respond to the request for further evidence. 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 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 felony possession of narcotics, a violation related to a controlled substance. The section of law under which the applicant was convicted relates to drugs other than marijuana (i.e., opiates, opium derivatives, cocaine, mescaline, peyote, hallucinogens and tetrahydrocannabinols-synthetic equivalents of substances found in the plant or resins of cannabis).

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 felony possession of a controlled substance other than marijuana and is 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 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 a controlled substance violation, other than simple possession of marijuana in an amount less than 30 grams. 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.