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U. S. Citizenship and Immigration Services
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FILE:

Office: SAN DIEGO, CA

Date:

SEP 09 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. Grisson
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, 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 December 1, 1990, was admitted to the United States as a lawful permanent resident. On January 27, 1998, the applicant appeared at the Calexico, California port of entry. The applicant presented his lawful permanent resident card and stated that he had nothing to declare. The applicant was referred to secondary inspections. During a search of the applicant's vehicle, approximately 93.70 pounds (42.59 kg) of marijuana was discovered concealed in the vehicle. On the same day, the applicant was placed into immigration proceedings as an alien whom the immigration officer at the port of entry had reason to believe was an illicit trafficker in a controlled substance under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C). On July 20, 1998, the applicant pled guilty to and was convicted of importation of marijuana in violation of 21 U.S.C. §§ 952 and 960. Specifically, the applicant pled guilty to "knowingly and intentionally imports approximately 42.59 kg (approximately 93.7 pounds) of marijuana, a Schedule I controlled substance, into the United States from a place outside thereof." The applicant was sentenced to twelve months in jail and three years of probation. On February 4, 1999, immigration proceedings were amended to reflect that the applicant had been convicted of a trafficking crime. On February 22, 1999, immigration proceedings charges were again amended to add the charge of being inadmissible as an alien convicted of a crime related to a controlled substance under section 212(a)(2)(A)(i)(II), of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). On March 2, 1999, the immigration judge ordered the applicant removed from the United States and the applicant waived his right to appeal. On March 3, 1999, a warrant for the applicant's removal was issued. The applicant was removed from the United States and returned to Mexico on the same day.

On October 7, 2008, the applicant filed the Form I-212. The applicant is inadmissible indefinitely 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 three U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. See *District Director's Decision* dated February 5, 2009.

On appeal, counsel contends that the applicant was removed from the United States as an alien convicted of a crime involving moral turpitude.¹ Counsel contends that the applicant filed an application for permission to reapply for admission pursuant to a section 212(h) waiver.² Counsel

¹ The AAO finds that the applicant was not removed as an alien who had been convicted of a crime involving moral turpitude. Rather, the applicant was removed from the United States as an illicit trafficker of a controlled substance and as an alien convicted of a crime related to a controlled substance.

² The AAO finds that counsel is incorrect in stating that the applicant's application for permission to reapply for admission is pursuant to section 212(h) of the Act. Permission to reapply for admission must be sought under section 212(a)(9)(A)(iii) or 212(a)(9)(C)(ii) of the Act. The AAO, however, does note that the applicant's application for

contends that the applicant's application should have been construed as an application under section 212(d)(3) of the Act because he wishes to reenter as a non-immigrant and to apply for a visitor's visa so that he may visit his family in the United States.³ Counsel contends that the applicant has never attempted to illegally reenter the United States, has multiple family members residing in the United States, resided in the United States for a number of years as a lawful permanent resident and has established strong ties to the community. Counsel contends that the applicant intends to submit documentation to establish that his drug conviction will be set aside.⁴ *See Counsel's Brief*, dated February 11, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation previously provided. 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.

permission to reapply for admission should be partly denied as a matter of discretion because, as discussed below, he is ineligible for a waiver under section 212(h) of the Act.

³ The AAO find counsel's contention to be unpersuasive. The applicant clearly stated on the Form I-212 that he wished to reenter the United States for the purposes of permanent residency in both boxes fifteen and sixteen. Statements from the applicant's family members clearly reflect that the applicant wishes to reenter the United States in order to join his family and work in the United States. The evidence clearly reflects that the applicant has an immigrant and not a nonimmigrant intent.

⁴ Counsel has failed to submit any evidence that the applicant's conviction has been set aside or that any actions have been taken in this regard. Moreover, the AAO finds that the applicant's conviction will remain a conviction for immigration purposes unless the conviction is set aside for deficiencies in procedural or constitutional requirements.

- (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 record reflects that the applicant was charged with and convicted of importation of marijuana. 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 importation of marijuana, a crime related to the 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 the 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 Act makes it clear that a section 212(h) waiver is not available to an alien who had been admitted as a lawful permanent resident, if he or she had, since admission as a lawful permanent resident, has been convicted of an aggravated felony. In this case, the applicant was convicted of importation of marijuana, a conviction reflecting his involvement in trafficking of a controlled substance, which renders the conviction an aggravated felony. 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 importation of 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.

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(II) of the Act, which are very specific and applicable. The waiver is available to an alien who has been convicted of a crime related to the controlled substance if the crime is for more than simple possession of 30g or less of marijuana. 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.