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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

hty

[Redacted]

FILE: [Redacted]

Office: NEW ORLEANS, LA

Date: **AUG 16 2010**

IN RE: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting 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 the Dominican Republic who, on January 31, 1992, was admitted to the United States as a lawful permanent resident. On November 16, 1995, the applicant pled guilty to and was convicted of possession of cocaine with intent to distribute in violation of section 35.5b(2) of the New Jersey Code of Criminal Justice. The applicant was sentenced to four years in jail. On August 30, 1996, the applicant was placed into proceedings for being a lawful permanent resident convicted of a crime relating to a controlled substance. On March 7, 1997, the immigration judge ordered the applicant removed from the United States. On April 4, 1997, the applicant was removed from the United States and returned to the Dominican Republic.

On April 1, 1999, the Dover Police Department, New Jersey, encountered and released the applicant. On October 27, 2008, the applicant filed the Form I-212 indicating that he resided in the Dominican Republic. The applicant is permanently 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 who seeks admission to the United States after being ordered removed. 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 return to the United States and reside with his naturalized U.S. citizen mother.

The acting field office director determined that the applicant is inadmissible pursuant to section 212(a)(2)(C), of the Act, 8 U.S.C. § 1182(a)(2)(C), for involvement in the illicit trafficking of a controlled substance. The acting field office director determined that there was no waiver available to the applicant and denied the Form I-212 accordingly. *See Acting Field Office Director's Decision* dated October 2, 2009.

On appeal, counsel contends that the acting field office director erred in denying the applicant's Form I-212. Counsel contends that the applicant maintains that he was never arrested by the Dover Police Department and he has been physically residing in the Dominican Republic since 1997.¹ Counsel contends that the acting field office director did not consider the totality of the circumstances in the applicant's case and did not properly consider the length of time that has elapsed since the applicant's removal. *See Form I-290B*, dated October 26, 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) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

¹ Counsel's contention is unpersuasive. The record reflects that the applicant was present in the United States on April 1, 1999. Moreover, even if the applicant has not illegally reentered the United States, he is still permanently inadmissible under section 212(a)(2)(C) of the Act and there is no waiver available for this ground of inadmissibility.

- (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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission. [emphasis added]

....

(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 101(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)(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 record reflects that the applicant was convicted of possession of cocaine with intent to distribute. The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, for involvement in the illicit trafficking of a controlled substance, cocaine.

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)(C) of the Act, which are very specific and applicable. No waiver is available to individuals found inadmissible under section 212(a)(2)(C) of the Act. 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.

Beyond the decision of the acting field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and no waiver is available to him. 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. The Act also makes it clear that a 212(h) waiver is not available to a lawful permanent resident who was convicted of an aggravated felony after admission or had not been admitted to the United States for a period of at least seven years at the time of commencement of proceedings. In this case, the applicant was convicted of possession of cocaine with intent to distribute, a crime related to a controlled substance and an aggravated felony, and had only been admitted as a lawful permanent resident for a period of five years at the time immigration proceedings commenced. The applicant is, therefore, ineligible for waiver consideration. Therefore, the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States. The AAO also finds that the applicant is inadmissible under the provisions of section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for illegally reentering the United States after having been removed, and does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Therefore, the applicant is statutorily ineligible to apply for permission to reapply for admission into the United States.²

ORDER: The appeal is dismissed.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).