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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: [REDACTED]

Office: SAN DIEGO, CA

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: Self-represented

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
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 October 8, 1986, was admitted to the United States as a lawful permanent resident. On November 5, 1996, the applicant pled guilty to and was convicted of possession of marijuana for sale in violation of section 11359 of the California Penal Code (CPC). The applicant was sentenced to three years of probation and 37 days in jail. On January 7, 1997, the applicant was placed into proceedings for being a lawful permanent resident convicted of a crime relating to a controlled substance and for involvement in the illicit trafficking of a controlled substance. On March 10, 1997 the immigration judge denied the applicant's application for relief under section 212(c) of the Act and ordered the applicant removed from the United States.¹ The applicant failed to depart the United States.

On June 9, 2006, the applicant filed the Form I-212 indicating that he resided in the United States. 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 reside in the United States.

The district director determined that the applicant was ordered removed from the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C), of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C), for having been convicted of a crime relating to a controlled substance and for involvement in the illicit trafficking of a controlled substance. The district 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 district director determined that the applicant is inadmissible, without exceptions or waivers because of the severity of his crime, and denied the Form I-212 accordingly. *See District Director's Decision* dated August 28, 2009.

On appeal, the applicant contends that he has paid his debt to society. The applicant contends that the district director did not consider all the pertinent factors in adjudicating his Form I-212.² *See Applicant's Brief*, dated January 19, 2010. In support of his contentions, the applicant submits the referenced brief, copies of the Act and copies of documentation already in the record. 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 The AAO notes that the applicant's lawful permanent resident status was taken away at the time he was ordered removed.

² The AAO notes that the district director need not make a determination as to whether an applicant warrants a favorable exercise of discretion when the applicant is otherwise mandatorily inadmissible to the United States.

- (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]

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)(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 —

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (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(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

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*

. . . .
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 AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of possession of marijuana for sale, a crime involving moral turpitude.³

³ While the applicant contends that he did not sell and did not have the intent to sell marijuana, the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. A record of conviction constitutes a conviction for immigration purposes. The applicant can only appeal such a conviction within the court

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 has, since admission as a lawful permanent resident, has been convicted of an aggravated felony. In this case the applicant, after he had been admitted to the United States as a lawful permanent resident, was convicted of possession of marijuana for sale, a trafficking crime and aggravated felony. The applicant is, therefore, 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 sections 212(a)(2)(A)(i)(I), which are very specific and applicable. No waiver is available to a lawful permanent resident who has been convicted of an aggravated felony after admission. 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 district director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(2)(A)(i)(II) of the Act 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 is convicted of an aggravated felony after admission. The applicant is, therefore, ineligible for waiver consideration. The applicant is also inadmissible under section 212(a)(2)(C) of the Act and no waiver is available to individuals found inadmissible under section 212(a)(2)(C) of the Act. 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.⁴

ORDER: The appeal is dismissed.

system. See *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980).

⁴ 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).