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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

[REDACTED]

FILE:

[REDACTED]

Office: FRESNO, CA

Date: DEC 06 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 \$630. 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

[REDACTED]

Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, 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.

[REDACTED] pled nolo contendere to and was convicted of sale/transportation of cocaine in violation of section 11352(a) of the California Health and Safety Code. The applicant was sentenced to 120 days in jail and three years of probation. [REDACTED] the applicant was placed into immigration proceedings for having entered the United States without inspection in October 1991 and having been convicted of a crime related to a controlled substance. On January 24, 1995, the immigration judge ordered the applicant removed from the United States. On the same day, [REDACTED] and returned to Mexico.

On January 8, 2010, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his naturalized U.S. citizen spouse. On the same day, the applicant filed an Application for a Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that he continued to reside in the United States. During the interview in regard to the Form I-485, the applicant testified that he had last entered the United States without inspection in March or April 1996. On May 20, 2010, the Form I-485 and Form I-601 were denied. 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 aggravated felon, specifically one who has been convicted of trafficking in a controlled substance. He seeks 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 U.S. citizen spouse and U.S. citizen child.

The field office 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), and is not eligible to apply for permission to reapply for admission. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated May 20, 2010.

On appeal, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007), when he relied on the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel contends that it has been more than ten years since the applicant's last departure from the United States and he is eligible to apply for permission to reapply for admission.¹ *See Counsel's Brief*, dated July 9, 2010. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

¹ Counsel's contention is unpersuasive. In 2007, the Ninth Circuit Court of Appeals (Ninth Circuit) found that the Ninth Circuit should defer to the Board of Immigration Appeals' (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007). Furthermore, retroactivity arguments before the Ninth Circuit in regard to *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).

(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 [REDACTED] or 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 on a 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(a)(43) of the Act states in pertinent part:

(43) The term "aggravated felony" means-

....

(B) illicit trafficking in a controlled substance . . . including a drug trafficking crime . . .

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.

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.)

In a separate proceeding, the field office director, Fresno, California found the applicant inadmissible pursuant to 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 crime relating to a controlled substance and ineligible for a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). *See Field Office Director's Decision on Form I-601*, May 20, 2010. The applicant failed to timely file an appeal of or motion to reopen/reconsider the denial of the Form I-601.

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.

In that the field office director found the applicant to be ineligible for a waiver of inadmissibility under section 212(h) of the Act and the applicant failed to file a timely appeal or motion to reopen/reconsider, 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. Accordingly, the appeal of the field office director's denial of the Form I-212 will be dismissed as a matter of discretion.

Beyond the decision of the 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 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. In this case, the applicant was convicted of sale/transportation of cocaine. The applicant is, therefore, ineligible for waiver consideration. The AAO also finds that the applicant is inadmissible under the provisions of section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as a trafficker, and no waiver is available. 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.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).