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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



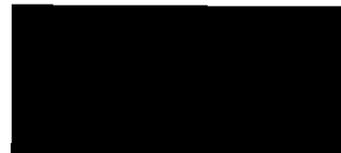
U.S. Citizenship
and Immigration
Services



H4

Date: APR 05 2011 Office: HARLINGEN, TX

FILE:



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: 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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Harlingen, Texas, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

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 December 13, 1996, the applicant pled guilty to and was convicted of possession of marijuana less than 2,000 pounds but greater than 50 pounds in violation of section 481.121(b)(5) of the Texas Health and Safety Code (TXHSC). The applicant was sentenced to ten years in jail. The imposition of the applicant's sentence was suspended in favor of ten years of probation and 80 days in jail. On May 23, 2003, the applicant was placed into proceedings pursuant to sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1227(a)(2)(B)(i), for being convicted of an aggravated felony, specifically a trafficking crime punishable by at least one year in jail under section 101(a)(43)(B), and for being convicted of a crime related to a controlled substance. On July 11, 2003, the immigration judge ordered the applicant removed under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act and terminated the applicant's lawful permanent resident status. On January 14, 2004, the applicant was removed from the United States and returned to Mexico.

On March 20, 2009, the applicant filed a Form I-212 indicating that he resided in the United States. On May 26, 2009, the applicant filed a second Form I-212, indicating that he continued to reside in the United States. On May 27, 2009, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On December 3, 2010, the Form I-485 and both Forms I-212 were denied. On October 31, 2010, the applicant filed a second Form I-485 based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen adult child. On February 17, 2011, the Form I-485 was 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. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen adult child.

The field office director determined that the applicant is subject to reinstatement provisions under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The field office director determined that an alien subject to reinstatement is ineligible for any relief under the Act. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated December 3, 2010.

On appeal, the applicant contends that the director erred in finding that his spouse and not his daughter petitioned on his behalf and that new petitions were filed; the applicant requests that all documents be examined carefully and that a cautious decision be issued in his case. *See Form I-290B*, dated December 10, 2010. In support of his contentions, the applicant submits the referenced Form I-290B 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.-

- (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]

While the applicant may be subject to reinstatement under section 241(a)(5) of the Act, the record in this matter does not establish that the applicant's prior removal order has been reinstated.¹ Accordingly, prior to reinstatement of a removal order, an applicant may file for permission to reapply for admission.

Since the applicant's removal order has not yet been reinstated, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 on the basis that the applicant is ineligible for relief under section 241(a)(5) of the Act. The matter shall be remanded to the field office director for entry of a new decision.² The AAO notes that the applicant is inadmissible under section

¹ U.S. Immigration and Customs Enforcement (USICE) may reinstate an applicant's prior removal order under section 241(a)(5) of the Act at any time, even though he or she reentered prior to April 1, 1997, and he or she may have filed a Form I-212, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422 (S. Ct. 2006). Reinstatement of removal orders are not within the jurisdiction of USCIS.

² The AAO notes that this decision has no bearing on whether the applicant does or does not warrant a favorable exercise of discretion. The AAO's decision merely withdraws the director's stated basis for the denial of the application and directs the director to review the applicant's Form I-212 under applicable grounds of inadmissibility and applications for

212(a)(9)(C)(i)(II) of the Act for his entry into the United States without admission subsequent to his 2004 removal, and he is ineligible for the exception or a waiver under sections 212(a)(9)(C)(ii) and (iii) of the Act.

ORDER: The field office director's decision is withdrawn. The application is remanded to the field office director for entry of a new decision, which if adverse to the applicant, shall be certified to the AAO for review.

permission to reapply for admission under section 212(a)(9)(C) of the Act. Beyond the decision of the field office director, the AAO finds that the applicant is ineligible to apply for permission to reapply for admission under section 212(a)(9)(C) of the Act and is **permanently inadmissible** under the provisions of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, for having been convicted of a crime related to a controlled substance and for being an illicit trafficker and that no waiver is available to the applicant because he has been convicted of more than simple possession of less than 30 grams or less of marijuana, was convicted of an aggravated felony after having been admitted as a lawful permanent resident and for being an illicit trafficker. The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. *United States v. Franklin*, 728 F.2d 994 (8th Cir., 1984); *United States v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980) (413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5th Cir. 1979) (26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978) (147 grams of cocaine). As such, no purpose would be served in approving the Form I-212.