

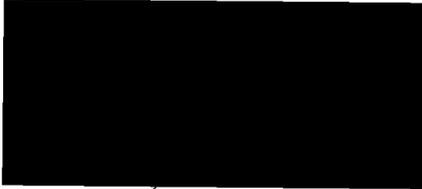
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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H4

DATE: **DEC 15 2011** Office: SAN ANTONIO, TX



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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Antonio, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and, on appeal, the Administrative Appeals Office (AAO) remanded the matter. The Field Office Director has issued a new decision, which has been certified to the AAO. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who has been found to be inadmissible to the United States 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). He is seeking permission to reapply for admission 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.

In his initial decision, the Field Office Director determined that the applicant was permanently inadmissible to the United States pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) as a removable alien convicted of an aggravated felony and that no waiver was available. He, therefore, denied the Form I-212 as he found no purpose was to be served by considering it. *Field Office Director's Decision*, dated October 4, 2010. On May 5, 2011, the AAO remanded the applicant's case to the Field Office Director based on a determination that he had incorrectly identified the statutory basis for the applicant's inadmissibility under the Act. In his second decision, dated June 24, 2011, the Field Office Director found the applicant to be inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), based on a controlled substance conviction and that no waiver was available. Accordingly, he denied the applicant's the Form I-212, again finding that a consideration of the application would serve no purpose. *Field Office Director's Decision*, dated June 24, 2011.

On appeal, the applicant contends that he was not convicted of cocaine possession, but was given deferred adjudication, which is not a conviction. *Form I-290B, Notice of Appeal or Motion*.

The record includes, but is not limited to, a memorandum issued by the Community Supervision and Corrections Department, Webb County, Texas and court records relating to the proceedings brought against the applicant for possession of cocaine. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Prior to considering whether the applicant's admission to the United States is permanently barred under section 212(a)(2)(i)(II) of the Act, the AAO turns to a consideration of the applicant's inadmissibility under section 212(a)(9)(A)(ii) of the Act, the basis for his filing of the Form I-212.

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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

The record reflects that the applicant has been twice removed from the United States. On December 29, 2002, he was removed pursuant to section 235(b)(1) of the Act, returning to the United States on December 30, 2002 under advance parole. On October 24, 2003, the applicant was issued a Final Administrative Removal Order under section 238(b) of the Act, 8 U.S.C. § 1228(b), and was removed on October 27, 2003 as an alien convicted of an aggravated felony. The applicant does not dispute that he was twice removed from the United States. As he is seeking admission within 20 years of the date of his second removal, he is inadmissible to the United States under section 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. § 1227(a)(9)(A)(ii)(I).

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 record establishes that on January 27, 2003, the applicant pled guilty to possession of cocaine in violation of Texas Health and Safety Code §481.115 and was granted deferred adjudication. He was sentenced to five years in jail, which was probated, fined and required to perform 240 hours of community service.

On appeal, the applicant asserts that he has not been convicted of any crime because he received deferred adjudication and his case was ultimately dismissed. In support of this claim, he submits an October 21, 2010 memorandum from [REDACTED] Supervision Officer, Community Supervision and Corrections Department, Webb County, Texas who reports that the applicant complied with all the conditions of his probation and that his case was terminated successfully on January 28, 2008. [REDACTED] memorandum contains the notation: “Deferred Adjudication is not a conviction.”

The AAO finds the memorandum from the Community Supervision and Corrections Department to establish that the applicant’s case was dismissed as a result of his compliance with the conditions of his probation. We note that under the current statutory definition of “conviction” set forth in section 101(a)(48)(A) of the Act,¹ no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). We further observe that the Board of Immigration Appeals (BIA) has previously addressed whether a guilty plea to a controlled substance charge followed by deferred adjudication constitutes a conviction for immigration purposes. In *Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002), the BIA concluded that an individual who had pled guilty to a controlled substance violation prior to receiving deferred adjudication under the Texas Code of Criminal Procedure had been convicted under the Act (reaffirming the rule previously set forth in *Matter of Roldan*). Accordingly, the AAO finds the applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), based on his conviction for cocaine possession under Texas Health and Safety Code § 481.115.

¹ Section 101(a)(48) of the Act, 8 U.S.C. § 1101(a)(48), states that “conviction” means:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

We further find that the applicant's conviction permanently bars his admission to the United States. Waiver eligibility under section 212(h) of the Act is limited to those individuals who have been convicted of possession of 30 grams or less of marijuana. As the applicant has been convicted of possession of cocaine, no waiver is available to him.

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 statutorily 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 and no waiver is available. Therefore, the AAO finds no purpose would be served in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In proceedings for permission to reapply for admission, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.