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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

Hy

[Redacted]

FILE: [Redacted]

Office: SAN FRANCISCO, CA

Date:

FEB 08 2011

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,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Francisco, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). On appeal, the Administrative Appeals Office (AAO) remanded the matter for further action. The matter is now before the AAO upon certification of the field office director's subsequent, adverse decision. The decision of the field office director will be affirmed and the application will remain denied.

The applicant is a native and citizen of Mexico who, on December 22, 1982, was placed into immigration proceedings for having entered the United States without inspection in February 1979. On February 1, 1983, the applicant pled *nolo contendere* to and was convicted of transporting/selling a controlled substance, heroin, in violation of section 11352 of the Health and Safety Code of California (HSC). The applicant was sentenced to one year in jail, which was suspended except for 22 days already served, and four years of probation. On October 14, 1983, the charges against the applicant in immigration court were amended to show that the applicant had been convicted of a crime related to a controlled substance. On March 5, 1984, the immigration judge ordered the applicant removed. On March 5, 1984, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. On November 3, 1984, the applicant departed the United States and returned to Mexico.

On May 22, 1985, the applicant was placed into immigration proceedings for having entered the United States without inspection in May 1985. On May 28, 1985, the immigration judge ordered the applicant removed from the United States. On May 29, 1985, the applicant was removed from the United States and returned to Mexico.

On September 3, 1985, the applicant pled *nolo contendere* to and was convicted of sale of heroin with a prior conviction, in violation of section 11352 of the HSC. The applicant was sentenced to four years in jail and four years of probation. On the same day, the applicant's probation was revoked in regard to his prior conviction and he was sentenced to four years in jail and four years of probation to be served concurrently. On January 28, 1987, the applicant was placed into immigration proceedings for having entered the United States without inspection on May 30, 1985. On March 30, 1987, the applicant pled guilty to and was convicted of being a deported alien in the United States in violation of 8 U.S.C. § 1326. The applicant was sentenced to two years in jail, which was suspended except for 179 days already served, and five years of probation.

On September 24, 2006, 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 U.S. citizen spouse. The Form I-485 indicates that the applicant last entered the United States without inspection in January 1988. During an interview in regard to the Form I-485 the applicant testified that he last entered the United States without inspection in January 1988. On March 6, 2007, the applicant filed a Form I-212, indicating that he continued to reside in the United States. On June 24, 2009, the Form I-485 was denied. The applicant is 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), for a period of twenty years. 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 spouse and U.S. citizen children.

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), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated June 24, 2009.

On appeal, counsel contended that there is no case law that holds that the field office director may not adjudicate the Form I-212 concurrently with the Form I-485, even though the service may reinstate the applicant's prior removal order. Counsel contended that the field office director's decision conflicted with pertinent regulations. Counsel contended that the regulations permit an applicant to apply for *nunc pro tunc* permission to reapply for admission from within the United States when the applicant files for adjustment of status.¹ *See Counsel's Brief*, dated July 1, 2009.

The AAO found that the applicant was not inadmissible pursuant to section 212(a)(9)(C) of the Act because the evidence in the record does not establish that the applicant entered or attempted to reenter the United States without being admitted on or after April 1, 1997. Accordingly, the AAO remanded to the field office director for a full adjudication of the application on the merits. *See AAO's Decision*, dated March 10, 2010.

On certification, the field office director finds that the applicant is permanently inadmissible under the provisions of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, 8 U.S.C. §§ 1182(a)(2)(C), for having been convicted of crimes related to a controlled substance and for being a trafficker in a controlled substance. The field office director finds that there is no waiver is available to the applicant because he has been convicted of more than one crime and each crime is related to a controlled substance other than 30 grams or less of marijuana, i.e. heroin, and there is no waiver available to a trafficker of a controlled substance. The field office director found that no purpose would be served in approving the Form I-212 and denied the Form I-212, accordingly. *See Field Office Director's Notice of Certification*, dated September 1, 2010.

On certification, counsel contends that the applicant's convictions are not drug convictions or aggravated felonies. Counsel contends that the field office director has failed to produce any evidence to support her claim that there is "reason to believe" that the applicant is a trafficker of a controlled substance.² *See Counsel's Brief*, dated September 21, 2010. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

¹ In light of recent case law in the Ninth Circuit, counsel's contentions are unpersuasive in regard to inadmissibility under section 212(a)(9)(C) of the Act. *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007); *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

² The documentation establishing the applicant's inadmissibility was issued to the applicant as part of his criminal prosecution. If the applicant has lost this documentation he may request a copy of it by filing a Freedom of Information Act Request (FOIA) or by filing appropriate requests with the courts. Counsel has failed to make a proper inquiry in order to obtain such documentation.

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 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.

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.)

Counsel asserts that the applicant's convictions are not aggravated felonies and are not even crimes relating to a controlled substance. Counsel contends that the applicant was convicted under a divisible statute which includes conduct which does not constitute a drug trafficking crime. Counsel contends that the statute includes solicitation to commit a drug offense, which is a separate and distinct crime from the underlying solicited criminal conduct and has been held to not be a crime relating to a controlled substance. The record clearly reflects, however, that the applicant's conviction under section 11360(a) of the California Health and Safety Code (CHSC) qualifies as an aggravated felony. First, counsel cites to cases that do not refer to the section of the California code under which the applicant was convicted. Counsel contends that the cases to which he cites are similar to the section of law under which the applicant was convicted. Second, while the cases to which counsel cites hold that an applicant has not been convicted of a crime relating to a controlled substance, or of a drug trafficking crime, if the statute under an applicant has been convicted includes solicitation to commit the underlying crime, the indictments to which the applicant pled guilty clearly reflect that the applicant was not convicted of "solicitation," but of "willfully, unlawfully and feloniously sell, furnish, administer and give away, and offer to sell, furnish, administer and give away, a controlled substance, to wit, heroin." The counts to which the applicant pled guilty did not involve the inchoate crime of solicitation. As such, the applicant has been convicted of crimes relating to a controlled substance and also of illicit trafficking, an aggravated felony.

The applicant is 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 crimes relating to a controlled substance and is ineligible for a waiver pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

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 applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, as a conviction is not required for a finding of inadmissibility under section 212(a)(2)(C) of the Act. A finding of inadmissibility under section 212(a)(2)(C) of the Act is dependent upon whether the evidence in the record reflects that there is sufficient evidence to reasonably believe that the applicant has been or is involved in the illicit trafficking of a controlled substance.

The record reflects that the applicant pled guilty to and was convicted of "willfully, unlawfully and feloniously sell, furnish, administer and give away, and offer to sell, furnish, administer and give away, a controlled substance, to wit, heroin." The evidence in the record reflects that there is sufficient evidence to reasonably believe that the applicant has been involved in the illicit trafficking of a controlled substance. No waiver is available to individuals found inadmissible under section 212(a)(2)(C) of the Act.

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 sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, which are very specific and applicable. The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a single 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 of heroin on more than one occasion. Therefore the applicant is ineligible for waiver consideration. No waiver is available to an alien who is a trafficker in any controlled substance. 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 application will be denied as a matter of discretion.

ORDER: The field office director's decision is affirmed. The application remains denied.