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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: SAN JOSE, CA Date: JAN 18 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: 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 $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 Jose, California denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the applicant appealed that decision. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for entry of a decision. The director again denied the application and the applicant submitted an appeal from that decision, which is now before the AAO. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who, on , was placed into immigration proceedings for having entered the United States without inspection on the same day. On April 27, 1988, the immigration judge ordered the applicant removed from the United States. On May 7, 1988, the applicant was removed from the United States and returned to El Salvador.

the applicant was convicted of false report of a crime in violation of section 148.5 of the California Penal Code. The applicant was sentenced to two years of probation. On October 28, 1993, the applicant pled guilty to and was convicted of possession of a controlled substance, not marijuana, being under the influence of a controlled substance and driving under the influence of a controlled substance in violation of sections 11350(a) and 11550(a) of the California Health and Safety Code and section 23152(a) Of the California Vehicular Code. The applicant was sentenced to three years of probation.

On May 10, 1999, 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 lawful permanent resident father. The applicant indicated that he reentered the United States without inspection in February 1990. On June 12, 2002, the applicant filed the Form I-212 indicating that he continued to reside in the United States. On October 20, 2005, the applicant's convictions for possession of a controlled substance, being under the influence of a controlled substance and driving under the influence of a controlled substance were expunged pursuant to section 1203.4 of the California Penal Code because the applicant had satisfied all the terms and conditions of his sentence. On July 27, 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). 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 with his lawful permanent resident father.

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 July 27, 2009. In its decision on the applicant's appeal, the AAO determined that the applicant was not inadmissible pursuant to section 212(a)(9)(C) of the Act because he had not reentered the United States after April 1, 1997, the date on which section 212(a)(9)(C) of the Act was enacted. The AAO remanded the applicant's Form I-212 to the field office director for further processing and entry of a new decision. *See AAO's Decision,* dated March 15, 2010.

On remand, the field office director determined that the applicant is inadmissible under 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. The field office director determined that no waiver is available and, therefore, no purpose would be served in adjudicating the application for permission to reapply for admission. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated June 28, 2010.

On appeal, the applicant contends that his U.S. citizen father, children and spouse require his support and his presence in the United States is very important and useful. *See Form I-290B,* dated July 26, 2010. In support of his contentions, the applicant submits only the Form I-290B. The entire record was reviewed in rendering a decision in this case.

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.)

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> 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.

The AAO finds that the applicant is not eligible for treatment as a first time offender under *Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). holds that the definition of "conviction" at section 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA) or the rule that no alien may be deported based on an offense that could have been tried under the FFOA, but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute. *Lujan* at 749.

The Ninth Circuit *Lujan* decision explained that:

> The [FFOA] is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. The [FFOA] allows the court to sentence the defendant in a manner that prevents him from suffering any disability imposed by law on account of the finding of guilt. Under the [FFOA], the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant's having committed the offense. The [FFOA's] ameliorative provisions apply for all purposes.

Id. at 735. To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

In this case, the applicant was found guilty of more than one violation related to a controlled substance. The FFOA provides that *an offense,* and not multiple offenses, may be covered by the FFOA. Additionally, the applicant was convicted of being under the influence of a controlled substance and driving under the influence of a controlled substance, crimes which do not fall under FFOA. *See Aguilez-Arellano v. Gonzales,* 446 F. 3d 980 at 982 (9th Cir. 2006); and *Lujan, Supra.* at 738. The AAO finds that the applicant is ineligible for treatment as a first-time offender and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of crimes related to a controlled substance.

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 less than 30 grams of marijuana. In this case, the applicant was convicted of possession of a controlled substance, not marijuana, being under the influence of a controlled substance and driving under the influence of a controlled substance. 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)(II), which are very specific and applicable. No waiver is available to an alien who has been convicted of more than simple possession of marijuana in an amount less than 30 grams. 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 field office director's decision will be affirmed.

ORDER: The appeal is dismissed. The application remains denied.