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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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Date: **NOV 10 2011**

Office: SAN ANTONIO, TEXAS

FILE: 

IN RE: Applicant: 

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 it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), as a controlled substance trafficker.

The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 wife, children, mother and siblings, and his lawful permanent resident father.

The field office director determined that based on his felony conviction for possession with intent to distribute a controlled substance (cocaine), the applicant was permanently inadmissible to the United States pursuant to section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43), as an aggravated felon, and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated March 11, 2011.

On appeal, counsel contends that the Form I-212 was wrongly decided because the evidence was not considered. Counsel states that on July 24, 2007 the governor of Oklahoma issued a certificate of full pardon for the state conviction for possession with intent to distribute a controlled substance. Counsel states that on July 22, 2008, the Oklahoma County District Court granted a *nunc pro tunc* order amending the applicant's conviction to possession of a controlled substance. Counsel asserts that the applicant is not permanently inadmissible as an aggravated felon since his conviction was amended to a drug possession charge, which is not necessarily an aggravated felony. Counsel argues that since the applicant is not permanently barred from the United States the director should consider the new evidence.

The record contains the certificate of pardon from the State of Oklahoma; the *nunc pro tunc* order from the District Court of Oklahoma County, State of Oklahoma; the Form I-212 and supporting evidence; and other 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.

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant was a lawful permanent resident since December 7, 1982. On May 30, 2001, the applicant was convicted of distribution of a controlled substance. The applicant traveled to Mexico and applied for admission to the United States on September 24, 2006, and was found to be inadmissible for having been convicted of distribution of a controlled substance. He was issued a Notice to Appear, charging him with removability under section 212(a)(2)(C) of the Act. On October 30, 2006, the Notice to Appear in Removal Proceedings was personally served on the applicant. On November 28, 2006, the Notice of Hearing in Removal Proceedings was issued to the applicant for a [REDACTED] on December 12, 2006. On December 12, 2006, the applicant was issued the Notice of Hearing in Removal [REDACTED] on December 20, 2006. On December 20, 2008, the immigration judge found the applicant to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act and ordered that the applicant be removed from the United States. On February 1, 2007, the applicant left the United States, and he now seeks permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

With regard to the applicant's criminal conviction, section 212(a)(2) of the Act provides, in pertinent part, that:

- (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-
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
 - (II) a violation of (or a 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.

. . .

- (C) 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.

Section 212(h) of the Act provides, in pertinent part, that:

- (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of 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 if -

. . .

- (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [now the Secretary of Homeland Security (Secretary)] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

Section 101(a)(43)(B) of the Act states that the term “aggravated felony” means “illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code).”

The applicant was found to be inadmissible under section 212(a)(2)(C) of the Act as a controlled substance trafficker. In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the Board held that the only requirement is that “an appropriate immigration official knows or has reason to believe that the alien is a trafficker in controlled substances at the time of admission to the United States.” *Matter of Jose Casillas-Topete*, 25 I&N Dec. 317, 321 (BIA 2010).

Upon review, the record supports that the applicant is inadmissible under section 212(a)(2)(C) of the Act, as there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. The Information contained in the record reflects that the applicant and another defendant “acting jointly,, [sic] willfully, and knowingly in distributed a quantity of cocaine, classified as a controlled dangerous substance in Schedule II of the Controlled Dangerous Substance Act of this State by delivering it to an undercover police officer. . .” The applicant stated in the blind plea guilty that he was given twenty dollars by an undercover police officer to buy cocaine for him and that he purchased the cocaine and gave it to the undercover police officer. The Judgment and Sentence reflects that the applicant was found guilty of distribution of a controlled substance (cocaine) and was sentenced to serve five years of probation.

Based on the foregoing, there is sufficient reason to believe that the applicant has been an illicit trafficker in a controlled substance, and he is inadmissible under section 212(a)(2)(C) of the Act. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C) of the Act.

Counsel argues that the applicant received a full pardon for the state conviction for possession with intent to distribute a controlled substance in violation of Okla. Stat. Tit. 63 § 2-401, and is therefore not permanently inadmissible as an aggravated felon. Counsel argues that the applicant’s conviction was amended to possession of a controlled substance (cocaine).

We are not persuaded by counsel’s argument. In *In re Suh*, 23 I&N Dec. 626, 627-628 (BIA 2003), the Board discussed the effect of a presidential or gubernatorial pardon on certain grounds of removability. The Board stated that section 237(a)(2)(A)(v) of the Act “provides for an automatic waiver of removability where a pardon has been granted for (i) crimes of moral turpitude, (ii) multiple criminal convictions, (iii) aggravated felonies, and (iv) certain high speed flight convictions.”¹ 23 I&N Dec. 626 at 627-628. However, the Board determined that some convictions which render an alien removable are not covered by the pardon waiver of section 237(a)(2)(A)(v) of the Act “such as controlled substance violations under section 237(a)(2)(B), certain firearm offenses under section 237(a)(2)(C), and violations of protection orders under section 237(a)(2)(E)(ii).” *Id.*

¹ Formerly section 237(a)(2)(A)(v) of the Act, redesignated as section 237(a)(2)(A)(vi) by section 401(1), Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, Act of July 27, 2006, 120 Stat. 587.

Thus, we find that the applicant's controlled substance conviction is not covered by the pardon waiver of section 237(a)(2)(A)(vi) of the Act.

The Board also indicated that it agreed with the Department of Homeland Security that "the Act clearly states what offenses may be waived for immigration purposes when a pardon has been granted, and that no further "implicit" waivers should be read into the statute." *Id.* at 627. Thus, a pardon generally will not alter inadmissibility under section 212 of the Act.

For the conviction of possession of a controlled substance (cocaine), the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act and is not eligible for a waiver under section 212(h) of the Act. A section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. The applicant is therefore statutorily ineligible for a waiver for the crime of possession of a controlled substance (cocaine).

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. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964)

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(II) of the Act. No waiver is available to an alien who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act; 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.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.