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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

[REDACTED]

Date: **NOV 10 2011**

Office: NEW YORK

FILE: [REDACTED]

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,

Michael Shumway

for Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, 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 Greece, date of birth August 18, 1949, who was ordered deported to Greece on July 17, 1975. After the applicant's deportation, he reentered the United States on November 12, 1975 as a non-immigrant crewman without obtaining permission for readmission. The applicant reentered the United States using a different spelling of his name, [REDACTED] and a different date of birth, August 19, 1948.¹ The applicant previously sought adjustment of status as an immigrant pursuant to Immigration and Nationality Act (INA or the Act) § 245, 8 U.S.C. § 1255, based on a Petition for Alien Relative (Form I-130) approved on his behalf on April 29, 1990, and that application was denied due to the fact that he entered the United States as a crewman. The applicant is now seeking adjustment of status pursuant to INA § 245(i), as the beneficiary of a visa petition filed on or before January 14, 1998. In connection with that application, the applicant was found inadmissible pursuant to INA § 212(a)(9)(A)(ii), 8 U.S.C. § 1182(a)(9)(A)(ii) based on his July 17, 1975 removal order. He was also found to be inadmissible to the United States pursuant to INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) due to his conviction on July 16, 1975 under New York Penal Law (N.Y.P.L.) § 220.03(7) for Possession of a Controlled Substance. 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 and children.

The district director denied the Form I-212 after determining that the applicant was not eligible for adjustment of status based on his inadmissibility under INA § 212(a)(2)(A)(i)(II) and did not merit permission to reapply for admission after deportation due to a negative discretionary finding.

On appeal, counsel for the applicant states that the applicant merits a positive exercise of discretion and that the applicant's arrests "may not have been treated as crimes but violations or less."

The record contains, among other documentation, an approved Petition for Alien Relative (Form I-130) filed on the applicant's behalf by his U.S. citizen wife, Application for Adjustment of Status to Lawful Permanent Resident (Form I-485), Affidavit of Support (Form I-864), federal and state income tax returns for the applicant, the applicant's marriage certificate, the applicant's spouse's biographic page of her U.S. passport, the applicant's spouse's divorce certificate for her prior marriage, social security statement for the applicant, photocopy of the applicant's health care member card, the applicant's birth certificate, dispositions for the applicant's 1975 criminal convictions, various bank and securities statements, utility statements, health insurance claims, and documentation of the applicant's immigration history.

¹ The applicant may also be inadmissible under INA § 212(a)(6)(C), fraud or willful misrepresentation of a material fact, due to his use of a different spelling and date of birth other than that that appeared on his deportation order and his statement to a U.S. immigration official that he had not previously entered the United States, all to reenter the United States on November 13, 1975.

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.

The applicant is inadmissible under INA § 212(a)(9)(A)(ii), as he was ordered deported on July 17, 1975 in deportation proceedings under INA § 242. The applicant has not remained outside of the United States for ten years and, as such, requires permission to reapply for admission after deportation before he can be admitted as a lawful permanent resident.

The applicant was also found to be inadmissible under INA § 212(a)(2)(A)(i)(II). Section 212(a) of the Act states in pertinent part:

- (2) 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)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -- ... in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

An individual is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The record illustrates that the applicant was convicted under N.Y.P.L § 220.03 (possession of a controlled substance), Class A, Misdemeanor Degree 7, on July 16, 1975 in the New York Court of Special Sessions, Greene County. He was sentenced to sixth months of probation and ordered to pay a fine of 25 dollars. The criminal complaint indicates that the applicant was in possession of "less than ¼ oz. of marijuana in a compressed form, commonly referred to as hashish."

N.Y.P.L § 220.03, previously stated, in relevant part:

A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance.

Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor.

A section 212(h) waiver applies to controlled substance cases that relate to a single offense of possession of 30 grams or less of marijuana. The record shows that the applicant was convicted of

possession of hashish with the net weight of less than $\frac{1}{4}$ of an ounce. The applicant has not provided any evidence to illustrate the exact amount of hashish, as such it could have been as much as .24 ounces, just less than .25 ounces. The drug equivalency of 1 gram of hashish is 5 grams of marijuana. See *United States Sentencing Commission Supplement to the 2000 Guidelines Manual*, dated May 1, 2001, Drug Equivalency Table. Using metric conversion, .24 ounces is equal to 6.80, which when multiplied by 5 in accordance with the Drug Equivalency Table is equal to 34 grams. In order to be eligible for consideration for a waiver under section 212(h) of the Act, the applicant must establish that his conviction was for the drug equivalency of 30 grams or less of marijuana. The applicant has not demonstrated that his conviction for possession of hashish meets the requirement of being a single offense of simple possession of 30 grams or less of marijuana. The burden of proof is upon the applicant to establish he is admissible to the United States in accordance with the requirements at 8 C.F.R. 103.2(b).

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 INA § 212(a)(2)(A)(i)(II) of the Act. No waiver is available under this provision unless the offense involves the equivalent of 30 grams or less of marijuana; therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the applicant's 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 Form I-212 was properly denied by the district director.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.