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



**U.S. Citizenship  
and Immigration  
Services**

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DATE **APR 23 2012** OFFICE: FRESNO, CALIFORNIA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Prior Immigration Violations under section 212(a)(9)(C)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Fresno, California, denied the application for permission to reapply for admission into the United States. The applicant through counsel appealed the Field Office Director's decision and, on December 6, 2010, the Administrative Appeals Office (AAO) dismissed the appeal. On January 3, 2011, counsel filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted. The previous decision of the AAO will be affirmed.

The applicant is a native and citizen of Mexico who was found by the Field Office Director to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having been ordered removed and reentering the United States without being admitted, and seeking admission during the proscribed period after removal. The Field Office Director found that the applicant failed to meet the requirements for consent to reapply and denied the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) accordingly.

On appeal, the AAO found the applicant to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed and seeking admission within the proscribed period after removal; section 212(a)(2)(A)(i)(II) of the Act, § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance; and section 212(a)(2)(C) of the Act, § 1182(a)(2)(C), for having trafficked in a controlled substance. The AAO dismissed the appeal, finding that the applicant is mandatorily inadmissible under provisions of the Act for which a waiver is not available, and thereby, no purpose would be served in the favorable exercise of discretion in adjudicating the applicant's Form I-212 application.

On motion, counsel states that, the AAO deprived the applicant due process because its denial of the appeal was not based on facts and allegations asserted in the Field Office Director's denial of Form I-212. Counsel also states that the applicant is eligible for permission to reenter the United States *nunc pro tunc* because the United States Citizenship and Immigration Services (USCIS) only found the applicant erroneously inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

Although not stated in its initial decision, the record does not reflect that the applicant did not enter or attempt to reenter the United States without being admitted on or after April 1, 1997. Therefore, the AAO finds that the applicant is not inadmissible under section 212(a)(9)(C)(i)(II) of the Act

However, as stated in the previous decision, the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, as an alien who is seeking admission after having been removed for having been convicted of an aggravated felony.

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 of Homeland Security] has consented to the alien's reapplying for admission. [Emphasis added]

The record reflects that, on November 18, 1994, the applicant was convicted of Sale or Transportation of a Controlled Substance pursuant to section 11325(a) of the California Health and Safety Code. The charging documents reflect that that the offense involved cocaine. The record further reflects that the applicant was issued an Order to Show Cause and Notice of Hearing on January 17, 1995 which was personally served upon and signed by the applicant. The grounds of deportation were listed in the Order to Show Cause and Notice of Hearing as follows:

Section 241(a)(1)(B) of the Immigration and Nationality Act, as amended, in that you entered the United States without inspection

Section 241(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that, at any time after entry, you have been convicted of a violation of 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)

Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that, at any time after entry, you have been convicted of an aggravated felony as defined in section 101(a)(43) of the Act.

The record further reflects that the applicant was ordered deported on January 24, 1995 “on the charge(s) contained in the Order to Show Cause.” The record further reflects that the applicant was removed from the United States on January 24, 1995. Subsequently, according to the applicant’s own testimony, the applicant entered the United States without inspection in March or April 1996.

The AAO finds, as it did in its previous decision, that the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act.

The AAO also found in its previous decision that the applicant is inadmissible under the provisions of section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a violation of a law relating to a controlled substance. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Specifically, as noted above, the applicant was convicted of Sale or Transportation of a Controlled Substance pursuant to section 11325(a) of the California Health and Safety Code, and the charging documents reflect that that the offense involved cocaine. Therefore, the AAO again finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act.<sup>1</sup> *See Mielewczyk v. Holder*, 575 F.3d 992 (9<sup>th</sup> Cir. 2009)(holding that California Health and Safety Code Section 11352(a) is a state law relating to a controlled substance). As noted previously, a waiver of inadmissibility under section 212(h) of the Act 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 30g of marijuana.

*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. As the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act and no waiver of inadmissibility is available, the AAO again finds that no purpose would be served in granting the applicant’s Form I-212 Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

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<sup>1</sup> The AAO previously found that the applicant is inadmissible under the provisions of section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as a controlled substance trafficker. However, upon further review, the AAO finds that the record does not adequately support this finding and thus it is withdrawn.

On appeal, counsel contends that the applicant's due process rights were violated because the AAO identified grounds of inadmissibility on appeal that had not been identified by the field office. Counsel states that the applicant's due process rights were violated in that the applicant was not given the opportunity to argue the issues raised for the first time in the AAO decision. Counsel's argument is not persuasive. As noted above, the record reflects that the applicant was personally served with the Order to Show Cause and Notice of Hearing which identified the grounds of the applicant's deportability. Further, although counsel states that the applicant did not have an opportunity to address the grounds of inadmissibility identified by the AAO on appeal, counsel makes no argument disputing those grounds of inadmissibility on motion. Finally, counsel has failed to identify any protected interest of the applicant that has been violated. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden is upon the applicant to establish that he is not inadmissible under any provision of the Act and that he is eligible for the benefit sought. Here, the applicant has not met that burden.

The AAO finds that the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.

**ORDER:** The motion is granted. The previous decision of the AAO is affirmed.