



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted] Office: California Service Center

Date: FEB 09 2000

IN RE: Applicant: [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)

IN BEHALF OF APPLICANT:
[Redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly
Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Egypt who was admitted to the United States in June 1976 and was authorized to remain until September 15, 1976. He failed to depart by that date or to obtain an extension of temporary stay. An Order to Show Cause was issued on April 16, 1980 and the applicant was ordered deported by an immigration judge on April 1, 1987. That decision was affirmed by the Board of Immigration Appeals (BIA) on October 1, 1992. The BIA granted the applicant 30 days in which to depart from the date of its order in lieu of deportation. He failed to surrender for deportation on February 15, 1994, therefore he is inadmissible under § 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant married a United States citizen, [REDACTED] on May 13, 1980 less than one month after the Order to Show Cause was issued. The applicant subsequently divorced his first wife and married [REDACTED]. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain with his wife and son.

Citing Matter of J-F-D-, 10 I&N Dec. 694 (Reg. Comm. 1963), and Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964), the director determined that the applicant is mandatorily inadmissible to the United States for having been convicted of violating a law relating to a controlled substance, and no waiver is available for such a conviction, and no purpose would be served in granting the application. The director then denied the application accordingly.

On appeal, counsel discusses the applicant's present marriage, his having full custody of his son from the prior marriage, the reduction of the amount of marijuana in his conviction to 30 grams or less, the expungement of his conviction and its subsequent dismissal pursuant to § 1203.4 of the California Penal Code. Counsel states that the applicant and his present wife have a child born in 1998, the applicant has had no problems with the law since 1983 and he has paid all of his fines and made restitution.

The record reflects that the applicant was convicted on May 29, 1980 by his plea of nolo contendere to the charge of Selling Marijuana, a violation of § 11360a of the Health and Safety Code of California. Imposition of sentence was suspended and the applicant was placed on probation for a period of three years on the attached terms and conditions which includes one year in jail concurrent with any other sentence. On June 27, 1983, the conviction was set aside and dismissed pursuant to § 1203.4 of the California Penal Code.

In Matter of Ibarra-Obando, 12 I&N Dec. 576 (BIA 1966; A.G. 1967); the Attorney General specifically determined that an expungement of a narcotics conviction under § 1203.4 of the California Penal Code does not wipe out the conviction. See Matter of G-, 9 I&N Dec. 159

(BIA 1960; A.G. 1961); Matter of A-F-, 8 I&N Dec. 429 (BIA, A.G. 1959).

Section 212(a). ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under § 240 of the Act 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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a). CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(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 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 § 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(C) CONTROLLED SUBSTANCE TRAFFICKERS.-Any alien who the consular officer or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing

assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is inadmissible.

Section 212(h) WAIVER OF SUBSECTION (a)(2)(A)(i)(I), (II), (B), (D), AND (E).-The Attorney General may, in his discretion, waive application of subparagraph (A)(i)(I),...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....

The police report in the record indicates that the applicant sold 1/4 ounce of marijuana and one amphetamine to an undercover informant on October 1, 1979. The record reflects that the applicant was convicted of the charge of Sale of Marijuana, which is a violation regarded as illicit trafficking. Notwithstanding the actions of the State of California in expunging the conviction under California § 1203.4 P.C., the Attorney General has stated that such an expungement does not wipe out the conviction for immigration purposes.

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 convicted of violating a law relating to illicit trafficking, since he is mandatorily excludable from the United States under present §§ 212(a)(2)(A)(i)(II) or 212(a)(2)(C) of the Act, and no purpose would be served in granting the application.

The record reflects that the applicant is inadmissible to the United States under § 212(a)(2)(C) of the Act for having been convicted of the Sale of Marijuana. No waiver of such ground of inadmissibility is available, except for a single offense of simple possession of 30 grams or less of marijuana. Therefore, the favorable exercise of discretion in this matter is not warranted.

In discretionary matters, the applicant bears the full burden of proof. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.