U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

Public Copy

FILE: [redacted] Office: California Service Center Date: 11 DEC 2001

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]

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

Robert P. Wiemann, 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 El Salvador who became a lawful permanent resident in October 1990. He applied for admission into the United States on January 29, 1992. A search of his vehicle revealed 22 pounds of marijuana concealed in the ventilating system with an estimated street value of $40,000. The applicant was arrested and paroled into the United States for possible prosecution. The applicant pleaded guilty to simple possession of a controlled substance (22 pounds of marijuana) in violation of 21 U.S.C. 844(a). His plea of guilty was accepted by the District Court on May 26, 1992, and the judge deferred imposition of guilt and the applicant was placed on supervised probation for one year. Upon completion of probation on February 14, 1994, the judge dismissed the charges with prejudice and granted the applicant's application for expunction.

On October 17, 1994, an immigration judge found the applicant to be excludable under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(C), for being an alien who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance. The applicant was excluded and deported from the United States on October 19, 1994. Therefore, he is inadmissible under 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 was again ordered excluded and deported *in absentia* on July 19, 1996, based on a stipulation and order continuing hearing dated June 27, 1996, with the consideration of an additional ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. 1182(a)(2)(A)(i)(II), for having violated a law relating to a controlled substance. The applicant seeks permission to reapply for admission under section 212(a)(9)(A)(iii), 8 U.S.C. 1182(a)(9)(A)(iii), to return to the United States.

Citing 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. The director then denied the application accordingly.

On appeal, counsel states that the applicant has not been found guilty of any offense defined in section 212(a)(2)(A)(I) of the Act, 8 U.S.C. 1182(a)(2)(A)(I). Counsel states that the judge deferred entering a judgement of guilty against the applicant. Therefore, the applicant was never formally found guilty of any offense that would make him inadmissible.

The applicant was found to be excludable under section 212(a)(2)(C) of the Act by an immigration judge. The Associate Commissioner is bound by that decision.

Section 212(a)(9)(A) of the Act, provides, in pertinent part, that:

> (ii) Any alien not described in clause (i) who-
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> > (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,
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> 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.
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> (iii) 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)(2) of the Act provides, in pertinent part, that:

> (A)(i) 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 section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
>
> (C) Any alien who the consular 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(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Section 212(h) of the Act provides that the Attorney General may, in his discretion, waive 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 if-....

In Matter of Roldan-Santoyo, Interim Decision 3377 (BIA 1999), The Board of Immigration Appeals held that the policy exception in Matter of Manrique, 21 I&N Dec. 58 (BIA 1995), which accorded Federal First Offender treatment to certain drug offenders is superseded by the enactment of section 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). Under the statutory definition of the term "conviction," no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

United States v. Franklin, 728 F.2d 994 (8th Cir., 1984), held that proof of possession of a small amount of a controlled substance, standing alone, is an insufficient basis from which an intent to distribute may be inferred. One of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking is the amount of illicit drugs discovered in the person's possession. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. It is clear that the amount of marijuana involved in the present case (22 pounds) is not consistent with an individual's personal use.

Matter of Rico, 16 I&N Dec. 181 (BIA 1977), held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act,

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 inadmissible to the United States under present sections 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 section 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act. 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.