**U.S. Department of Homeland Security**
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U.S. Citizenship and Immigration Services

[redacted]

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APR 13 2004

FILE: [redacted] Office: BALTIMORE, MARYLAND Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION**: The waiver application was denied by the District Director, Baltimore, Maryland and 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 Haiti. He was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted for the offence of possession of a controlled substance. The applicant is the beneficiary of an approved petition for alien relative filed by his U.S. citizen spouse. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States to reside with his spouse.

The district director determined that the applicant is not eligible for any relief or benefit from this application and denied the application accordingly. *See District Director Decision* dated March 31, 2002.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(i) [A]ny 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.

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

> (h) The Attorney General [now the Secretary of 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 relate to a single offense of simple possession of 30 grams of less of marijuana if -
>
> (1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
>
> > (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or

> (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 [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 . . . .

To recapitulate the record reflects that on August 29, 1994, the applicant was charged by the Circuit Court of Wicomico County of the crimes of felonious Possession of Cocaine and Possession of Cocaine. On March 2 1995, he was convicted of the above-mentioned crimes. The applicant is, therefore, inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act.

As stated above there is no waiver available to an alien found inadmissible under this section of the Act except for a single offense of simple possession of thirty grams or less of marijuana. The applicant does not qualify under this exception.

On appeal, counsel submits a brief and asserts that the Immigration and Naturalization Service (now know as Citizenship and Immigration Services [CIS]), improperly denied the waiver. In the brief counsel states that since the applicant is the beneficiary of an approved Form I-130 he has an entitlement to admission and that CIS erred in denying the waiver application due to a conviction since the applicant was already in valid status and entitled to a waiver. The mere approval of a Form I-130 does not confer immigration benefits or lawful status to an individual. Under the Act an individual is inadmissible to the United States if he/she has been convicted of certain crimes. Counsel further states that the applicant was not covered by the provision of Section 212(i) since it applied to persons previously admitted as permanent residents. The AAO does not find counsel's reference to section 212(i) to have any relevance in this case since section 212(i) of the Act refers to a waiver availability of clause (i) of subsection (a)(6)(C) of the Act. However, in any event, both section 212(i) and 212(h) apply to all applicants regardless of their manner of arrival.

Additionally, counsel states that the applicant's drug conviction was extinguished by the First Offender Act and that the Ninth Circuit Court held that an expungement and other "rehabilitative relief" will eliminate a conviction of first offense of a simple possession of a controlled substance. The applicant in the present case was convicted in the State of Maryland and the decision of the Ninth Circuit Court is not controlling. In cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for Federal First Offender Act (FFOA) treatment. *See Matter of Salazar-Regino,* 23 I&N Dec. 223 (BIA 2002) and *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999)

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) 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 at 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. *See Matter of Roldan, supra.*

Furthermore, counsel states that CIS did not consider the extreme hardship that would be imposed upon the applicant's spouse if the waiver applicant is denied. In the present case the applicant does not qualify for the section 212(h) exception of a single offense of simple possession of thirty grams or less of marijuana. Since no waiver is available, no purpose would be served in examining hardship.

Finally counsel's assertion that the applicant's drug conviction is invalid because the arresting police officer was discharged from the police force after a drug conviction is unpersuasive. No documentation was provided to indicate that the court nullified or vacated the conviction, and as stated above once an alien is subject to a "conviction" as that term is defined at section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes.

Notwithstanding the arguments on appeal, section 212(a)(2)(A)(i)(II) of the Act is very specific and applicable. In the present case the applicant is subject to the provision of section 212(a)(2)(A)(i)(II) of the Act and he is not eligible for any relief under this Act. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.