

U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES, CALIFORNIA

Date: JUL 29 2004

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Interim District Director, Los Angeles, California, 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 Mexico. 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 offense 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 and children.

The Interim District Director determined that the applicant is not eligible for any relief or benefit from this application and denied the application accordingly. See *Interim District Director's Decision* dated June 20, 2003.

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 or less of marijuana if -

. . . .

(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 September 10, 1985, in the San Bernardino Municipal Court, District County of San Bernardino, State of California, the applicant was charged with violation of California Health and Safety Code § 11358, Cultivating Marijuana. On May 27, 1986, the charge was changed to a violation of California Health and Safety Code § 11357(c), Possession of a Controlled Substance. The applicant was convicted and required to pay a fine.

In addition, on October 3, 1983, in the San Bernardino Municipal Court District, s County of San Bernardino, State of California, the applicant was charged with the offence of Possession of a Controlled Substance, in violation of California Health and Safety Code § 11350(a). On October 17, 1983, the charge was changed to a violation of California Health and Safety Code § 11550(a), using or being under the influence of any controlled substance. The applicant was convicted and sentenced to 90 days imprisonment.

Furthermore, in an affidavit submitted by the applicant he admits that for a period of time he was smoking pot and that he had been arrested by the police 2-3 times for possession and use of pot.

Based on his two convictions of crimes relating to controlled substances, the applicant is 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 since he has two convictions relating to a controlled substance.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) based its decision on erroneous information with regard to the applicant's criminal convictions. Counsel states that the applicant was not convicted as charged in violation of California Health and Safety code § 11350 and § 11358 and therefore he should not be inadmissible under any section of the Act.

The AAO finds that the Interim District Director erred in finding that the applicant was convicted of violation of California Health and Safety code § 11350(c). This office finds the error to be harmless since the record of proceedings clearly reveals that the applicant was convicted of violation of California Health and Safety code § 11357(c) and § 11550(a) and therefore the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

In addition the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a Crime Involving Moral Turpitude.

The record of proceedings reflects that the applicant was convicted on January 17, 1984, of violation of Californian Penal Code § 488, Petty Theft. The applicant was convicted to 12 months probation and a fine. It has long been held that an offense of "Petty Theft" is a CIMT. *See Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of V-* 2 I&N Dec. 340 (BIA 1940). Petty Theft in California was found to be a CIMT. *See Wilson v. Carr*, 41 F.2d 704 (9th Cir. 1930); *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

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.