

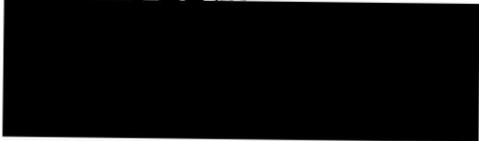
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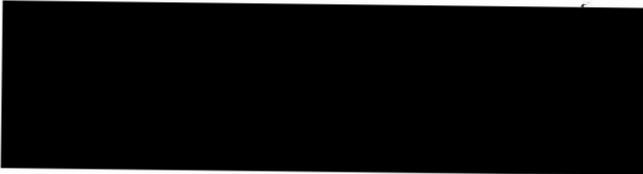
Office: LOS ANGELES, CA

Date: **NOV 17 2006**

IN RE:

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, CA, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(6)(E)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(E)(i), for having aided an alien in attempting to enter the United States. The applicant is married to a United States citizen, is the son of two U.S. citizen parents and has a U.S. citizen daughter. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

The district director concluded that the applicant was seized on September 9, 1991 at the San Ysidro Port of Entry for aiding in an attempt to smuggle an alien without proper documentation and his two children. The director found the applicant ineligible for a waiver based on this incident and denied the application accordingly. *Decision of the District Director*, dated March 2, 2005.

On appeal, counsel states that the director erred in finding the applicant ineligible for a waiver based on the attempted smuggling incident because the applicant was never arrested for the crime, no charges were ever filed against the applicant and no further action was taken. He states that Border Patrol released the applicant. Counsel asserts that the Service decision does not cite any facts or circumstances that would lead a reasonable trier of fact to conclude that the applicant was involved in alien smuggling, so there is no basis to deny the waiver. *Form I-290B*, dated April 4, 2005.

The AAO finds that the record is not clear as to whether the applicant was arrested for alien smuggling, however the record does indicate that the applicant was convicted of a crime involving a controlled substance.

The record reflects that on August 30, 1999 the applicant plead guilty and was convicted of Section 11350(A) of the California Penal Code (CPC), Possession of Narcotics. The record also reflects that on August 6, 2002, under Section 1203.4 of the CPC, the applicant's conviction was reduced to a misdemeanor and a plea of not guilty was entered. The AAO notes that an expungement under Section 1203.4 of the CPC is a limited expungement. In *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit stated that California Penal Code section 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. *See Ramirez* at 1175. Therefore, despite the limited expungement, the applicant's conviction for Possession of Narcotics will remain a conviction for immigration purposes.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) 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 —

- (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 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:

The Attorney General may, in his discretion, waive the 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* (emphasis added.)

Thus, the applicant is not eligible for a Section 212(h) waiver because his record contains a conviction involving narcotics other than 30 grams or less of marijuana. The Act makes it very clear that the section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. Therefore, the applicant is statutorily ineligible to be considered for a section 212(h) waiver.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen child and/or parents or whether he merits the waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.