

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

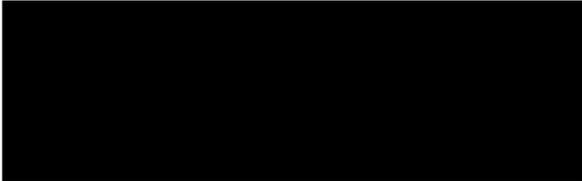
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

#2



FILE:



Office: LOS ANGELES, CA

Date: **AUG 21 2007**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The record indicates that the applicant is married to a United States citizen spouse. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her United States citizen husband and United States citizen mother.

The District Director stated that the applicant was seeking a waiver under section 212(h) and found that she failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated May 6, 2005.

On appeal, the applicant, through counsel, asserts that Citizenship and Immigration Services (CIS) "erred in denying the I-601 waiver by failing to consider all of the factors constituting extreme hardship." *Form I-290B*, filed June 3, 2005. Counsel contends that the applicant's initial Application to Register Permanent Residence or Adjust Status (Form I-485) was erroneously denied in 1986 because the applicant's drug conviction for phencyclidine (PCP) was not classified as a controlled substance at that time; and, therefore, her drug conviction would not render her inadmissible to the United States. *Brief in Support of Appeal*, filed June 3, 2005. Counsel further asserts that the denial of the applicant's admission into the United States would result in extreme hardship to her United States citizen husband and United States citizen mother. *Id.* In support of the extreme hardship claim, counsel submitted a brief, court dispositions from the Municipal Court, Los Angeles County, affidavits from the applicant's husband and mother, medical documents pertaining to the applicant's husband's medical conditions, and letters from the Consulate General of the United States of America, Tijuana, Mexico.

The AAO finds that the District Director erred in finding the applicant inadmissible for crimes involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. The record of proceedings establishes that the applicant was convicted of being in possession of a controlled substance, which makes the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). In order for the applicant to qualify for a waiver pursuant to section 212(h) of the Act, she must have been convicted of only a single offense of simple possession of 30 grams or less of marijuana. Since the applicant was not convicted of being in possession of a single offense of simple possession of 30 grams or less of marijuana, there are no other waivers to the applicant's ground of inadmissibility. The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and; therefore, she is statutorily ineligible for a waiver of inadmissibility.

The record reflects that on May 27, 1980, the applicant was convicted of being in possession of a controlled substance, in violation of California Health and Safety Code § 11377, and was sentenced to 24 months probation. On May 16, 1984, the applicant was convicted of being in possession of a controlled substance and being convicted of being in possession of a controlled substance within seven years of the previous drug conviction, in

violation of California Health and Safety Code §§ 11377a and 11550b, respectively, and was sentenced to 24 months probation.

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

(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...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:

(h) The Attorney General [Secretary of Homeland Security] 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.)

Counsel asserts that on July 9, 1986, the “consular officer wrongly denied [the applicant’s visa] application based on INA section 212(a)(23) for convictions of possession of a controlled substance, namely phencyclidine (commonly known as PCP).” *Id.* “At the time of the interview, PCP was not a controlled substance that could render an alien inadmissible under INA section 212(a)(23). However, just three and a half months later, the Omnibus Drug, Education and Control Act of 1986 was enacted classifying PCP as a controlled substance a conviction for which could trigger inadmissibility under 212(a)(23).” *Id.* (emphasis deleted). The applicant’s husband wrote letters to the Consulate General of the United States of America, in Tijuana, Mexico, and counsel asserts that the American Consul “acknowledged [an] error” was made, in finding the applicant inadmissible. *Id.* However, the AAO notes on January 23, 1997, the American Consul states, “[a]lthough it appears that [the applicant] was not ineligible for a visa when [she] first applied on June 6, 1986, the provisions of the Omnibus Drug, Education and Control Act of 1986, enacted on October 27, 1986 would result in a 212(a)(23) finding if the application was presented at this time.” *Letter from [redacted] American Consul, Consulate General of the United States of America, Tijuana, Mexico*, dated January 23, 1987. Additionally, the Vice Consul states, “[a]lthough it turns out that you are correct that at the time of [the applicant’s] interviews here phencyclidine, as a controlled substance, involvement would not have resulted in a 212(a)(23) ineligibility, the law changed on October 27, 1986. The Omnibus Drug Enforcement, Education, and Control Act of 1986 changed 212(a)(23) to include convictions of controlled substances, including phencyclidine, *even if the conviction occurred before October 27, 1986.*” *Letter from [redacted] Vice Consul, Consulate General of the United States of America, Tijuana, Mexico*, dated November 18, 1986 (emphasis added). Clearly, the American Consulate found the applicant was subject to the changed law, wherein PCP was found to be a controlled substance. In the absence of explicit statutory

direction, an applicant's eligibility is determined under the statute in effect at the time her application is finally considered. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999). 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 and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968). The AAO finds that even though the applicant's convictions occurred more than twenty (20) years ago and at that time, being in possession of PCP would not make her inadmissible, she is inadmissible now, and there is no waiver available to her.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to her United States citizen husband and mother or whether she 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 proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.