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



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 01 2007

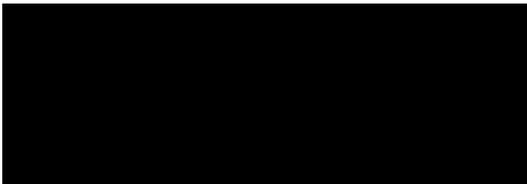
IN RE:

Applicant:



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 Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the waiver application will be deemed moot as the applicant has not been convicted of a crime relating to a controlled substance for immigration purposes, and is thus not inadmissible.

The applicant is a native and citizen of Israel who 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 of Possession of Less Than 20 Grams of Cannabis (Marijuana), in violation of Florida Statute 893.13(6)(b). The director determined that the applicant had failed to establish that his wife would suffer extreme hardship if he were denied admission into the United States. The applicant's Form I-601, Application for Waiver of Ground of Inadmissibility (I-601 Application) was denied accordingly.

Through counsel, the applicant indicates that his conviction was vacated on substantive and procedural grounds in October 2006, and that he has therefore not been convicted of a crime relating to a controlled substance, for immigration purposes. The applicant asserts through counsel that he is thus not inadmissible, and that a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) is not required. On this basis, the applicant asks that his case be remanded to the district director in Miami, Florida, for approval of his Form I-485 adjustment of status application. In the alternative, the applicant asserts through counsel that the evidence in the record establishes that his wife would suffer extreme hardship if he were denied admission into the United States. The applicant asserts that he is therefore eligible for a section 212(h) of the Act waiver of his ground of inadmissibility.

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

(i) [A]ny 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.

The record reflects that on December 8, 2000, the applicant pled no contest to the misdemeanor offense of possession of 20 grams or less of cannabis (marijuana), in violation of Florida Statute 893.13(6)(b). Based on these facts, the applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraph . . . (A)(i)(II) [of section 212(a)(2)(A)(i)(II) of the Act]

insofar as it relates 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

The record reflects that the applicant is married to a U.S. citizen. On this basis, he qualifies for consideration under section 212(h) of the Act.

In the present matter the applicant asserts, through counsel, that he is no longer inadmissible under section 212(a)(2)(A)(i)(II) of the Act because his controlled substance conviction was vacated on substantive and procedural grounds. The applicant submits evidence that on August 11, 2006, the Martin County, Florida, 19th Judicial Circuit Court entered an order to set aside his conviction under Florida Statute 893.13(6)(b), on the basis that the applicant had not been informed of the potential deportation consequences of his no contest plea, in accordance with Florida Rule of Criminal Procedure 3.172(c)(8). The applicant submits additional evidence reflecting that on October 17, 2006, the State of Florida filed a NOLLE PROSEQUI reflecting that the State chose not to re-prosecute the applicant for the offense of possession of 20 grams or less of cannabis.

The Board of Immigration Appeals stated in *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) that:

As a general rule, we give full faith and credit to State court actions that purport to vacate an alien's criminal conviction. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Nonetheless, if a court vacates an alien's criminal conviction solely on the basis of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its vacatur. *Matter of Pickering* [23 I&N Dec. 621 (BIA 2003)]; *see also Ali v. Ashcroft*, 395 F.3d 722, 728-29 (7th Cir. 2005). . . .

In the present matter, the evidence in the record reflects that the applicant's conviction for possession of 20 grams or less of cannabis was vacated because the applicant was not informed of the potential deportation consequences of his original plea, in accordance with Florida Rule of Criminal Procedure 3.172(c)(8). Upon review of the evidence, the AAO finds that the applicant has established that his conviction was vacated on the basis of a substantive or procedural defect in his underlying criminal proceedings, rather than on the basis of immigration hardships or rehabilitation. The applicant has therefore established that he is not convicted of a controlled substance related crime, for immigration purposes. Accordingly, the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and a section 212(h) of the Act waiver is not necessary.

ORDER: The appeal is dismissed and Form I-601 application for a waiver of inadmissibility under section 212(h) of the Act is moot, as the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.