

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H2

[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: APR 07 2008

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, Chief
Administrative Appeals Office

DISCUSSION: The Form I-601, Waiver of Inadmissibility (I-601 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 application denied.

The applicant is a native and citizen of the Dominican Republic 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 a crime relating to a controlled substance. The applicant seeks a waiver of his ground of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director found the applicant had failed to provide evidence to establish that a U.S. citizen or lawful permanent resident spouse, parent or child would suffer extreme hardship if the applicant were denied admission into the United States. The director found further that because the applicant had been convicted of a controlled substance related crime, he was ineligible to apply for a waiver of inadmissibility under section 212(h) of the Act. The I-601 application was denied accordingly.

On appeal the applicant asserts, through counsel, that he has met the extreme hardship requirements set forth in section 212(h) of the Act. The applicant indicates that section 212(h) of the Act provisions allow for hardship to the applicant himself to be considered. In support of this assertion, the applicant refers, through counsel, to a May 27, 2003, Memorandum by William R. Yates, USCIS Acting Director for Operations, discussing *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), and exceptional and extremely unusual hardship requirements. The applicant asserts that the hardship that he, his wife and his child would suffer amount to extreme hardship. He concludes he is therefore eligible for a waiver of his ground of inadmissibility. The applicant does not address the director's finding that he is ineligible to apply for section 212(h) of the Act waiver relief because his ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is not covered by section 212(h) provisions.

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

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any (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.

(ii) Exception.- **Clause (i)(I)** shall not apply to an alien who committed only one

crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed.)

(Emphasis added.) The record reflects that on January 11, 1995, the applicant pled guilty in New York, to the offense of Possession of a Controlled Substance, in violation of New York Penal Law (NPL) section 220.03. The director indicates in his decision, and counsel concedes on appeal, that the controlled substance involved was heroin. The Controlled Substances Act, 21 U.S.C. § 802, lists heroine as a Schedule I controlled substance. The applicant is therefore 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 [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 relates to a single offense of simple possession of 30 grams or less of marijuana**

. . . .

(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**

It is noted that on appeal the applicant claims, through counsel, that the Attorney General decision, *Matter of Jean, supra*, and a May 27, 2003, USCIS Memorandum by William Yates establish that hardship to the applicant, him or herself, may also be considered for section 212(h) of the Act extreme hardship purposes. Counsel's assertion is unconvincing. *Matter of Jean, supra*, pertained to a waiver of inadmissibility under section 209(c) of the Act, 8 U.S.C. § 1159(c), which pertains to asylees and refugees. Moreover, *Matter of Jean, supra*, did not in any way discuss or pertain to requirements for extreme hardship under section 212(h) of the Act. The statutory language contained in section 212(h) of the Act clearly limits its extreme hardship provisions to the following qualifying family members: U.S. citizen or lawfully resident spouse, parent, son

or daughter. The AAO therefore finds that section 212(h) of the Act does not allow for consideration of extreme hardship to the applicant himself.

The AAO notes further that section 212(h) of the Act does not provide for the possibility of a waiver of a section 212(a)(2)(A)(i)(II) of the Act, ground of inadmissibility for a controlled substance offense which is not a single offense of simple possession of 30 grams or less of marijuana. A finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for a heroine related conviction is not within the scope of section 212(h) of the Act waiver relief.

The burden of proof is on the applicant to establish his eligibility for the immigrant visa and waiver of inadmissibility benefits sought. *See* section 291 of the Act, 8 U.S.C. § 1361. In the present matter, the record contains copies of the applicant's criminal case disposition and history reflecting that on January 11, 1995, the applicant was convicted, upon plea of guilty, of Criminal Possession of a Controlled Substance in the seventh Degree, in violation of NPL section 220.03. The applicant does not contest the director's finding that his conviction was for possession of heroin, and he confirms on appeal that his conviction was for possession of heroine.

The AAO notes that the CSA lists heroine as a Schedule I controlled substance. The applicant was thus convicted of a crime in violation of a U.S. state law relating to a controlled substance, as set forth in the CSA, and he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Because the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, he is not eligible to apply for a waiver of inadmissibility under section 212(h) of the Act. It is therefore unnecessary to address the applicant's claim of hardship under section 212(h) of the Act, and the applicant's appeal will be dismissed, and his application denied.

ORDER: The appeal is dismissed. The application is denied.