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U.S. Citizenship  
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[Redacted]

FILE:

[Redacted]

Office: CLEVELAND, OH

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 waiver application was denied by the District Director, Cleveland, Ohio. 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 Jamaica 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 inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The district director found that in 1994, the applicant was convicted in Canada of Possession of a Narcotic (cocaine). The district director determined that the applicant was therefore inadmissible under section 212(a)(2)(A)(i)(II) of the Act. The district director determined further that the applicant was ineligible to apply for section 212(h) of the Act, waiver of inadmissibility relief. In addition, the district director noted that the applicant did not qualify for an exception to his ground of inadmissibility under section 212(a)(2)(A)(ii) of the Act, because the enumerated exceptions applied only to a crime involving moral turpitude violation under section 212(a)(2)(A)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and not to a controlled substance related violation under section 212(a)(2)(A)(i)(II) of the Act. The applicant's Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601 application) was denied accordingly.

On appeal the applicant asserts, through counsel, that his Canadian record of conviction does not specify the narcotic involved in his conviction, and thus does not constitute a ground of inadmissibility under section 212(a)(2)(A)(ii)(II) of the Act. Counsel asserts further that the applicant's narcotics conviction is a section 212(h) of the Act, waivable offense because the maximum penalty for the offense was a six-month sentence and/or a \$1000 fine - similar to a misdemeanor, petty offense. Counsel asserts that the evidence in the record establishes the applicant's wife and children would suffer extreme hardship if he were unable to remain in the United States with them, or if they moved to Jamaica in order to be with the applicant. Counsel concludes that the applicant's I-601 application should therefore be considered and approved.

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 June 30, 1994, the applicant was convicted in Toronto, Canada, of the offense of Possession of a Narcotic, in violation of section 3(1) of the Canadian Narcotic Control Act, R.S.C. 1985, N-1 (NCA). The district director indicates in his decision that the narcotic involved was cocaine.

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 . . . .

Section 212(h) of the Act does not provide for the possibility of a waiver for 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 cocaine related narcotics possession conviction is therefore not be within the scope of section 212(h) of the Act waiver relief.

On appeal, counsel asserts that the applicant's possession of narcotics offense is similar to a single misdemeanor offense of simple possession of 30 grams or less of marijuana, and should therefore be viewed similarly, and found to be eligible for relief under section 212(h) of the Act. To support his assertion, counsel refers to the Board of Immigration Appeals (Board) case, *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994). The AAO notes that *Matter of L-G-*, *supra*, pertained to a respondent in deportation proceedings who was charged with deportability as an aggravated felon, based on a possession of cocaine conviction. The Board determined that the circumstances of the respondent's case did not establish that the respondent had been convicted of an aggravated felony as defined in the Act. The Board found that the respondent was thus not barred from applying for asylum and withholding of removal relief. *Matter of L-G-*, *supra*, did not discuss or deal with the issue of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and the AAO finds that the case fails to establish that the applicant in the present matter qualifies for the simple possession of marijuana exception contained in section 212(h) of the Act, or that he is eligible to apply for relief under section 212(h) of the Act.

Counsel additionally asserts on appeal that, although the applicant's criminal conviction record reflects that he was convicted of Possession of Narcotics, under section 3(1) of the NCA, the criminal conviction sheet does not specify the narcotic involved in the applicant's conviction. Counsel indicates that because the possession of narcotics criminal conviction record is silent as to the narcotic involved, the applicant is not inadmissible under the Act. Counsel refers to the Board case, *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), to support his assertion.

The AAO notes that *Matter of Paulus*, *supra*, pertained to a respondent placed into deportation proceedings based on a controlled substance related deportation charge. The basis of the respondent's conviction was his violation of California Health and Safety Code § 11503 which provided he, "[d]id offer unlawfully to sell and furnish a narcotic to a person and did then sell and deliver to such person a substance and material in lieu of such narcotic." *Id.* at 274-75. The Board found that the respondent's record of conviction was silent as to the narcotic involved in his conviction, and the Board found that because it was possible that the respondent's conviction might have involved a substance which is not defined as a controlled substance under the Controlled Substances Act, 21 U.S.C. 802 (CSA), the Immigration and Naturalization Service (INS) had failed to prove by clear, unequivocal and convincing evidence that the respondent was deportable for a controlled substance related crime.

It is noted that in deportation or removal proceedings, the government bears the burden of establishing a respondent's deportability or removability by clear, unequivocal and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966). However, the burden of proof in the present matter is on the applicant to establish his eligibility for the waiver of inadmissibility sought. *See* section 291 of the Act, 8 U.S.C. § 1361.

The applicant does not contest the district director's finding that his conviction was for possession of cocaine. The AAO notes further that the applicant did not submit the full court disposition for his case, and he submitted no other information to indicate that his conviction was not for possession of cocaine. To the contrary, the applicant confirms on his I-601 application and in his appeal brief that his Possession of Narcotics conviction was for possession of cocaine.

Upon review of the evidence, the AAO finds that the applicant's Possession of Narcotics convictions was for possession of cocaine. Cocaine was listed as a Schedule 2 narcotic under the Canadian Narcotics Control Act. Moreover, the U.S. Controlled Substance Act lists cocaine as a Schedule II controlled substance. The applicant was thus convicted of a crime in violation of a foreign 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. The applicant's appeal will therefore be dismissed, and his application denied.

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