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U.S. Citizenship
and Immigration
Services

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FILE:

Office: BALTIMORE, MD

Date: DEC 10 2008

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant is a native and citizen of Sierra Leone 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 a controlled substance. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined that the applicant had failed to establish a qualifying family member would suffer extreme hardship if the applicant were denied admission to the United States. The applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), was denied accordingly.

On appeal, counsel for the applicant submitted a brief, dated October 18, 2006, and supporting documentation. The entire record was reviewed and considered in rendering this decision.

The record reveals that on April 19, 2002, the applicant was arrested for *possession of marijuana* in violation of section 18.2-250.1 of the Virginia Code (case # [REDACTED]). The applicant pled guilty to this offense and his driver's license was suspended for six months. The suspension of the applicant's driver's license is a restraint on his liberty and, therefore, constitutes a conviction pursuant to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A).

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.

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

- (h) Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D) and (E)

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of . . . 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

The burden of proof in the present proceedings is on the applicant to establish his eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. A section 212(h) the Act waiver of the bar to admission, resulting from the violation of section 212(a)(2)(A)(i)(II) of the Act, is only available for simple possession of 30 grams or less of marijuana. Here, the applicant has not established that he has satisfied this requirement for a waiver under section 212(h) of the Act.

The applicant was convicted under section 18.2-250.1 of the Virginia Code, which in pertinent part, provides:

It is unlawful for any person knowingly or intentionally to possess marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.). Upon the prosecution of a person for violation of this section, ownership or occupancy of the premises or vehicle upon or in which marijuana was found shall not create a presumption that such person either knowingly or intentionally possessed such marijuana. Any person who violates this section shall be guilty of a misdemeanor, and be confined in jail not more than thirty days and a fine of not more than \$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, shall be guilty of a Class 1 misdemeanor. . . .

Section 18.2-250.1 of the Virginia Code does not delineate terms of punishment based upon possession amount. A plain reading of the statute provides that any unauthorized possession of marijuana constitutes a misdemeanor. The record of conviction in this case only shows that the applicant was convicted of possession of marijuana, and does not indicate the possession amount. Consequently, the applicant has not established that his conviction for was for 30 grams or less of marijuana.

On appeal, counsel asserts that the applicant was convicted of a Class 3 misdemeanor punishable by not more than 30 days in jail and/or a fine of \$500.00. Counsel states that this sentence indicates that the quantity of the substance found with the applicant was less than 30 grams. In support of her assertion, counsel submits section 18.2-248.1 of the Virginia Code. This section of the code relates to penalties for sale, gift, distribution or possession with intent to sell, give or distribute marijuana. Here, the applicant was convicted of possession of marijuana under section 18.2-250.1, an offense that is distinct and separate from section 18.2-248.1. Therefore, counsel's reference to section 18.2-248.1 of the Virginia Code is not relevant to the applicant's ground of inadmissibility in the present proceedings.

There is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of 30 grams or less of marijuana. The applicant has not met his burden of proof in establishing that he qualifies for this exception. In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests 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.