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U.S. Citizenship and Immigration Services

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JAN 18 2005

[redacted]

FILE: [redacted] Office: MIAMI DISTRICT OFFICE Date:

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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, Director
Administrative Appeals Office

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

The record reflects that the applicant is a 36-year-old native and citizen of Cuba who entered the United States as a parolee travelling from the Port of Mariel, Cuba, on August 21, 1980, at the age of 12. The applicant was found inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(2)(C). The applicant claims to be the husband of a U.S. citizen and father of four U.S. citizen children. He seeks a waiver of inadmissibility to remain in the United States with his family and adjust his status to that of a lawful permanent resident pursuant to Section 1 of the Cuban Adjustment Act of 1966.

The district director found that the applicant was statutorily ineligible for a waiver of inadmissibility and denied the application accordingly. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (i) In general.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the 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.

8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant was also found inadmissible under INA § 212(a)(2)(C), which provides, in pertinent part:

> (C) Controlled substance traffickers.—
>
> Any alien who the consular officer or the Attorney General [now Secretary of Homeland Security] knows or has reason to believe—
>
> (i) is or has been an illicit trafficker in any controlled substance . . . or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any such controlled or listed substance or chemical, or endeavored to do so. . . . is inadmissible.

8 U.S.C. § 1182(a)(2)(C). The waivers available for 212(a)(2) inadmissibility grounds are enumerated in INA § 212(h), 8 U.S.C. § 1182(h). *See* INA § 212(a)(2)(F), 8 U.S.C. § 1182(a)(2)(F). Section 212(h) provides, in pertinent part:

> The Attorney General [now the Secretary of Homeland Security] 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 . . .

8 U.S.C. § 1182(h). A waiver of inadmissibility under INA § 212(a)(2)(A)(i)(II) is therefore only available if the applicant was convicted for a single offense of simple possession of 30 grams or less of marijuana, without intent to distribute. There is no waiver available of inadmissibility pursuant to INA § 212(a)(2)(C). Consequently, if the applicant is inadmissible under INA § 212(a)(2)(C), no waiver is available and the application for waiver would be moot. The threshhold question on appeal is therefore whether the applicant is inadmissible under INA § 212(a)(2)(C); that is, whether the district director applicant knew or had reason to believe the applicant is, was, or endeavored to be an illicit trafficker in a controlled substance, or aided, abetted, assisted, conspired, or colluded with others in such trafficking or endeavor to traffic.

The applicant contends that he was convicted of a single offense of simple possession of 30 grams or less of marijuana. The district director based the finding of inadmissibility under this section on February 13, 1987, and October 6, 1989, New Jersey convictions of "Possession of a Controlled Dangerous Substance with Intent to Distribute." *Decision of the District Director* (May 16, 2000) at 3. The applicant contends that the district director misinterpreted the criminal records and, in fact, he was convicted for a single offense and sentenced on February 13, 1987, but then violated the terms of his probation and, in October 1989, was sentenced to additional time in jail and an extension of probation. As support for this contention, he notes that the case numbers for the two offenses cited by the district director are the same.

The record contains a 1999 Federal Bureau of Investigation (FBI) Record of Arrest and Prosecution ("RAP Sheet") obtained by comparison with the applicant's fingerprints. The RAP sheet shows that the applicant was arrested five times between 1984 and 1992. The arrests apparently resulted in the dismissal of all charges, except when he was arrested on September 1, 1986 and charged with ten different counts. The disposition of this arrest was a conviction for one count of violation of New Jersey Statute § 24:21-19a(1), which in 1986 provided, in pertinent part:

> 19. a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:
>
> > (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance . . . .

N.J. Stat. Ann. § 24:21-19.a(1) (Chapter 31, Laws of 1975) (repealed 1987). The maximum punishment for this offense with respect to marijuana, depending on the quantity involved, was imprisonment for not more than 12 years or, in the case of one ounce or more, up to life imprisonment. N.J. State Ann. § 24:21-19.b.(1), (2) (Chapter 31, Laws of 1975) (repealed 1987). The pre-sentencing report indicates that the final charge against the applicant was "Possession of Controlled Dangerous Substance with Intent to Distribute N.J.S. 24:21-19a(1)." *State of New Jersey, Adult Presentence Report*, at 1. The attached narrative states that the "seven packs of vegetation marijuana/brown color . . . were examined [by the New Jersey State police, Special and Technical Service Section, Forensic Science Bureau]. Specimen number one was positive for marijuana, controlled dangerous substance, schedule one, 6.48 grams." *Id.* The record reflects that the applicant was convicted by guilty plea. The record further reflects that he specifically admitted to the probation officer who prepared his pre-sentencing report that he "sold drugs for one year and would earn $2.00 per bag and would sell twenty to thirty bags per day." *State of New Jersey, Adult Presentence Report*, at 12.

INA § 212(a)(2)(C) does not requre a conviction in order to support a finding of inadmissibility. The adjudicator need only possess a "reason to believe" that the individual in question is or was involved in illegal drug trafficking. The conviction for possession of marijuana with intent to distribute and the related criminal records provide ample support to lead a reasonable person to believe that the applicant was at one time involved in the trafficking of drugs. The district director's inadmissibility finding under INA § 212(a)(2)(C) is therefore affirmed.

Inasmuch as there is no waiver available for inadmissibility under INA § 212(a)(2)(C), no purpose would be served in discussing whether the applicant is eligible for an INA § 212(h) waiver of inadmissibility under INA § 212(a)(2)(A)(ii). The application for waiver is therefore moot. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.