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U.S. Department of Homeland Security  
20 Massachusetts Avenue NW, Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

H2

[REDACTED]

FILE: [REDACTED] Office: LOS ANGELES (SANTA ANA) Date: DEC 27 2007

IN RE: [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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under 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 unlawfully selling a controlled substance. The record indicates that the applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his United States citizen wife.

The District Director found that the applicant was statutorily ineligible for a waiver under section 212(h) of the Act, and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated January 10, 2006.

On appeal, the applicant, through counsel, claims that “[t]his conviction is currently the subject of a Non-Statutory Motion to Vacate for constitutional reasons, and should not be considered a final conviction for purposes of denial of the I-601 waiver.” *Form I-290B*, filed January 27, 2006. Additionally, counsel asserts that “[p]ursuant to the holding in *Matter of Tinajero*, 17 I&N Dec. 424 (BIA 1980), this matter should be held in abeyance while the post conviction relief is pending.” *Id.*

The record of proceedings establishes that on April 5, 1993, the applicant<sup>1</sup> was convicted of selling/transporting a controlled substance, in violation of California Health and Safety Code § 11352, and was sentenced to 180 days in county jail and 3 years probation, which makes the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). In order for the applicant to qualify for a waiver pursuant to section 212(h) of the Act, he must have been convicted of only a single offense of simple possession of 30 grams or less of marijuana. Since the applicant was not convicted of being in possession of a single offense of simple possession of 30 grams or less of marijuana, there are no other waivers to the applicant's ground of inadmissibility. The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and; therefore, he is statutorily ineligible for a waiver of inadmissibility.

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

- (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...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)),

<sup>1</sup> The applicant was convicted of selling/transporting a controlled substance under the name of [REDACTED]

is inadmissible.

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

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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...*(emphasis added.)

Counsel, relying on *Matter of Tinajero*, 17 I&N Dec. 424 (BIA 1980), asserts that since the applicant is pursuing a motion to vacate his criminal conviction, the AAO should hold the applicant's appeal in abeyance until a decision is made on the motion to vacate. The AAO notes that the alien in *Tinajero* was convicted of burglary, which is a crime involving moral turpitude. Since Tinajero's crime was a crime involving moral turpitude, he would be eligible for a waiver under section 212(h) of the Act; unlike the applicant in the present case, who was convicted of a controlled substance offense, which makes him ineligible for any waivers under the Act. Additionally, "collateral attacks upon an [applicant's] conviction do not operate to negate the finality of his conviction unless and until the conviction is overturned." *Matter of Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996) (citations omitted). Moreover, this office cannot go behind the judicial record to determine the guilt or innocence of an alien. *See id.* The AAO notes that since counsel filed the applicant's appeal on January 27, 2006, no other documentation has been filed regarding the applicant's motion to vacate his criminal conviction.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his United States citizen wife or whether he merits the waiver as a matter of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely 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.