U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES DISTRICT OFFICE Date: MAR 2 9 2007

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:

[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.

Ellen L. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The applicant, [redacted], a national and citizen of Mexico, was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. [redacted] seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain with his U.C. citizen spouse, [redacted], and their four children in the United States.

The District Director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's convictions of three crimes involving moral turpitude. *District Director's Decision,* dated April 15, 2005. The District Director also found that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly, based on the requirements of section 212(h)(1)(B) of the act. *Id.*

On appeal, counsel contends that "[t]he Service erroneously denied the Waiver of Grounds of Inadmissibility [and] that the applicant submitted substantial documentation to establish that the hardship that his wife would suffer, **in the cumulative,** would rise to the statutorily required level for the grant of the waiver" (emphasis in the original). *Notice of Appeal to the Administrative Appeals Office (AAO) (Form I-290B), Counsel's Statement,* dated May 12, 2005. In support of the appeal, counsel submits medical records and a letter from [redacted]'s doctor explaining that her last pregnancy resulted in a premature birth and that the baby "is known to be RhD positive and is at risk for hemolytic disease"; he also notes that [redacted] "has had at least a 5 year history of depression" and was intermittently on medication and had been offered counseling. *Letter from* [redacted] May 6, 2005. [redacted] concludes that due to those facts, "it is vital for this family unit to remain intact." *Id.*

The record also contains counsel's brief and attachments submitted in support of [redacted] Form I-601, including (1) a sworn statement from the applicant's wife noting that she came to the United States when she was three years old, she is not fluent in Spanish and has no recollection of Mexico and no close relatives or contacts in Mexico; that her parents and siblings are either U.S. citizens or Legal Permanent Residents and are very involved in their children's lives; that their children are all in school and well adapted and that moving to a new country would disrupt their development and emotional stability; and that she relies on [redacted] to help raise their children and she would not be able to support herself and their children without [redacted]'s income; (2) tax forms, earnings statements and letters from employers indicating that from 1998 to 2001 the couple filed taxes showing earnings for [redacted] ranging from $25,000 to $49,000; and indicating that she has been employed by Home Depot since 1989; and that [redacted] worked as a salesperson in 2001 and 2002 and has been employed by Home Depot since 2003; (3) a letter of reference for [redacted] from his employer (Human Resources Manager at Home Depot), dated March 24, 2005, indicating his current salary of $14 per hour as a full time Department Supervisor, and attesting to his excellent work habits and skills and his "excellent character." [redacted] "Disposition[s] of Arrest and Court Action" from the California Department of Justice, Bureau of Criminal Information and Analysis and his arrest record from the Federal Bureau of Investigation (FBI) are also included. The entire record was considered in rendering a decision on this appeal.

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

> 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 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* (emphasis added).
>
> . . . .

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

> The Attorney General [now Secretary, Homeland Security, "Secretary"] 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) if. . . .
>
> > (1) (A) . . . it is established to the satisfaction of the Attorney General that –
> >
> > > (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> > >
> > > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> > >
> > > (iii) the alien has been rehabilitated; or
> >
> > (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 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 . . . (emphasis added)

The record reflects that, based on evidence from California Department of Justice records, [redacted] was convicted of three offenses: (1) on April 29, 1987, for violation of California Penal Code §459, Burglary (auto), a misdemeanor, for which he was sentenced to 45 days in jail; (2) on September 10, 1987, for violation of California Penal Code §496.1, Receiving Stolen Property, a misdemeanor, for which he was also sentenced to 45 days in jail; and (3) on October 11, 1991, for violation of California Penal Code §211, Robbery – 2nd Degree, a felony, for which he was sentenced to seven years in prison. Based on these

convictions, the District Director concluded that [redacted] was inadmissible for having been convicted of crimes involving moral turpitude. Counsel does not contest this finding.

The record also reflects, however, that [redacted] was arrested on June 15, 1989 and charged with one count of possession of cocaine, a charge that was not alluded to in the District Director's decision. *FBI Record, RAP Sheet Printout,* requested January 6, 2002. Handwritten notes taken during [redacted] adjustment interview indicate that he admitted that he was arrested and charged with possession of cocaine for which he plead "no contest." *Interview Notes,* June 1, 2004; *Notes on RAP Sheet,* undated.

The record indicates that [redacted] convictions, noted above, for burglary, receiving stolen property, and robbery, were for activities that occurred over 15 years ago. As his current application for adjustment of status is pending, and it is more than 15 years after the occurrence of the activities for which he was found inadmissible, he is not inadmissible under section 212(h)(1)(B) of the Act as stated by the District Director. If those convictions were the sole grounds of inadmissibility, he would be statutorily eligible for a waiver pursuant to section 212(h)(1)(A) of the Act. *See Matter of Alarcon,* 20 I & N Dec. 557, 562 (BIA 1992) (clarifying that an application for adjustment of status, similar to an application for admission, "is a continuing application, and inadmissibility is determined on the basis of the facts and the law at the time the application is finally considered." [redacted] application remains pending until a final determination is made on this appeal.

However, [redacted] admission to a violation of a law involving a controlled substance, *i.e.,* possession of cocaine, makes him inadmissible under section 212(a)(2)(A)(i)(II) of the Act (*supra).* The Act provides for no waiver of this ground of inadmissibility.

Before completing this adjudication on its merits, and in order to provide [redacted] with the opportunity to provide additional evidence regarding the final court disposition of the charge of possession of cocaine, the AAO communicated with [redacted] counsel to request a copy of the court records of the criminal case, noting the charge and the date. *Facsimile Memo to* [redacted] *Counsel for* [redacted] January 29, 2007. In response, [redacted] provided certified copies of the results of record searches conducted between February 21 and 23, 2007:

1. The Los Angeles County Superior Court referred to an inquiry regarding [redacted] stating "Our court has no record regarding your inquiry."
2. The Superior Court of the State of California, County of Los Angeles, referred to an inquiry regarding [redacted] for the time period from 1997 through the present, stating, "There is no record of any Long Beach action under the aforementioned name."
3. The Superior Court of the State of California, County of Orange, referred to an inquiry regarding [redacted] for the time period from 1997 to the present, stating "No Criminal record found," and also stating that no record was found after a records search for 1989 through 1990.

[redacted] also provided a copy of a letter from The County of Los Angeles Sheriff's Department, addressed to "Dear Valued Customer" with no date or reference to a particular person, noting that the Department does not release crime reports or booking jacket records.

In any application for admission, the burden of establishing that the application merits approval and that the applicant is not inadmissible remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The record in this case indicates that the applicant is inadmissible based on evidence that he pled "no contest" to possession of cocaine in 1989; the evidence consists of an FBI report indicating that the applicant was charged with possession of cocaine, and the applicant's statements to a CIS officer regarding the disposition of that charge. The applicant was given an opportunity to establish that the charge was dismissed or that the evidence was incorrect and that the applicant is therefore not inadmissible under section 212(a)(2)(A)(i)(II) of the Act. The documents submitted by the applicant in response, however, prove neither, as they either do not include a reference to the applicant that includes his various aliases or they do not cover the relevant year(s) of his court records; and it is not clear that inquiries were made to all relevant jurisdictions. No evidence has been submitted to show where the applicant resided in 1989 that would support a conclusion that all appropriate inquiries were made for court records. Moreover, counsel's actual request for records was not provided to the AAO to establish that the 1989 charge at issue in this case was the subject of the inquiry.

Although counsel submitted the responses of various county records searches, *supra,* and noted that pursuant to an exhaustive investigation all relevant agencies indicated that there is no record of the arrest at issue, the evidence submitted is limited to a few jurisdictions, without explanation as to why those jurisdictions were the focus of his inquiry. The fact that some of the responses do not include the year of the arrest or the applicant's aliases raises doubts as to exactly what inquiry was made. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The applicant has not met his burden of proving that he is not inadmissible.

The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may make a decision on an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

The record reflects that [redacted] is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having violated a law relating to a controlled substance, *i.e.,* possession of cocaine; there is no waiver for this ground of inadmissibility.

ORDER: The appeal is dismissed.