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

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FILE: [redacted] Office: MIAMI, FL Date: MAR 04 2009

IN RE: [redacted]

PETITION: 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 PETITIONER:

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible 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), and the relevant waiver application is, thus, moot. The matter will be returned to the District Director for continued processing.

The applicant is a native and citizen of Jamaica 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 a crime involving a controlled substance. The applicant is the spouse of a naturalized United States citizen. He now seeks a waiver of inadmissibility so that he may reside in the United States with his spouse and child.

The District Director concluded that the applicant was not eligible for a waiver and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director,* dated May 16, 2007.

On appeal, the applicant[1] contends that United States Citizenship and Immigration Services (USCIS) erred in finding that the applicant inadmissible for a controlled substance violation. *Brief.*

In support the applicant's claim, a brief has been submitted. The record also includes, but is not limited to, a court order; earnings statements for the applicant's spouse; tax statements for the applicant's spouse; an employment letter for the applicant's spouse; criminal court documents; a car insurance policy; and an apartment lease. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On November 3, 2006 the applicant pled No Contest and adjudication was withheld for the offenses of Possession of Cannabis/20 Grams or Less under section 893.13(6)(b) of the 2006 Florida Statutes and Possession of Drug Paraphernalia under section 893.147(1)(b) of the 2006 Florida Statutes. *County Court Disposition Order in and for Broward County, Florida*, dated November 3, 2006.

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 . . . is inadmissible.

[1] The AAO notes that although an attorney has submitted a brief, there is no Form G-28, Notice of Entry of Appearance as Attorney or Representative included in the record. The AAO will therefore not recognize this representative.

> (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:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (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 if—
>
> > (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 . . .

Prior to addressing whether the applicant is eligible and qualifies for a waiver, the AAO finds it necessary to address the issue of inadmissibility. On May 2, 2008 a Florida Circuit Court judge ruled that the applicant had failed to receive the warnings contained in State of Florida Criminal Rule 3.172(c)(8) relating to the possibility of deportation consequences attaching to a conviction; that the applicant's motion to vacate the conviction pursuant to Florida Rule of Criminal Procedure 3.850 was timely filed within the two (2) year window provided for in *State vs. Owran Green,* S.C. 05-687 (October 2006), see also *Pearl v. State*, 756 So.2d 42 (Fla. 2000); and that the applicant's failure to receive the warning of possible immigration consequences attaching to a plea sufficiently prejudiced the applicant in that he should now be allowed to withdraw his plea of guilt. *State vs. Owran Green*, S.C. 05-687 (October 2006), see also *Pearl v. State*, 756 So.2d 42 (Fla. 2000). *Order, The State of Florida vs. Everlyn Evon Brown, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, State of Florida, Criminal Division*, dated May 2, 2008. As such, the Florida Circuit Court judge vacated the applicant's criminal convictions. *Id.*

State of Florida Criminal Rule 3.172(c)(8) states in pertinent part:

> (c) Determination of Voluntariness: Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:

> (8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service.... .

The AAO notes that the applicant's convictions were vacated specifically because he had failed to receive the warnings contained in State of Florida Criminal Rule 3.172(c)(8) relating to the possibility of deportation consequences attaching to a conviction. In *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), the Board of Immigration Appeals held that an Ohio conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea was no longer a valid conviction for immigration purposes. As the applicant's convictions have been vacated on the basis of a procedural defect, the AAO finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act and his relevant waiver application is thus moot.

An applicant must demonstrate by a preponderance of the evidence that he is eligible for the benefit sought. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, places the burden of proof upon the applicant to establish that eligibility. The applicant has met his burden of proof.

ORDER: The appeal is dismissed as the underlying waiver application is moot. The District Director shall reopen the Form I-485 application on motion and continue to process the adjustment application.