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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAY 15 2009

IN RE: Applicant: [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)i)

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.

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).

Ellen C. Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Canada, was found inadmissible to the United States under 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 multiple crimes involving moral turpitude and under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a controlled substance violation. The applicant sought 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 her U.S. citizen spouse.

The center director concluded that the applicant had 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. *Decision of the Center Director,* dated June 13, 2007.

In support of the appeal, counsel for the applicant submits a brief, dated June 27, 2007 and a letter from the applicant's U.S. citizen spouse, dated June 25, 2007. The entire record was reviewed and considered in rendering this decision.

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

> (A)(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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (II) a violation of...any law or regulation of a State, the United States, or a foreign country relating to a controlled substance... is inadmissible.

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)(II) of ... subsection [(a)(2)] insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –
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> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General (Secretary) 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 (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 . . . .

(2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record reflects inadmissibility under 212(a)(2)(A)(i)(I) of the Act based on convictions of crimes involving moral turpitude. In March 1977, the applicant was convicted of Theft under $200, a violation of section 294(b) of the Canadian Criminal Code; the sentence was suspended and the applicant was placed on probation for one year. In May 1979, the applicant was convicted of Theft under $200, a violation of section 294(b) of the Canadian Criminal Code; the applicant paid a fine and was incarcerated for five days. In May 1979, the applicant was convicted of Uttering a Forged Document, a violation of Section 326(1) of the Canadian Criminal Code, and Failure to Appear, a violation of Section 133 of the Canadian Criminal Code. The record also reflects inadmissibility under 212(a)(2)(A)(i)(II) of the Act for having been convicted of a controlled substance violation. In November 1989, the applicant was convicted of Possession of a Narcotic, a violation of section 3(1) of the Narcotic Control Act. A fine of $900 was imposed.

The AAO notes that inadmissibility for the controlled substance violation referenced above may only be waived under section 212(h) as it relates to the simple possession of 30 grams or less of marijuana. The record does not establish that the applicant's conviction in November 1989 for Possession of a Narcotic relates to simple possession of 30 grams or less of marijuana. Although a letter has been provided by the lawyer that represented the applicant with respect to said offense, asserting that the applicant's conviction was for marijuana, and moreover, was for a "relatively small amount...", the lawyer further notes that he has no recollection as to what the quantity was for which the applicant was convicted, nor does he have documentation regarding the offense as the file was destroyed. *Affidavit of* [redacted] dated October 13, 2005. Moreover, the Court Information (for

the purpose of a pardon application) submitted by the applicant only references the Offense of Possession of Narcotics; it does not specifically establish that the conviction was for simple possession of 30 grams or less. In addition, the AAO notes that the Information submitted by the applicant references that the applicant "unlawfully cultivate marihuana....did unlawfully have in their possession, a Narcotic, to wit: Cannabis Marihuana.....did unlawfully have in her possession, a Narcotic, to wit: Cannabis Resin...." *Information of* [redacted] Said evidence does not establish that the applicant's conviction was for simple possession of 30 grams or less of marijuana. Finally, a document was provided establishing that the applicant pled guilty to Count 2 in November 1989, but no documentation has been provided to establish what Count 2 references. *See Court Document executed by* [redacted] dated November 10, 1989.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The record does not clearly support a finding that the applicant's conviction was for simple possession of 30 grams or less or marijuana.[1] Accordingly, she is not eligible for the limited waiver available for marijuana possession under section 212(h). Thus, the AAO concludes that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, and no waiver is available.

Because the applicant is statutorily ineligible for relief, the center director erred in analyzing extreme hardship to the applicant's U.S. citizen spouse and/or whether the applicant merited a waiver as a matter of discretion, as outlined in section 212(h) of the Act.

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[1] Section 103.2(b)(2) of the Code of Federal Regulations states, in pertinent part:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility.... If a required document...does not exist or cannot be obtained...the applicant...must demonstrate this and submit secondary evidence.... If secondary evidence also does not exist or cannot be obtained, the applicant...must demonstrate the unavailability of both the required document and relevant secondary evidence and submit two affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

Section 103.2(b)(2)(ii) of the Code of Federal Regulations states, in pertinent part:

> Where a record does not exist, the applicant...must submit an original written statement on government letterhead establishing this from the relevant government or other authority. The statement must indicate the reason the record does not exist, and indicate whether similar records for the time and place are available....

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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. The waiver application is denied.