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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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FILE: [redacted] Office: PHOENIX, AZ Date: SEP 21 2009

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.

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Canada 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 controlled substance.[1] The applicant is the spouse of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse.

The District 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 Excludability (Form I-601) accordingly. *Decision of the District Director,* dated February 22, 2007.

On appeal, counsel states that the applicant's conviction for possession of a controlled substance was vacated and he is therefore not inadmissible. In the alternative, counsel states that the applicant's U.S. citizen spouse and Canadian parents would suffer extreme hardship. *Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO).*

In support of the applicant's claim, counsel submits a brief. The record also includes, but is not limited to, a court record for the applicant vacating his conviction; an employment letter for the applicant's spouse; a statement from the applicant's spouse; college transcripts for the applicant's spouse; wedding receipts; school admission requirements for the University of Victoria, British Columbia, Canada; a statement from the applicant's mother-in-law; medical records for the applicant's mother-in-law; a statement from the applicant's father-in-law; medical records for the applicant's father-in-law; a statement from the applicant's father; a house title for the applicant's father; a statement from the applicant; a business contract; a statement from a friend; letters of recognition; award certificates; criminal records and court documents for the applicant; an apartment lease; and a utility bill. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On April 12, 2003 the applicant was arrested for Marijuana – Possess/Use, A Class 6 Felony. *Court Information Sheet, Superior Court of the State of Arizona, Maricopa County.* On April 6, 2004 the applicant pled guilty to the reduced charge of Marijuana-Possess/Use, A Class 1 Misdemeanor. *Tempe Police Dept. printout*, dated May 4, 2004. The applicant was placed on probation for nine months and ordered to pay a fine. *Id.* On November 17, 2004 the applicant was found guilty of Liquor – Minor in Possession. *Court records, North Mesa Justice Court, Maricopa County, Arizona*, dated November 17, 2004. The applicant was ordered to pay a fine and complete alcohol screening. *Id.*

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

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[1] The AAO notes that the District Director erred in finding the applicant to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving moral turpitude. Individuals who have been convicted of crimes involving moral turpitude are barred by section 212(a)(2)(A)(i)(I) of the Act.

(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.

(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 qualifies for a Form I-601 waiver, the AAO finds it necessary to address the issue of inadmissibility. On February 14, 2007, the Superior Court of Arizona, Maricopa County vacated the applicant's possession of marijuana conviction. *Minute Entry, Superior Court of Arizona, Maricopa County*, dated February 14, 2007. While the AAO acknowledges this vacatur, it notes that the Board of Immigration Appeals concluded that where a court vacates a conviction "for reasons unrelated to the merits of the underlying criminal proceedings," the conviction remains in effect for immigration purposes. *In re Pickering*, 23 I. & N. Dec. 621, Int. Dec. 3493 (BIA June 11, 2003). As there is no indication in the terms of the court order that the relief was based on a defect in the conviction or the proceedings that led to it, the AAO finds that the conviction has not been eliminated for immigration purposes and the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Title 13 of the Arizona Criminal Code states in pertinent part:

13-3405. Possession, use, production, sale or transportation of marijuana; classification

A. A person shall not knowingly:

1. Possess or use marijuana.

Subsection A, paragraph 1 of this section involving an amount of marijuana not possessed for sale having a weight of less than two pounds is guilty of a class 6 felony.

Two pounds is the equivalent of 907.18 grams. While the AAO notes that the applicant pled to a reduced charge of a class 1 misdemeanor, neither the record nor the Arizona Criminal Code specify the amount of marijuana possessed for a class 1 misdemeanor under Title 13-3405. Although counsel asserts that the applicant pled guilty to possession of less than 30 grams of marijuana, there are no documents in the record to support this assertion. There are no documents in the record that specify how many grams of marijuana the applicant had in his possession. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The 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).

As such, the AAO finds that the applicant has not met his burden of proof in showing that he is eligible for a waiver under section 212(h) of the Act. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant was convicted for possession of a controlled substance and is therefore inadmissible under section 212(a)(2)(A)(i)(II). No waiver is available under this section of the Act except for a single offense of simple possession of 30 grams or less of marijuana. As the applicant has not demonstrated that he was convicted of simple possession of 30 grams or less of marijuana, he is not eligible for this exception. Having found that a waiver is inapplicable to this case, no purpose would be served in discussing whether the applicant's spouse has established extreme hardship under section 212(h) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.