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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 21 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Hennessy

for Perry Rhew
Chief, Administrative Appeals Office

ACTION COMPLETED
APPROVED FOR FILING
Initials: JT Date: 6/22/11
FCO/Unit COW

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

The applicant is a native and citizen of Cuba 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 married to a United States citizen and has three U.S. citizen children. He seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his family.

In a decision dated May 14, 2008, the director found that the applicant was inadmissible to the United Stated for his conviction of possession of heroin and that he did not warrant the favorable exercise of discretion. The director denied both the applicant's waiver and lawful permanent resident applications accordingly.

In a Notice of Appeal dated June 12, 2008, counsel states that the director incorrectly found that the applicant had been convicted of possession of heroin and narcotics equipment on April 19, 1972 because the applicant's criminal case was vacated and dismissed on July 27, 2007. Counsel states that the applicant only has one conviction for accessory after the fact of an armed robbery which occurred on July 2, 1982. Counsel also states that the applicant has a wife and three children in the United States, one of whom is permanently disabled as a result of a head trauma suffered from a 2004 automobile accident. He states that the applicant's son requires constant care and that the applicant is not the same person he was when his crimes were committed.

The record indicates that on October 18, 1971 in New Jersey, the applicant was arrested and charged with possession of heroin and possession of narcotics equipment. On April 19, 1972 in Passaic County Superior Court the applicant was found guilty on both charges and was sentenced to six months in jail and one year probation.

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

> (I) Criminal and related grounds. —
>
> (A) Conviction of certain crimes. –
>
> (i) 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 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, that:

> The Attorney General 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.)

The AAO notes that the Act states that a section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In the applicant's case he was convicted of possession of heroin. There is no waiver available for the applicant's conviction.

Counsel states that the applicant was not convicted of possession of heroin and narcotics equipment as his 1972 convictions were vacated by the municipal court in Clifton, New Jersey in an Order Granting Post Conviction Relief on July 27, 2007. The AAO notes that under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). It appears from the record that the dismissal of the applicant's conviction was by a state rehabilitative statute. There is nothing in the record to show that it was based on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act and, as a result, is statutorily ineligible for relief.

The AAO also notes that the applicant's third conviction for accessory after the fact of an armed robbery, which occurred in 1981 will not be discussed in this decision as it has no bearing on the applicant's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

The AAO also acknowledges the very difficult situation the applicant is experiencing concerning his son and his severe disability. However, because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen spouse and/or children 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 establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.