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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 0 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska 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 the Bahamas who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime relating to a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse and stepchildren.

The Director concluded that the applicant is not eligible to apply for a 212(h) waiver and stated that the applicant's waiver application was denied on discretion. *See Decision of the Director*, dated February 17, 2012.

On appeal, counsel for the applicant asserts that the applicant is eligible to apply for a 212(h) waiver because he was convicted of violating Bahamas' Dangerous Drugs Act, which also includes the possession of Indian hemp.

In support of the waiver application and appeal, the applicant submitted letters from his spouse and stepchildren, medical documents concerning his spouse and stepson, letters of support, family photographs, and a document concerning his criminal record. The entire record was reviewed and considered in rendering a decision on the appeal.

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 –
>
> > (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

The record reflects, based upon an interview with the applicant, that the applicant was convicted in the Bahamas for possession of dangerous drugs, cocaine. The record further indicates that the applicant was convicted on October 19, 1991 and sentenced to a fine or 14 days imprisonment.

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 subparagraphs (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 –

> (1) (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 . . . .

Counsel for the applicant asserts that the applicant's conviction has since been expunged and the record contains a certificate from the Royal Bahamas Police Force, dated October 31, 2011, stating that the applicant has not been convicted of a criminal offense. It is noted that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an individual is considered convicted for immigration purposes. *Id.*

Counsel for the applicant asserts that possession of a drug such as Indian hemp or marijuana does not rise to the level of inadmissible offenses. Counsel further asserts that it cannot be proven that the applicant was convicted of cocaine possession and that the applicant's sentence indicates that he was convicted of a very minor charge or given a diversionary first-time offender program that would not be a conviction for immigration purposes.[1]

First, it is clear from section 212(a)(2)(A)(i)(II) and 212(h) of the Act that possession of marijuana is a crime of inadmissibility for which an applicant may, or may not, be eligible for a waiver. Further, the applicant has not fulfilled his burden of demonstrating that he was convicted of marijuana, including a quantity of marijuana for which he would be eligible for a waiver, or that his conviction would qualify for FFOA treatment. Specifically, the applicant has not demonstrated either that he is not inadmissible to the United States or that he is eligible for a waiver of inadmissibility. It is noted that the record does not contain a submission of the applicant's record of conviction or indication from a clerk of court that the applicant was unable to obtain such documentation.

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.

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[1] It is noted that the record does not indicate that the applicant's conviction should not be a "conviction" for immigration purposes in accordance with *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The record does not indicate that the applicant would be eligible for FFOA treatment of his controlled substance conviction if he had been charged under federal drug laws.

ORDER: The appeal is dismissed.