**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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 18 2014 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to 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 committed a crime relating to a controlled substance. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen mother.

The Director concluded that the applicant is a drug abuser or addict and found the applicant to be inadmissible pursuant to section 212(a)(1)(A)(iv) of the Act, for which there is no waiver. The Director denied the application accordingly. *See Decision of the Director*, dated March 7, 2013.

On appeal, the applicant asserts that he has used marijuana occasionally, but not habitually. The applicant further asserts that he has ceased using marijuana since December 2012 and enrolled himself in a drug rehabilitation program.

In support of the waiver application and appeal, the applicant submitted letters, drug test results and letter from a drug rehabilitation program, and identity documents. The entire record was reviewed and considered in rendering this decision.

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

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 –
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> > (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 . . . .

The record reflects that the applicant was convicted of possession of ganja on December 11, 2009, in the [redacted]. The applicant was sentenced to a fine or ten days imprisonment with hard labor. A letter from the court indicates that the weight of the controlled substance in the applicant's case amounted to less than an ounce. As the applicant was convicted of a single offense of 30 grams or less of marijuana, he would be eligible to apply for a section 212(h) waiver of inadmissibility for his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

Section 212(a)(1) of the Act states, in pertinent part:

> (A) In General
>
> Any Alien –
>
> (iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.

The Director's March 7, 2013 decision notes that a consular officer found the applicant to be inadmissible to the United States pursuant to section 212(a)(1)(A)(iv) of the Act as a drug abuser or addict based upon the applicant's prior conviction and positive cannabis test result at a medical exam.

The applicant asserts that prior to his 2009 conviction for possession of cannabis, he used the drug recreationally once or twice a month, at most. The applicant asserts that he stopped using cannabis from 2009 until 2011 and stopped again in December 2012. The applicant contends that he has not used any drug at all since that date and that he has enrolled himself into [redacted] a drug rehabilitation program. The record contains a drug test form indicating a negative test result for the applicant for marijuana on April 4, 2013 and a letter stating that the applicant has an appointment for treatment and rehabilitation services.

Only medical examiners, such as panel physicians, civil surgeons, or other physicians designated by the Director of Health and Human Services may make determinations of inadmissibility pursuant to section 212(a)(1)(A) of the Act. *See* 42 C.F.R. § 34. Neither the Act nor regulations provide USCIS with jurisdiction to overturn a finding of inadmissibility made by an authorized medical examiner under section 212(a)(1)(A) of the Act.[1]

[1] It is noted that 9 FAM 40.11 N11 indicates that if the last refusal on a case was more than one year ago, then the applicant must reapply for a visa, complete a new medical examination with a panel physician and pay all applicable fees. 9 FAM 40.11 N11.1 also indicates that a panel physician has the discretion to use their clinical judgment to consider sustained, full remission of at least 12 months.

Although the Act provides for waivers of inadmissibility under sections 212(a)(1)(A)(i), 212(a)(1)(A)(ii), and 212(a)(1)(A)(iii) of the Act, there is no waiver of inadmissibility for section 212(a)(1)(A)(iv) of the Act.

The applicant is currently inadmissible under section 212(a)(1)(A)(iv) of the Act, for which no waiver is available. If the applicant is found by a panel physician to be in sustained, full remission, he may be found to be admissible as he would no longer have a Class "A" mental disorder. However, as noted above, the AAO may not make such a determination, and it must be made by a panel physician based on clinical judgment. *See* 9 FAM 40.11 N11.1. As such, the AAO will not address the applicant's inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act under which he would be eligible for a section 212(h) waiver and required to show the requisite hardship to a qualifying relative.

In proceedings for a waiver of grounds of inadmissibility under section 212(g) and 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, because no waiver is available for his inadmissibility under section 212(g) of the Act, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.