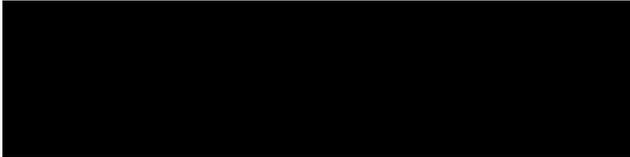




U.S. Citizenship
and Immigration
Services

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Office: HARLINGEN, TEXAS

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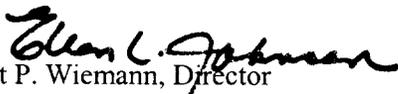
APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Harlingen, Texas. The matter is now before the AAO on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who is married to a U.S. citizen and is the beneficiary of an approved petition for alien relative. The applicant was found to be inadmissible to the United States under § 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 theft, a crime involving moral turpitude. The AAO also finds the applicant to be inadmissible pursuant to § 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of possession of a controlled substance. The applicant seeks a waiver of inadmissibility under § 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his spouse and children.

Section 212(a)(2)(A) states:

- (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 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, 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 if-

- (1)(A) [I]t is established to the satisfaction of the Attorney General that-
 - (i) [T]he 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 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 district director denied the § 212(h) waiver of the applicant's 2000 Texas theft conviction for unexplained reasons. On appeal, counsel asserts that the applicant has provided sufficient evidence to demonstrate that his

wife and children would experience extreme hardship on account of his inadmissibility. The record contains a letter from the applicant's wife, birth certificates and other civil documents, financial and tax documents, letters of support, and court records. The AAO has reviewed all of the documentation on the record and does not concur with counsel's contention. The record does not support a finding that the applicant's wife and children would undergo extreme hardship if the applicant were removed.

More importantly, there is no waiver available for the applicant's 1985 second degree felony conviction of possession of cocaine, a ground of inadmissibility under § 212(a)(2)(A)(i)(II) of the Act. The 1987 expungement of this conviction does not erase the bar to admissibility.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In cases arising outside the Ninth Circuit, a state expungement does not erase the conviction for immigration purposes. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002); *see also Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999). In *Matter of Roldan-Santoyo* the Board of Immigration Appeals held that the policy exception in *Matter of Manrique*, which accorded Federal First Offender treatment to certain drug offenders is superseded by the enactment of § 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). Under the statutory definition of the term 'conviction', 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. Once an alien is subject to a 'conviction' as that term is defined in § 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure.

Because there is no waiver available for the applicant's narcotics conviction, pursuant to § 212(a)(2)(A)(i)(II) of the Act, and the expungement does not remove the conviction for immigration purposes, the applicant remains subject to this ground of inadmissibility. Given his statutory ineligibility for a waiver, the AAO finds it unnecessary to discuss in greater detail the applicant's claim regarding extreme hardship to his qualifying relatives, and/or any discretionary factors presented in the record.

In proceedings for applications for waiver of grounds of inadmissibility under § 212(h), the burden of establishing that the application merits approval remains entirely with the applicant. *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984). Here, the applicant has not met that burden. Accordingly, the denial of the waiver will be affirmed.

ORDER: The appeal is dismissed.