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**U.S. Citizenship
and Immigration
Services**

412

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO

Date:

APR 13 2006

IN RE:

[REDACTED]

PETITION:

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

ON BEHALF OF PETITIONER:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois, denied the waiver application, and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act/INA), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182(a)(6)(C)(i), for having been convicted of a violation of a law relating to a controlled substance and for willfully misrepresenting a material fact to an immigration officer while seeking a benefit under the Act. The applicant is the spouse of a U.S. citizen and parents of three U.S. citizen children. He seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(h) and 1182(i), in order to reside in the United States with his spouse and children.

The district director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated September 13, 2003.

The record reflects that, on May 5, 1997, under the name [REDACTED] the applicant plead guilty to the charge of unlawful possession of cocaine, a controlled substance in violation of paragraph 720, chapter 570/402(c) of the Illinois Compiled Statutes (ILCS). Paragraph 720, chapter 570/402(c) of the ILCS states in pertinent part that:

Sec. 402. Except as otherwise authorized by this Act, it is unlawful for any person knowingly to possess a controlled or counterfeit substance or controlled substance analog. A violation of this Act with respect to each of the controlled substances listed herein constitutes a single and separate violation of this Act. For purposes of this Section, "controlled substance analog" or "analog" means a substance which is intended for human consumption, other than a controlled substance, that has a chemical structure substantially similar to that of a controlled substance in Schedule I or II, or that was specifically designed to produce an effect substantially similar to that of a controlled substance in Schedule I or II . . .

(c) Any person who violates this Section with regard to an amount of a controlled or counterfeit substance not set forth in subsection (a) or (d) is guilty of a Class 4 felony. The fine for a violation punishable under this subsection (c) shall not be more than \$25,000.

The applicant was sentenced to 24 months of probation. On June 20, 1999, the court dismissed or terminated the case against the applicant after he successfully completed his probation.

The district director concluded that in order to qualify for a waiver pursuant to section 212(h) of the Act, the applicant must have been convicted of only a single offense of simple possession of 30 grams or less of marijuana. He concluded further that the Act provides for no other waivers to the applicant's ground of inadmissibility. Finally, the district director concluded that no purpose would be served in discussing whether the alien is eligible for a waiver of the 212(a)(6)(C)(i) inadmissibility grounds pursuant to INA § 212(i).

On appeal, counsel asserts that the district director erred in finding that the applicant was inadmissible pursuant to either section 212(a)(2)(A)(i)(II) of the Act or section 212(a)(6)(C)(i) of the Act. *See Applicant's Brief* dated September 30, 2004. In support of the appeal, counsel only submitted the above-referenced brief. The entire record was reviewed and considered in rendering a decision on the appeal.

A "conviction" for immigration purposes is defined in section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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.

The applicant's criminal record indicates that the applicant entered a plea of guilty to unlawful possession of cocaine and was ordered to serve 24 months of probation by the judge.

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

- (1) 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 –
 - (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.)

It is noted that in *Matter of Michel*, the Board of Immigration Appeals referred specifically to the fact that, in certain cases, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), provided limits to an alien's eligibility to seek a waiver of inadmissibility pursuant to

section 212(h) of the Act. *See Matter of Michel*, 21 I&N Dec. 1101 at 1103 (BIA 1998). For example, a section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. Indeed, the Act makes it very clear that the 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 this case, the applicant was convicted of unlawful possession of cocaine. Thus, the district director correctly concluded that the applicant is statutorily ineligible to be considered for a section 212(h) waiver.

Counsel argues that that applicant is not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act because to find him inadmissible under this section is an unwarranted departure from previous Board of Immigration Appeal decisions that state that a simple possession offense must be punishable as a federal felony under the Controlled Substance Act in order to constitute a “drug trafficking crime” and an “aggravated felony.” *See Applicant’s Brief*, dated September 30, 2003. However, as discussed above, whether the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act does not turn on whether the crime of which he has been convicted is a drug trafficking crime or an aggravated felony; the applicant’s inadmissibility turns on whether the applicant has been convicted of a violation of a law *related* to a controlled substance. The AAO finds counsel’s arguments inapplicable to the applicant’s grounds of inadmissibility.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant is also inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, has established extreme hardship to his U.S. citizen wife and children, or merits a 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.