



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

H2



FILE:

Office: NEWARK

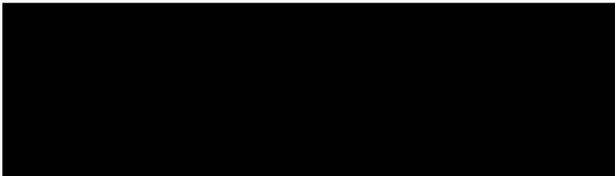
Date: JUN 05 2006

IN RE:



PETITION: 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 PETITIONER:



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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Newark, New Jersey, 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 Cuba 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 been convicted of a violation of a law relating to a controlled substance. The applicant is the spouse of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her spouse.

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 August 5, 2004.

The record reflects that, on March 25, 1984, the applicant pled guilty to unlawful possession of cocaine and unlawful possession of marijuana. The applicant was sentenced to 3 years of probation. On May 1, 1986, the court dismissed the case against the applicant after she successfully completed her 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. *See Decision of the District Director*, dated August 5, 2004.

On appeal, counsel asserts that the applicant's case may be adjudicated despite the applicant's criminal record because she is an applicant under the Cuban Adjustment Act (Pub. L. 89-732) of November 2, 1966. *See Applicant's Brief* dated April 14, 2006. 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.

Counsel argues that that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act because under the Immigration and Naturalization Services Operations Instructions (INS OIs):

Section 1 of the Cuban Adjustment Act (Pub. L. 89-732) of November 2, 1966, remains in effect. It has been, however, modified by the Refugee Act of 1980 An alien who was paroled into the United States as a refugee under section 212(d)(5) of the Act before April 1, 1980, and who is seeking adjustment of status under section 1 of the Cuban Adjustment Act, is no longer subject to the provisions of paragraphs 212(a)(4), 212(a)(5)(A), 212(a)(5)(B), and 212(a)(7)(A)(i) of the Act. In addition, any other provision of 212(a) of the Act may be waived at the discretion of the district director, with the exception of paragraphs 212(a)(3)(A), 212(a)(3)(B), 212(a)(3)(C), 212(a)(3)(F), and 212(a)(2)(C) insofar as it relates to drug trafficking (See OI 209.3). *Applicant's Brief*, dated April 14, 2006.

The AAO finds that counsel's argument is unpersuasive. The INS OIs were written prior to the enactment of the

Illegal Immigration Reform and Immigrant Responsibility Act (“IRIRA”), Pub. L. 104-208, 110 Stat. 3009 (1996), and have been superseded by the Adjudicator’s Field Manual. Section 23.11 (Cuban Adjustment Act Cases) of the Adjudicator’s Field Manual states, in pertinent part:

(f) Admissibility. The inadmissibility grounds of section 212 of the Act apply, with the exception of section 212(a)(4) of the Act (see *Matter of Mesa*, 12 I. & N. Dec. 432 (Dep. Assoc. Comm’r, 1967), and sections 212(a)(5), and 212(a)(7) of the Act. Furthermore, on April 19, 1999, INS issued a memorandum to all offices stating that “[t]he policy of the Service is that the inadmissibility ground that is based on an alien's having arrived at a place other than a port of entry *does not* apply to CAA applicants. All Service officers adjudicating CAA applications will do so in accordance with this policy. So long as the applicant meets all other CAA eligibility requirements, it is contrary to this policy to find the alien ineligible for CAA adjustment on the basis of the alien's having arrived in the U.S. at a place other than a designated port of entry.” *Adjudicator’s Field Manual*.

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 3 years 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.)

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.

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 her burden.

ORDER: The appeal is dismissed.