



U.S. Citizenship
and Immigration
Services

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HE

FILE:

[REDACTED]

Office: MIAMI, FL

Date:

NOV 17 2006

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:

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 waiver application was denied by the Acting District Director, Miami, FL, and 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 under 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 crimes involving a controlled substance. The applicant is the son of a lawful permanent resident and the father of two U.S. citizens. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The district director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility because of his convictions regarding a controlled substance. The application was denied accordingly. *Acting District Director's Decision*, dated January 16, 2002.

On appeal, counsel asserts that the applicant applied for residency in 1996 under the Cuban Adjustment Act and the changes in the laws and regulations since that time should not be applied retroactively to his case. In addition, counsel states that the applicant's application should be considered despite his convictions because he has two minor U.S. citizen children. *Form I-290B*, dated February 13, 2002. In his appeal's brief, counsel states that the director's decision should be reversed because he did not specify the criminal statutes the applicant allegedly violated. *Counsel's Appeals Brief*, dated March 14, 2002.

The record reflects that the applicant was convicted for Possession of Cocaine (FL 893.13) on October 20, 1982; March 23, 1991; and March 22, 1993. In addition, the applicant was convicted of Sale or Delivery of Cocaine with Intent (FL 893.13) on October 20, 1982.

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 —
 - (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 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.)

Thus, the applicant is not eligible for a Section 212(h) waiver because his record contains three convictions involving a controlled substance, cocaine. 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. Therefore, the acting district director correctly concluded that the applicant is statutorily ineligible to be considered for a section 212(h) waiver.

Furthermore, counsel's asserts regarding laws and regulations not being retroactively applied to the applicant's case are incorrect. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George and Lopez-Alvarez*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968). Therefore, the applicant is subject to the current laws and regulations, including section 212(a)(2)(A)(i) and section 212(h) of the Act.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his U.S. citizen children and/ or his lawful permanent resident mother or whether he merits the 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.