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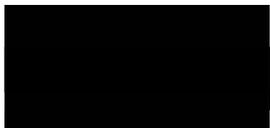
U.S. Citizenship
and Immigration
Services

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FILE:



Office: LOS ANGELES, CALIFORNIA
[consolidated therein]

Date: MAY 30 2008

IN RE:

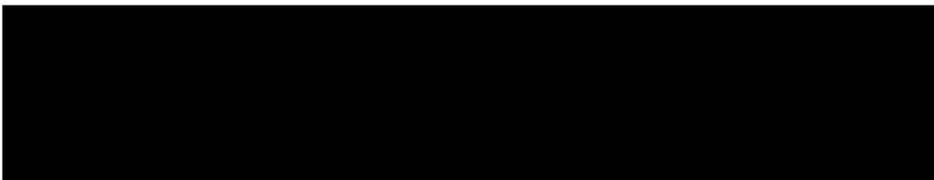
Applicant:



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:

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 District Director, Los Angeles, California, and 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 under section 212(a)(2)(C) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), for being convicted of a controlled substance trafficking offense, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating any law or regulation relating to a controlled substance. The record indicates that the applicant is married to a naturalized United States citizen and he is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant 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 his United States citizen wife and five children.

The District Director found that the applicant was statutorily ineligible for a waiver under section 212(h) of the Act, and she denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *District Director's Decision*, dated April 13, 2004.

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

A) Conviction of certain crimes.-

(i) [A]ny 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...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.

....

C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so;

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 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 AAO finds that the Director erred in finding the applicant inadmissible for being convicted of a controlled substance trafficking offense under section 212(a)(2)(C) of the Act. The record of proceedings establishes that the applicant was convicted of transporting a controlled substance for “personal” use, not “sale.” The AAO notes that even though the applicant was not convicted of a controlled substance trafficking offense, the amount of the controlled substance in his possession determines if he is inadmissible under section 212(a)(2)(C) of the Act. In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board of Immigration Appeals (Board) held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, one of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of the illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *Matter of Franklin*, 728 F.2d 994 (8th Cir. 1984). The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. *United States v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980) (413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5th Cir. 1979) (26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978) (147 grams of cocaine). The AAO notes that the record establishes that the applicant was in possession of cocaine; however, there is no indication of the amount of cocaine he had in his possession. The AAO finds that the record does not establish that the applicant is inadmissible under section 212(a)(2)(C) of the Act; however, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating any law relating to a controlled substance.

On appeal, the applicant, through counsel, asserts that the District Director “erred, as a matter of law in denying applicant’s I-601 waiver. The [District Director] argues applicant’s January 23, 1991 conviction is not waivable by the [Secretary of Homeland Security]. This is in error. Applicant’s conviction was for ‘Transportation’ ONLY, NOT sales, and NOT transportation for sales. In addition, applicant was only sentenced to 180 days in Count [sic] Jail, NOT 4 years in state prison.” *Form I-290B*, filed April 27, 2004.

The record of proceedings establishes that on January 23, 1991, the applicant was convicted of selling/transporting a controlled substance, (cocaine) in violation of California Health and Safety Code (H&S) § 11352(a), and was sentenced to 180 days in jail and three (3) years probation, which makes the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). In order for the applicant to qualify for a waiver pursuant to section 212(h) of the Act, he must have been convicted of only a

single offense of simple possession of 30 grams or less of marijuana. Since the applicant was not convicted of a single offense of simple possession of 30 grams or less of marijuana, there is no waiver of the applicant's ground of inadmissibility. The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act; and, therefore, he is statutorily ineligible for a waiver of inadmissibility.

The applicant, through counsel, submitted documents establishing that the applicant's drug conviction was set aside on March 26, 2002. *See minute order, Superior Court of California, Country of Los Angeles*, dated March 26, 2002. The AAO notes that even though the applicant's conviction was set aside after he successfully completed his probation, he has still been convicted of a crime for immigration purposes. Section 101(a)(48) of the Act states that when an alien enters a plea of guilty, or is found guilty, and a formal judgment of guilt is entered by a court, where a judge has ordered some form of punishment, penalty, or restraint on the alien's liberty, there has been a conviction for immigration purposes. On January 23, 1991, the applicant was convicted of selling/transporting a controlled substance, in violation of California H&S § 11352(a), and was sentenced to 180 days in jail and three (3) years probation, which is a restraint on the applicant's liberty.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has established extreme hardship to his United States citizen wife and children 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 proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.