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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: MIAMI, FLORIDA Date: NOV 03 2008

IN RE: Applicant: [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:



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, Florida, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Canada who initially entered the United States in 1986 on a visitor's visa. On July 17, 1996, the applicant was convicted of possession of cannabis/20 grams or less and disobeying a stop/yield sign; however, a judge withheld adjudication of guilt and ordered the applicant to pay court costs. On an unknown date, the applicant departed the United States and reentered on March 1, 1998. On December 9, 1999, the applicant was arrested for offering to commit prostitution, and on February 3, 2000, a judge placed the applicant in an advocate program. On May 13, 2000, the applicant was arrested for possession of marijuana. On May 18, 2000, a judge dropped the February 3, 2000 charges against the applicant, based on his compliance with the advocate program requirements. On September 28, 2000, a judge withheld adjudication of guilt and ordered the applicant to pay court costs for his May 13, 2000 arrest. On May 9, 2001, the applicant's United States citizen wife filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On the same day, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485). On May 29, 2001, the applicant's July 17, 1996 charges were dismissed. On August 14, 2001, the applicant was arrested for possession of cocaine and cannabis/20 grams or less; however, no charges were filed against the applicant for this arrest. On April 8, 2002, the applicant filed a Waiver of Grounds of Excludability (Form I-601). On June 27, 2002, the applicant's Form I-130 was approved. On September 13, 2004, a judge granted the applicant's motion to vacate plea and set aside the sentence of September 28, 2000. On April 8, 2006, the Acting District Director denied the applicant's Form I-485 and Form I-601, finding the applicant inadmissible to the United States pursuant to section 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 admitting to committing the essential elements of a crime involving moral turpitude. Additionally, the Acting District Director found that the applicant failed to demonstrate extreme hardship to his qualifying relative. On October 6, 2006, a judge granted the applicant's motion to vacate plea and set aside the sentence of July 17, 1996. On July 28, 2007, the applicant's wife filed another Form I-130 on behalf of the applicant, and the applicant filed another Form I-485 and Form I-601. The AAO notes that the Forms I-130, I-485, and I-601 filed on July 28, 2007 have not been adjudicated.

The AAO notes that the applicant was convicted of possession of marijuana on July 17, 1996 and September 28, 2000. Generally, possession offenses are not crimes of moral turpitude. *Matter of Abreu-Semino*, 12 I&N Dec. 775 (BIA 1968). The AAO finds that the Acting District Director erred in finding the applicant inadmissible for a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I). However, the AAO finds that the applicant 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 a law relating to a controlled substance. 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 convicted on two separate occasions of being in possession of marijuana, there is no waiver available for the applicant's ground of inadmissibility. The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and he is statutorily ineligible for a waiver of inadmissibility.

Section 212(a)(2) of the Act provides, in pertinent part, that:

(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 [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...*

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that—

(i)...the 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 established to the satisfaction of the [Secretary] 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...

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's

applying or reapplying for a visa, for admission to the United States, or adjustment of status.

On appeal, the applicant provided documents regarding the birth of his United States citizen daughter. Additionally, the applicant provided documents establishing that all of his convictions have been vacated and the sentences were set aside. The AAO notes that for both the applicant's July 17, 1996 and September 28, 2000 convictions, a judge withheld adjudication of guilt but ordered the applicant to pay fines and court costs. The AAO finds that the applicant has still been convicted of crimes 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. Additionally, the imposition of costs and surcharges in the criminal sentencing context constitutes a form of punishment. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). The applicant is clearly inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The AAO finds that 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 daughter 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.