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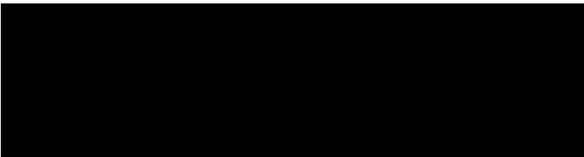
FILE:  Office: BALTIMORE, MD

Date: APR 28 2009

IN RE: 

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 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Venezuela who was admitted to the United States on January 8, 2002 as a nonimmigrant visitor for pleasure. He had previously resided in the United States and 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 a crime involving a controlled substance on June 11, 1993. The applicant is married to a United States citizen and he is the beneficiary of an approved Petition for Alien Relative. 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 with his spouse and daughter.

The district director concluded that the applicant was statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act because he had not established he had been convicted of only a single offense of simple possession of 30 grams or less of marihuana and denied his application accordingly. *See Decision of the District Director* dated November 17, 2006.

On appeal counsel asserts that the applicant was not convicted for immigration purposes because there was no plea or finding of guilt and the charges against him were dismissed after he complied with the terms of his probation by completing community service as ordered by the court. *Brief in Support of Appeal* at 4-5. Counsel further contends that even if the applicant is found to have been convicted of possession of marijuana, he is unable to prove the amount he was convicted of possessing because the court has destroyed the records related to his case and state police records do not indicate the amount he was found to have in his possession. *Brief* at 6. Counsel further asserts that possession of marijuana is not a crime involving moral turpitude and the applicant is eligible for a waiver under section 212(h) of the Act. *Brief* at 1-2. Counsel additionally asserts that the applicant's wife would suffer extreme hardship if the applicant were removed from the United States. In support of the waiver application, counsel submitted affidavits from the applicant and his wife, affidavits from the applicant's wife's family members and from family friends, a deed of trust and other documentation related to the home purchased by the applicant and his wife in 2004, documents related to the business owned by the applicant, a letter from the applicant's church, and a copy of an order from the Alexandria General District Court stating that criminal case records prior to 1995 may be destroyed. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2)(A)(i) of the Act provides 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

- (II) political offense) or an attempt or conspiracy to commit such a crime, or 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:

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 record reflects that on June 11, 1993, the applicant was found guilty of possession of marijuana, a misdemeanor, in the Alexandria General District Court, Alexandria, Virginia. *See Virginia Criminal Record* dated December 13, 2006.

At the time of the applicant's conviction, section 18.2-250.1 of the Virginia Code provided, in pertinent part:

§ 18.2-250.1 Possession of marijuana unlawful.

A. It is unlawful for any person knowingly or intentionally to possess marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the Drug Control Act (§ 54.1-3400 et seq.). . . . Any person who violates this section shall be guilty of a misdemeanor, and be confined in jail not more than thirty days and a fine of not more than \$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, shall be guilty of a Class 1 misdemeanor.

At the time of the applicant's conviction, section 18.2-251 of the Virginia Code provided, in pertinent part:

§ 18.2-251 Persons charged with first offense may be placed on probation; conditions; screening, evaluation and education programs; drug tests; costs and fees; violations; discharge.

Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not

previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250 or to possession of marijuana under § 18.2-250.1, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, *may* defer further proceedings and place him on probation upon terms and conditions.

...

Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes of applying this section in subsequent proceedings. (Emphasis added).

....

Counsel asserts that the applicant has attempted to obtain a record of his conviction from the court, but that such records have been destroyed, and further states that a record obtained from the Virginia State Police indicates only the crime he was convicted of and not the amount of marijuana he was convicted of possessing. *Brief* at 4-6. Counsel states, "The Service is putting the Respondent in the position of trying to prove a nonentity; something when the primary evidence does not exist, i.e., the amount was too small to be measured and was not measured." *Brief* at 6. Counsel further contends that since section 18.2-250.1 of the Virginia Code allows charges against first offenders to be dismissed upon the fulfillment of conditions of probation, the applicant's conviction for possession of marijuana "is not a conviction for immigration purposes." *Brief* at 4-5. Counsel further claims that the only evidence on the record concerning the amount of marijuana is in an affidavit and a drawing prepared by the applicant, and there is no evidence that the applicant possessed 30 grams or more of marijuana. *Brief* at 6-7.

The burden is on the applicant, not USCIS, to show that he is admissible or that he qualifies for a waiver under section 212(h) of the Act. Records indicate that the applicant was found guilty of possession of marijuana, and if the charges were dismissed as Counsel claims, the burden is on the applicant to submit evidence establishing there was no conviction. In the alternative, it is the applicant's burden to show that he was convicted of a single offense of simple possession of 30 grams or less of marijuana and is therefore eligible to seek a waiver under section 212(h) of the Act. The record does not contain evidence to support counsel's assertion that charges against the applicant were dismissed. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaignena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The Virginia Criminal Record in the record indicates that the applicant was found guilty of possession of marijuana. Further, even if the applicant fell under the first offender portion of the statute, as asserted by counsel, he would remain convicted for immigration purposes. Section 101(a)(48) of the Act defines conviction 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 Virginia statute referred to by counsel indicates that a first offender would be placed on probation and subjected to 24 hours of community service. These conditions would constitute some form of punishment, penalty or restraint as found in section 101(a)(48) of the Act. Further, the record does not establish that the applicant was convicted of possessing less than 30 grams of marijuana. Because the applicant provided no proof that his conviction was for possession of 30 grams or less of marijuana, he has not met his burden, and is therefore ineligible for a waiver under 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 wife or 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 establishing that the application merits approval rests with the applicant. *See* 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.