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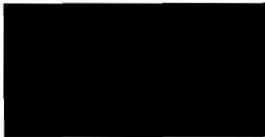
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JAN 23 2009

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada 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 a controlled substance violation. The applicant is the spouse of a U.S. citizen and the father of a U.S. citizen child, and he now seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his spouse and child.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated May 19, 2006.

On appeal, counsel contends that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in finding that the applicant had failed to meet the burden of establishing extreme hardship to his qualifying relative as necessary for a waiver under 212(h) of the Act. *Form I-290B*.

In support of counsel's claim, the record includes, but is not limited to, a statement from the applicant's spouse; a psychological evaluation from [REDACTED]; a statement from [REDACTED], guidance counselor, The Benson Elementary School; awards for the applicant; report cards for the applicant's child; an employment letter for the applicant; tax statements for the applicant and his spouse; medical letters and records for the mother of the applicant's spouse; criminal records for the applicant; and bank statements for the applicant and his spouse. The entire record was considered in rendering a decision on the appeal.

The applicant has the following criminal history. On June 1, 1990 the applicant pled guilty to possession of a narcotic, to wit: Cannabis Resin (Hashish) in Ontario, Canada for which he received a fine of \$100.00. *Criminal records, Province of Ontario*, dated June 1, 1990. The amount of Hashish was 2.8 grams. *Statement from Durham Regional Police Service, Ontario, Canada*, dated August 22, 2005.

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

- (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 . . . is inadmissible.
 - (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:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of 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 if—

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [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 is established to the satisfaction of the Attorney General [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 . . .

Prior to addressing the issue of extreme hardship, the AAO finds it necessary to address the issue of eligibility of the section 212(h) waiver. As previously noted, the applicant was convicted of possession of 2.8 grams of Hashish. *Criminal records, Province of Ontario*, dated June 1, 1990; *Statement from Durham Regional Police Service, Ontario, Canada*, dated August 22, 2005. According to the United States Sentencing Commission Guidelines Manual § 2D1.1, Schedule I, Marihuana, 1 gram of Cannabis Resin or Hashish is equal to 5 grams of marihuana. *2008 Federal Sentencing Guidelines Manual, Chapter 2 – Part D – Offenses Involving Drugs and Narco-Terrorism*, http://www.ussc.gov/2008guid/2d1_1.htm. As such, the applicant's conviction of possession of 2.8 grams of Hashish is equivalent to 14 grams of marihuana.¹ As the applicant was convicted of a single offense of simple possession of 30 grams or less of marijuana, he is eligible for a waiver.

¹ The AAO notes that the Ninth Circuit has ruled that marijuana and hashish “are derivatives of a common source,” and that, in the context of determining admissibility under U.S. immigration law, “marijuana is sufficiently general in scope to include hashish.” *Hamid v. I.N.S.*, 538 F.2d 1389, 1391 (9th Cir. 1976).

The AAO notes that the Director erred in determining that the applicant needed to show extreme hardship to his U.S. citizen spouse in order to qualify for a section 212(h) waiver. As the events that led to his criminal conviction occurred in 1990, over 15 years ago, the AAO finds that the applicant may seek a waiver of inadmissibility under section 212(h)(1)(A) of the Act. To qualify for a section 212(h)(1)(A) waiver, the applicant first needs to show that his admission would not be contrary to the welfare, safety or security of the United States and that he has been rehabilitated.

The applicant has not had any criminal activity since his 1990 conviction. *IBIS Hit Resolution record; Statement from Durham Regional Police Service, Ontario, Canada*, dated August 22, 2005. The applicant has a U.S. citizen spouse and a U.S. citizen child and owns a home in the United States. *Marriage certificate and U.S. birth certificates; Mortgage statement*. The applicant has a consistent work history and has paid taxes. *See letters of employment; tax statements*. The applicant has received numerous awards in his industry, including an Emmy Award Honor for Outstanding Sound Mixing for a Variety or Music Series or Special for the 45th Annual Grammy Awards. *See award certificates*. Therefore, the AAO finds that the applicant's admission to the United States would not be contrary to the welfare, safety or security of the United States and that he has been rehabilitated.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant in this case include the applicant's U.S. citizen spouse, U.S. citizen child, and the supportive and loving relationship with his family as evidenced by affidavits. *Marriage certificate and U.S. birth certificates; Statements from the applicant's spouse*, dated August 8, 2005 and June 5, 2006. As previously noted, the applicant has a consistent work history and has paid taxes. *See letters of employment; tax statements*. The AAO finds that these favorable factors outweigh the unfavorable factors of the applicant's one prior criminal conviction occurring in 1990, and periods of unauthorized presence in the United States and unauthorized employment. The AAO therefore finds that the applicant qualifies for a 212(h) waiver for being inadmissible pursuant to 212(a)(2)(A)(i)(I) of the Act.

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 met his burden.

ORDER: The appeal is sustained.