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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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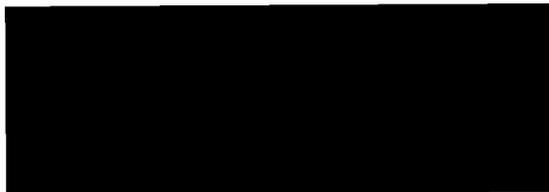
Applicant:



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.

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 or reopen, 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, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Dominican Republic. He is the husband of a U.S. citizen, and the father of two U.S. citizen daughters. He 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. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his wife and children.

The district director found that the applicant is inadmissible for having been convicted of an offense related to a controlled substance. The district director also found that the applicant had not demonstrated that denying the waiver application would cause his wife extreme hardship. On appeal, counsel asserted that the district director had not correctly considered the evidence pertinent to hardship. Although counsel did not appear to contest the district director's determination of inadmissibility, the AAO will review that determination.

Section 212(a)(2)(A)(i)(II) of the Act states that an alien who is convicted of a violation of a law relating to a controlled substance is inadmissible. That section refers to 21 U.S.C. § 802 for a definition of "controlled substance." The statute at 21 U.S.C. § 802 subsection (6) defines "controlled substance" as anything on Schedules I through V of Part B. Part B that states that marijuana is a Schedule I drug and cocaine is a Schedule II drug.

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

The Attorney General may, in his discretion, waive the application of . . . [212(a)(2)(A)(i)(II) of the Act] . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes 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 record shows the following offenses:

1. On December 26, 1997, the applicant was arrested, in New York, New York, for a violation of NYPL 220.16, criminal possession of a controlled dangerous substance in the third degree; a violation of NYPL 220.03, criminal possession of a controlled dangerous substance in the seventh degree, to wit: cocaine; and a violation of NYPL 221.15, criminal possession of more than two ounces of marijuana. On March 19, 1998, the applicant was convicted, pursuant to his plea of guilty, of the violation of section 220.03, criminal possession of a controlled dangerous substance in the seventh degree. The applicant was placed on conditional discharge for one year, his drivers license was suspended for six months, and he was required to perform three days of community service.

2. On October 6, 1998, the applicant was arrested, in New York, New York, for a violation of section 220.39, criminal sale of a controlled substance in the third degree. On January 5, 1999, that charge was dismissed.

3. On June 12, 2002 the applicant was arrested, in Richmond, Virginia, for a violation of 21 U.S.C. § 846, conspiracy to distribute cocaine. On August 26, 2002, that charge was dismissed.

The record demonstrates that the applicant was convicted, in number 1, above, of a violation of a law involving a controlled substance within the meaning of section 212(a)(2)(A)(i)(II) of the Act. The applicant is therefore inadmissible. The remainder of this decision will address whether the applicant is eligible for a waiver under section 212(h) of the Act.

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. Section 212(h) waiver applies to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. No waiver is otherwise available for inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act.

The AAO notes that NYPL 220.03, the law pursuant which the applicant was convicted of violating, may be charged pertinent to possession of various drugs under various conditions, but does not pertain to possession of marijuana. A charging document in the record specifies that the other drug the applicant possessed, in addition to more than two ounces of marijuana, was more than 1/8 ounce of cocaine. In a Form I-213 Record of Deportable/Inadmissible Alien, an officer of USCIS stated that the applicant confirmed to him that the substances he pled guilty to possessing were cocaine and marijuana.

The conviction that triggered the applicant's inadmissibility is not for possession of 30 grams or less of marijuana. **Therefore, no waiver is available. Because the AAO has found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether failure to grant waiver will result in extreme hardship to a qualifying relative or whether the applicant merits a waiver as a matter of discretion.**

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the

Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.