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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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FILE:

Office: MIAMI (TAMPA)

Date: MAY 06 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 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, as required by 8 C.F.R. 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica 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 crime involving a controlled substance. The applicant is married to a United States citizen and has a U.S. citizen mother. 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 family.

The acting district director found that the applicant failed to demonstrate that his inadmissibility would result in extreme hardship to the applicant's spouse or mother. *Acting District Director's Decision*, dated April 6, 2006.

On appeal, counsel states that because the applicant's two convictions arose from the same set of facts on the same date, the applicant's convictions constitute only one conviction. *Counsel's Brief*, dated May 26, 2009. In addition, counsel asserts that the applicant has not committed a crime involving moral turpitude because the crime for which the applicant was found guilty involved less than thirty grams of marijuana, and although it is a controlled substance offense, it is not an aggravated felony. *Id.*

The record reflects that on December 22, 1993 the applicant was allegedly involved in the sale of cocaine and possession with intent to sell cocaine in violation of section 893.13 of the Florida Statutes. *Arrest Report*, dated February 17, 1994. On August 22, 1994 the applicant was charged with two counts of unlawful possession of a controlled substance, cocaine and cannabis, with intent to sell or deliver said controlled substance in violation of section 893.13 of the Florida Statutes, and possession with intent to use drug paraphernalia to store, contain, or conceal a controlled substance as defined by Chapter 893 of the Florida Statutes in violation of section 893.147 of the Florida Statutes. *Criminal Complaint*, dated August 22, 1994. The applicant was also charged with sale of cocaine and possession of cocaine with intent to sell. *Arrest Warrant*, dated March 4, 1994. The record indicates that all of these charges were dismissed and the applicant pled guilty to two counts of attempted possession of cocaine and was sentenced to one year probation for each count to be served consecutively.

Section 212(a)(2)(A)(i) of the Act states 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 political offense) or an attempt or conspiracy to commit such a crime, or

(II) 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.

....

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

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

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 AAO finds that the record indicates that the applicant's two convictions were not based on one set of facts occurring on the same date as asserted by counsel. Even if these convictions were based on the same set of facts occurring on the same date, they would still be considered two separate convictions in accordance with section 212(a)(2)(B) of the Act, which makes no exception for offenses arising from a single scheme of misconduct.

Furthermore, counsel's reading of the Act is incorrect. The Act is clear that a section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of thirty grams or less of marijuana. There is no waiver for cases that involve possession of more than thirty grams of marijuana or any amount of other controlled substances. In this case, the applicant was convicted of crimes relating to the controlled substance cocaine. Thus, the acting district director incorrectly concluded that the applicant was statutorily eligible to be considered for a section 212(h) waiver.

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 mother, 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 remains entirely with the applicant. 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.