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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



U.S. Citizenship
and Immigration
Services

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H₂

FILE:

Office: MIAMI

Date:

OCT 26 2009

IN RE: 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)i

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of the United Kingdom, was found inadmissible to the United States under 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 having been convicted of a crime involving moral turpitude, and under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a controlled substance violation. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

The district director concluded that the positive factors present in the record did not warrant favorable use of discretion, and denied the Form I-601 accordingly. *Decision of the District Director*, undated.¹

In support of the appeal, counsel for the applicant submitted the Form I-290B, Notice of Appeal, dated May 7, 2007, and an attachment. In addition, counsel requested 90 days to submit a brief and/or evidence in support of the appeal. To date, no additional documentation has been sent by counsel and/or the applicant in support of the instant appeal and thus, the record is considered complete.

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

(A)(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 (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- (II) a violation of...any law or regulation of a State, the United States, or a foreign country relating to a controlled substance... is inadmissible.

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

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I) ... of subsection (a)(2) ... if-

¹ Although the Decision of the District Director is undated, counsel has provided a copy of the envelope containing the decision that counsel received; said envelope is postmarked April 6, 2007.

- (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
- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien’s applying or reapplying for a visa, for admission to the United States, or adjustment of status.

. . . No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony. . .

The record reflects inadmissibility under 212(a)(2)(A)(i)(I) of the Act based on the applicant’s conviction for a crime involving moral turpitude. In November 2004, the applicant was convicted of Robbery/Armed/Firearm or Deadly Weapon, violations of section 812.13(2)(a) and 775.087 of the Florida Statutes Annotated; the applicant was placed on probation for five years. The AAO has reviewed the statutes, case law and other documents related to this conviction, as well as the relevant precedent decisions from the Board of Immigration Appeals and the courts. The AAO concurs with the district director that the applicant has been convicted of a crime involving moral turpitude and is therefore inadmissible under section 212(a)(2)(A)(i) of the Act.

The record also reflects inadmissibility under 212(a)(2)(A)(i)(II) of the Act based on the applicant’s conviction for a controlled substance violation. In October 2000, the applicant was convicted of

Possession of Marijuana, a violation of section 893.13 of the Florida Statutes Annotated; the applicant was placed in an Advocate Program.²

The AAO notes that inadmissibility for the controlled substance violation referenced above may only be waived under section 212(h) as it relates to the simple possession of 30 grams or less of marijuana. The record does not establish that the applicant's conviction for Possession of Marijuana relates to simple possession of 30 grams or less of marijuana. Although the charge listed in the Complaint/Arrest Affidavit is "Possn of Marijuana (under)", it has not been established that the applicant was ultimately convicted of simple possession of 30 grams or less of marijuana. See *Complaint/Arrest Affidavit*, dated August 26, 2000. Moreover, the letter provided by [REDACTED], Advocate Program, Inc., only references the charge of Possession of Marijuana; it does not specifically establish that the conviction was for simple possession of 30 grams or less.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The record does not clearly support a finding that the applicant's conviction was for simple possession of 30 grams or less of marijuana. Accordingly, he is not eligible for the limited waiver available for marijuana possession under section 212(h). Thus, the AAO concludes that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act, and no waiver is available.

² Pursuant to section 101(a)(48) of the INA,

- (A) The term "conviction" means, with respect to an alien, 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 had 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 establishes that based on a possession of marijuana offense in August 2000, the applicant was placed in the Advocate Program, Inc., a private not-for-profit agency offering structured probation, traditional probation, diversion and community service programs. See www.advocateprogram.com. Were the applicant not guilty of possession of marijuana and/or admitted sufficient facts to warrant a finding of guilt, a court would not have ordered his placement in the program; nor would the applicant have accepted such terms. As such, despite counsel's assertions to the contrary, the AAO concludes that the applicant was convicted of possession of marijuana, as outlined in section 101(a)(48)(A) of the Act, based on an August 2000 offense.

Even if it were established by a preponderance of the evidence that the applicant's conviction was for simple possession of 30 grams or less of marijuana, the applicant remains ineligible for a waiver based on his conviction for a crime involving moral turpitude³, as the applicant has failed to establish extreme hardship to his U.S. citizen spouse were his waiver request denied. Despite counsel's assertion on appeal to the contrary, no documentation of extreme hardship was submitted with the Form I-601 in November 2006, and moreover, counsel and/or the applicant failed to submit documentation establishing extreme hardship to the applicant's U.S. citizen spouse on appeal. As such, it has not been established that the applicant's U.S. citizen spouse, the only qualifying relative in this case, would suffer extreme hardship were she to relocate abroad to reside with the applicant due to his inadmissibility and alternatively, it has not been established that she would suffer extreme hardship were she to remain in the United States while the applicant resided abroad due to his inadmissibility.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. 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. The waiver application is denied.

³ On appeal, counsel makes numerous references to the fact that the applicant's conviction for Robbery/Armed/Firearm or Deadly Weapon does not constitute an Aggravated Felony under section 101(a)(43) of the Act. The issue of whether a conviction constitutes an aggravated felony in the section 212(h) waiver context is only relevant if the individual has already been admitted as a lawful permanent resident of the United States, as noted above. The applicant has been convicted of a crime involving moral turpitude, which may or may not be an aggravated felony. The arguments presented by counsel on appeal with respect to aggravated felonies are not applicable to the instant appeal and will not be further addressed by the AAO.