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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

SEP 21 2009

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to 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 possession of a controlled substance. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The director determined that the applicant's controlled substance violation was outside the purview of the 212(h) waiver, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel for the applicant failed to address the basis for the denial. Counsel instead asserted that the refusal of the applicant's admission to the United States would result in extreme hardship to the applicant and his wife based on the social, economic and political situation in Cuba. The entire record was reviewed and considered in rendering a decision on the appeal.

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

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (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.

The record reflects that on April 17, 1986, the applicant was arrested and charged with unlawfully and feloniously having in his actual or constructive possession the controlled substance of cocaine in violation of section 893.13 of the Florida Statutes. On October 2, 1986, the applicant entered a plea of nolo contendere to the charge in the Circuit Court of the Eleventh Judicial Circuit of Florida. The court found him guilty of the offense, withheld adjudication of guilt, and he was sentenced to a term of imprisonment for two days ([REDACTED]).

The AAO notes that the applicant's plea of nolo contendere and the judge's order of imprisonment for two days render the applicant convicted for immigration purposes.

Section 101(a)(48) provides:

- (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 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 definition of conviction applies to convictions and sentences entered before, on, or after September 30, 1996. Section 322(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009; *See Matter of Punu*, 22 I&N Dec. 224 (BIA 1998)(the definition of conviction is applied retroactively). Based on the foregoing, the AAO affirms the director's determination that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of a controlled substance. The applicant does not dispute this finding of inadmissibility on appeal.

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

(h) Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D) and (E)

The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of . . . 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 . . .

....

Therefore, a section 212(h) the Act waiver of the bar to admission, resulting from the violation of section 212(a)(2)(A)(i)(II) of the Act, is only available for simple possession of 30 grams or less of marijuana. Here, the applicant was convicted of possession of cocaine. There is no other waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Since there is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of 30 grams or less of marijuana, the applicant is ineligible for a waiver of inadmissibility. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.