

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



HRZ

FILE:



Office: MIAMI, FL

Date:

SEP 25 2009

IN RE:



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:

SELF-REPRESENTED

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).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The record reflects that the applicant is a 41-year-old native and citizen of El Salvador 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 a controlled substance violation. The District Director also found that the applicant was inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as an alien who the Attorney General has reason to believe has been an illicit trafficker in a controlled substance. The applicant is married to a citizen of the United States, and he seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside with his wife and four children in the United States.

The District Director denied the Application for Waiver of Ground of Excludability (Form I-601), finding that the applicant was ineligible for a waiver. *See Decision of the District Director*, dated Mar. 28, 2007. The applicant submitted a timely appeal. On appeal, the applicant apologizes for his past violation, claims rehabilitation, and contends that the denial of the waiver would impose extreme hardship on his wife and family. *See Form I-290B, Notice of Appeal; Letters from [REDACTED] and [REDACTED]*

The record contains, *inter alia*, a copy of the couple's marriage certificate, dated Sept. 22, 1988; birth certificates for the couple's four U.S. citizen children; letters from the applicant and his wife; documentation related to the applicant's son's Individualized Education Program; tax records; employer letters; and documentation related to the applicant's 1989 arrest and conviction. The entire record was reviewed and considered in rendering this decision on appeal.

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

(2) Criminal and related grounds. —

(A) Conviction of certain crimes. —

- (i) In general. — . . . any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —
- (I)
 - (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.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.

The waiver provision at section 212(h) of the Act provides for a discretionary waiver of the ground of inadmissibility at section 212(a)(2)(A)(i)(II) of the Act, if the violation “relates to a single offense of simple possession of 30 grams or less of marijuana.” 8 U.S.C. § 1182(h). Section 212(h) of the Act does not provide for a waiver of the trafficking ground of inadmissibility at section 212(a)(2)(C) of the Act. *Id.*

On October 27, 1989, the New Jersey Superior Court convicted the applicant of a controlled substance offense in violation of section 2C:35-5a(1) & b(12) of the New Jersey Code of Criminal Justice. *See Judgment of Conviction.* The record indicates that the applicant pleaded guilty to possession with intent to distribute less than one ounce of marijuana. *Id.* The court sentenced the applicant to five years of probation and 100 hours of community service.¹ The applicant’s probation was closed on November 8, 1993, with all conditions met. *See Letter from Superior Court of New Jersey, Probation Division.* The record contains no further indications of criminal activity.

The applicant’s controlled substance conviction renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. An applicant with “a single offense of simple possession of 30 grams or less of marijuana” may qualify for a waiver under section 212(h) of the Act. 8 U.S.C. § 1182(h). Here, the applicant’s conviction involved less than 30 grams of marijuana. *See* section 2C:35-5b(12) of N.J. Stat. Ann. (stating that a violation with respect to “[m]arijuana in a quantity of less than one ounce including any adulterants and dilutants, . . . is guilty of a crime of the fourth degree). However, the applicant was convicted of possession with intent to distribute, which does not constitute a crime of “simple possession.” *See Wilson v. Ashcroft*, 350 F.3d 377, 380 (3d Cir. 2003). Accordingly, the applicant is not eligible for a section 212(h) waiver.

Because the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and there is no available waiver, no purpose would be served in reviewing the District Director’s determination that the applicant is also inadmissible under section 212(a)(2)(C) of the Act as an illicit trafficker in a controlled substance.

¹ The District Director erred in finding that the applicant was convicted of possession with intent to distribute a controlled substance within 1000 feet of school property. *See Decision of the District Director* at 2. This count of the indictment was dismissed. *See Judgment of Conviction.*

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