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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

PUBLIC COPY

Hr

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 03 2010

(relates)

IN RE:

[Redacted]

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 PETITIONER:

[Redacted]

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.

Perry R. Hew

Chief, Administrative Appeals Office

**DISCUSSION:** The application was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada who was found to be inadmissible to the United States pursuant to 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 section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), based on his conviction for possession of a controlled substance. The applicant seeks 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 U.S. citizen spouse and their children.

The Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Director*, dated July 12, 2007.

On appeal, prior counsel for the applicant contends that United States Citizenship and Immigration Services (USCIS) misapplied the law in this case. *Form I-290B, Notice of Appeal or Motion*.

In support of the claim the record includes, but is not limited to, statements from the applicant's children; a statement from a Senior Agent Supervisor, Federal Prosecution Service, Department of Justice, Canada; criminal records for the applicant; tax records for the applicant's spouse; and a statement from the applicant. The entire record was considered in rendering a decision on the appeal.

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

- (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 . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible.
  - (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.

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

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) of 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 if—

(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 . . .

The applicant has the following criminal history. On September 8, 1975 in Canada, the applicant was convicted of Possession of a Narcotic to Wit: Cannabis Marihuana under Section 3(1) of the Narcotic Control Act and was sentenced to 30 days and \$100 fine. *Conditional and Absolute Discharge and Related Information*, dated November 28, 2001; *Information and Complaint, Canada Magisterial District of the Province of Nova Scotia*, dated September 6, 1975. On September 23, 1983 in Canada the applicant was convicted of Personation under Section 361 of the Canadian Criminal Code and received a sentence of 30 days. *Conditional and Absolute Discharge and Related Information*, dated November 28, 2001. On January 26, 1995 in Canada the applicant was convicted of Fraud over \$1000 under section 380(1)(A) of the Canadian Criminal Code and received a suspended sentence, probation for three years, \$9200 restitution, and 300 hours of community service. *Id.*

Regarding the 1975 drug possession conviction, a statement in the record from a Senior Agent Supervisor, Federal Prosecution Service, Department of Justice, Canada indicates that she was unable to locate the records in the applicant's case and that they have likely been destroyed as part of a routine destruction of files conducted by the law firm that prosecuted the case. *Statement from [REDACTED] Federal Prosecution Service, Department of Justice, Canada.* This destruction is in keeping with the rules of Nova Scotia Barristers' Society. *Id.* There is no other place where a copy of the file would have been kept. *Id.* The court file does not indicate the amount of cannabis in question. *Id.* However, the Senior Agent Supervisor advises that the fine of \$100 imposed against the applicant in 1975 for possession of cannabis marihuana clearly indicates that the amount in question was very small, certainly less than 30 grams and most likely less than a single gram. *Id.* As such, the AAO finds that the applicant, although inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of less than 30 grams of marijuana, is eligible for a waiver consideration.

With respect to the applicant's 1995 fraud conviction, any crime involving fraud is almost always a crime of moral turpitude. *See Jordan v. DeGeorge*, 341 U.S. 223 (1951); *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992). The AAO therefore finds that the applicant has been convicted of a crime involving moral turpitude. The applicant does not contest these findings.

An application for admission or adjustment is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of decision is the date of the final decision on the application, which in this case must wait the AAO's findings in the present matter. Therefore, section 212(h)(1)(A) of the Act applies to the applicant as all the activities that rendered him inadmissible to the United States occurred more than 15 years prior to his application for adjustment of status. He may establish eligibility for a waiver by showing that he is not a risk to the welfare, safety or security of the United States and has been rehabilitated.

There is no indication in the record that the applicant has ever relied on the government for financial assistance or will rely on the government for financial assistance. Further, there is nothing in the record that points to the applicant's involvement in any activities that would undermine national safety or security. The applicant has not been convicted of any crime since 1995. *Criminal Convictions, Conditional and Absolute Discharge and Related Information*, dated November 28, 2001. Therefore, the AAO finds the record to demonstrate that admitting the applicant to the United States would not be contrary to its national welfare, safety, or security and that the applicant is rehabilitated.

The granting of the waiver is discretionary in nature. The favorable discretionary factors for the applicant in this case include the applicant's United States citizen spouse (*See U.S. birth certificate*) and their children and the general hardship they would experience if he were removed from the United States. The applicant's children attest to the positive role that the applicant has played in their lives. *Statements from the applicant's children*, dated August 12, 2007, August 13, 2007, August 14, 2007, August 17, 2007, and August 21, 2007. The AAO finds that these favorable factors outweigh the unfavorable factors of the applicant's prior criminal convictions. The AAO therefore finds that the applicant qualifies for a 212(h) waiver of his inadmissibility pursuant to 212(a)(2)(A)(i)(I) of the Act.

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 rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met his burden and the appeal will be sustained.

**ORDER:** The appeal is sustained.