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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

H2

DATE: AUG 02 2011

Office: PORTLAND, ME

FILE: [REDACTED]

IN RE: [REDACTED]

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Brazil 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). The applicant is the spouse of a U.S. citizen and the father of a U.S. citizen. He 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.

The Field Office Director found that the applicant had been convicted of two controlled substance offenses and was, therefore, ineligible for waiver consideration under section 212(h) of the Act. He denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's decision*, dated July 24, 2008.

On appeal, counsel states that the applicant stands convicted of a single offense of possession of marijuana and is eligible for waiver consideration. *Form I-290B, Notice of Appeal or Motion*, dated August 22, 2008.

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—

....

(II) A violation (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, that:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

In the present case, the record reflects that the applicant was arrested on October 31, 2005 for Unlawful Possession of Marijuana, Massachusetts General Laws (MGL) Chapter (Ch.) 94C § 34 and that, on September 28, 2006, he admitted sufficient facts to support a finding of guilt. On June 7, 2007, the applicant filed a motion withdrawing his plea and asking for a new trial. On June 28, 2007, the applicant's motion for a new trial was granted and he was placed on pre-trial probation until December 26, 2008. The record does not reflect the outcome of the applicant's second trial for possession of marijuana.

On December 21, 2005, the applicant was arrested for Possession With Intent to Distribute a Class D Controlled Substance, MGL Ch. 94C § 32C. On February 5, 2007, the applicant admitted to

sufficient facts to support a finding of guilt, but, on June 19, 2007, was allowed to withdraw his plea and was granted a new trial. On June 28, 2007, the applicant was convicted of Unlawful Possession of a Class D Controlled Substance. The record does not identify the Class D controlled substance possessed by the applicant.

Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. Therefore, on March 8, 2001, the AAO issued a request for evidence, notifying the applicant of the record's failure to establish his eligibility for 212(h) waiver consideration and requesting a final disposition for his October 31, 2005 arrest for marijuana possession, as well as court records or other documentation identifying the Class D controlled substance he was convicted of possessing on June 28, 2007. The applicant was given 12 weeks to respond, but, as of this date, has submitted no additional documentary evidence.

In waiver proceedings under section 212(h) of the Act, the burden of proof is on the applicant to establish his or her admissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant in the present matter has failed to establish that he has been convicted of a single offense of possessing less than 30 grams of marijuana. Accordingly, the AAO finds he is ineligible for waiver consideration under section 212(h) of the Act. Having determined the applicant to be ineligible for a 212(h) waiver, the AAO finds no purpose would be served in determining whether the record establishes that his spouse or child would suffer extreme hardship as a result of his inadmissibility.

In proceedings for an application for a 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. *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.