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



U.S. Citizenship
and Immigration
Services

H2

FILE: [REDACTED] Office: PORTLAND

Date:

JAN 10 2011

IN RE: Applicant: [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)

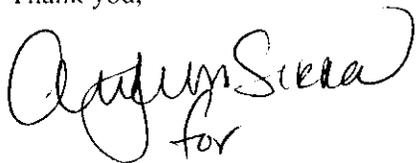
ON BEHALF OF PETITIONER:

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 Colombia 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 committed crimes 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 crime involving a controlled substance. The applicant seeks a waiver under 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 children and parents.

The field office director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility and that he failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Ground of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated July 10, 2008.

On appeal, counsel for the applicant contends that the applicant's plea relating to a controlled substance charge was vacated and the case was subsequently dismissed, thus he does not have a conviction relating to a controlled substance that may serve as a basis for inadmissibility. *Brief from Counsel*, at 10, received September 30, 2008. Counsel further asserts that the applicant has shown that qualifying relatives will suffer extreme hardship should the present waiver application be denied. *Id.* at 5-10.

The record contains a brief from counsel; statements from the applicant, as well as the applicant's wife, mother, stepfather, child, uncle, and aunt; a letter from the applicant's church; medical documentation for the applicant's wife; letters from the applicant's son's school; reports on conditions in Colombia; documentation relating to the applicant's business activities, and; documentation regarding the applicant's criminal activity. The entire record was reviewed and considered in rendering this decision.

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

Criminal and related grounds. —

(A) Conviction of certain crimes. —

(i) In general. — Except as provided in clause (ii), any 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 (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.

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

The Attorney General 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

Section 101(a) of the Act provides, in pertinent part:

As used in this Act-

(48)(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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The record reflects that on November 20, 1995 the applicant tendered an admission to a charge of possession of a class B controlled substance pursuant to the General Laws of Massachusetts, Chapter 94C, sections 31, 34. The Boston Municipal Court - Criminal Division accepted the admission, levied a \$50 assessment against the applicant, and referred him to a clinic for evaluation and treatment for drug dependency. Records of the applicant's criminal history contain a notation of CWOFF (continued without a finding) for the charge.

The criminal proceedings against the applicant for possession of a class B controlled substance resulted in a conviction as contemplated by section 101(a)(48)(A) of the Act, as the applicant admitted guilt, and the judge ordered a penalty in the form of an assessment and restraint on the applicant's liberty due to referring him for evaluation and treatment for drug dependency.

On February 3, 2006, the applicant filed a motion to vacate the plea and vacate the finding. On February 27, 2006, the court allowed the motion and the case was dismissed. Based on this fact, counsel contends that the applicant does not have a conviction relating to a controlled substance that may serve as a basis for inadmissibility. *Brief from Counsel* at 10.

However, the applicant has not shown the basis for which the court vacated his plea and its finding approximately 10 years after his conviction. The present matter arises in the jurisdiction of the First Circuit. In cases arising outside the Ninth Circuit, State expungement measures do not erase a conviction for immigration purposes, even if the applicant could have been eligible for Federal First Offender Act (FFOA) treatment. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002); *see also Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). The applicant has not established that his admission of guilt was vacated due to a technical error or procedural defect in the criminal proceedings. Thus, he has failed to show that his conviction for possession of a class B controlled substance may not serve as a basis for inadmissibility under section 212(a)(2)(A)(ii)(II) of the Act.

Class B controlled substances in Massachusetts include substances such as opium, methamphetamine, and lysergic acid. General Laws of Massachusetts, Chapter 94C § 31. Marijuana is designated as a class D substance under Massachusetts law, thus the applicant's conviction was not for possession of 30 grams or less of marijuana. *Id.* Accordingly, he is not eligible for a waiver of his inadmissibility under section 212(a)(2)(A)(ii)(II) of the Act. *See* section 212(h) of the Act.

The applicant has been charged with numerous other crimes, and the field office director found that he is also inadmissible under section 212(a)(2)(A)(ii)(I) of the Act due to having been convicted of crimes involving moral turpitude. This finding is based on the fact that on November 22, 2000 the applicant received the equivalent of convictions in Massachusetts for assault and battery with a dangerous weapon, assault and battery, and threatening, each relating to acts against his wife. As the applicant is statutorily ineligible for a waiver of his inadmissibility under section 212(a)(2)(A)(ii)(II) of the Act, no purpose would be served in assessing whether he is inadmissible under section 212(a)(2)(A)(ii)(I) of the Act, whether he has established extreme hardship to a qualifying relative as contemplated by section 212(h) of the Act, or whether he merits a waiver as a matter of discretion.

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 remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.