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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H2

Date: OCT 05 2011

Office: BALTIMORE, MD

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act (INA), 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,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

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

The applicant, a native and citizen of Peru, 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 a controlled substance. The record indicates that the applicant has a U.S. citizen spouse and two U.S. citizen stepchildren. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

In his decision, dated July 21, 2008, the district director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for being convicted of cocaine possession. He also found that the applicant failed to demonstrate his eligibility for a waiver and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a Notice of Appeal to the AAO (Form I-290B), dated August 22, 2008, counsel states that the applicant was not conditionally discharged for possession of cocaine on October 31, 2007 as the district director stated in his decision, but was conditionally discharged for a disorderly persons offense on October 31, 1987, over 21 years ago. Counsel states further that in New Jersey a disorderly person offense is generally not considered a crime, the defendant is not afforded the same constitutional rights as someone charged with a crime, the violation would be adjudicated in a separate municipal court system, and the municipal judge would not have jurisdiction to find the applicant guilty of a crime. Counsel asserts that the applicant is eligible for a section 212(h)(1)(A) waiver, but that the applicant may not have been convicted for immigration purposes and may not require a waiver.

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

- (1) 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) or 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* (emphasis added.)

The applicant's Final Expungement Order, dated December 12, 2005, indicates that the applicant was arrested in [REDACTED] on October 31, 1987 for "possession of a controlled dangerous substance" in violation of N.J. Stat. Ann. § 2C:35-10a(4). The Order states that the applicant was granted a conditional discharge. Court documents dated March 19, 2002 show that the applicant was charged with possession of cocaine. In addition, in a sworn statement, taken by a District Adjudications Officer in Baltimore, Maryland on April 10, 2008, the applicant states that in 1987 he was arrested for being in a car with cocaine.

The AAO finds counsel's assertions regarding the applicant's convictions being a violation as opposed to a crime are irrelevant, as section 212(a)(2)(A)(i)(II) of the Act does not require a criminal conviction, but only a violation of any law or regulation of a State, which we interpret to include municipalities or other entities under State authority.

N.J. Stat. Ann. § 2C:35-10a(4) states:

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, unless the substance was obtained directly, or pursuant to a valid prescription or order form from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c. 226 (C. 24:21-1 et seq.). Any person who violates this section with respect to:

...

(4) Possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish is a disorderly person.

N.J. Stat. Ann. § 2C:36A-1 states:

Conditional discharge for certain first offenses; expunging of records.

a. Whenever any person who has not previously been convicted of ... a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title or, subsequent to the effective date of this title, under any law of the United States, this State or any other state relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, is charged with or convicted of any disorderly persons offense or petty

disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:

(1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; or

(2) After plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person after proper reference to the State Bureau of Identification criminal history record information files, place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.

Because counsel failed to submit the final disposition of the applicant's arrest, the AAO will rely on the Final Expungement Order and the applicant's sworn statement to determine how this arrest was resolved. As stated above, the applicant was granted a conditional discharge which would have either suspended further proceedings against the applicant and resulted in probation or would have had the applicant found guilty or enter a guilty plea also resulting in probation. Based on the applicant's sworn statement, the AAO finds that the applicant pled guilty and was sentenced to probation under N.J. Stat. Ann. § 2C:36A-1(a)(1).

Section 101(a)(48) of the Act 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 AAO finds that information taken from the expungement record, N.J. Stat. Ann. § 2C:36A-1, and the applicant's sworn statement indicates that the applicant entered a plea of guilty to the charge under N.J. Stat. Ann. § 2C:35-10a(4), satisfying the first prong of section 101(a)(48)(A) of the Act. The AAO finds that information taken from N.J. Stat. Ann. § 2C:36A-1 and the applicant's sworn statement indicates that the applicant's sentence of probation is a restraint on his liberty that satisfies the second prong of section 101(a)(48)(A) of the Act.

The AAO also finds that the Final Expungement Order does not expunge the applicant's conviction for immigration purposes. Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which

purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). There is nothing in the record to show that the expungement of the applicant’s conviction was based on a defect in the proceedings. Thus, the applicant is and remains “convicted” within the meaning of section 101(a)(48)(A) of the Act.

In addition, as stated above, a section 212(h) waiver applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of possessing cocaine. Thus, the applicant is statutorily ineligible to be considered for a section 212(h) waiver. The AAO notes that the burden of establishing that the applicant is admissible remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361.

Because the applicant is statutorily ineligible for a waiver of inadmissibility, no purpose would be served in discussing whether the applicant has been rehabilitated, established extreme hardship to his U.S. citizen wife, 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.