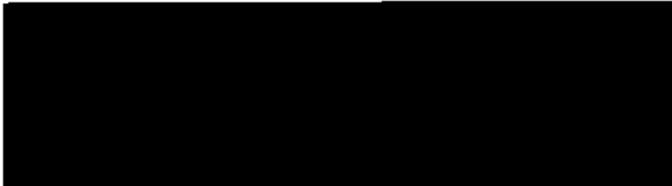




#2



DATE: **DEC 20 2012**

Office: NEW YORK

FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(h), and under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The record establishes that the applicant, a native and citizen of Jamaica, was admitted to the United States as a B-1 visitor on June 7, 2002,¹ allowed to remain until December 6, 2002, and has not departed. He began accruing unlawful presence when his authorized stay expired, and he was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for one year or more. The applicant contests this finding of inadmissibility, but alternatively seeks a waiver of inadmissibility in order to remain in the United States with his U.S. spouse. In addition, the record shows that the applicant has been twice convicted of possessing 30 grams or less of marijuana. By virtue of these convictions, the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having more than one controlled substance violation.

The district director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Ground of Inadmissibility (Form I-601). *Decision of the District Director*, March 11, 2011. In addition, the director noted without further comment that the applicant had submitted evidence regarding dispositions of three arrests for possession of marijuana.

On appeal, the applicant's counsel asserts that the field office director erroneously applied the unlawful presence provisions of the Act because the applicant has not departed the country. In support of the appeal, counsel provides a brief explaining the nonapplicability of the unlawful presence inadmissibility, highlights the hardship contentions made in support of the waiver filing, and addresses the applicant's criminal convictions as adverse factors. The record also includes documents previously submitted in support of applicant's waiver request. The entire record was considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides:

(i) In General. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

¹ The applicant used a single entry, three-month validity, B1/B2 visa to enter the country. The stamp in his passport indicates that the applicant was admitted as a B-1 visitor. Neither the now expired passport bearing the 2002 visa nor the applicant's current passport issued in 2009 evidences any U.S. departures. There is nothing in the record suggesting that he has departed the United States since his 2002 entry.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General (Secretary) that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien... .

Section 212(a)(2)(A) of the Act provides:

(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—

....

(II) a violation of ... 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:

Waiver of Subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E). - The [Secretary] may, in [her] discretion, waive the application of subparagraphs (A)(i)(I), (II), (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

The applicant entered the United States lawfully in June 2002 and overstayed his authorized period of admission, but he did not depart the United States and is therefore not inadmissible under section 212(a)(9)(B)(i)(II) of the Act. As the applicant is not inadmissible under this section, he need not obtain the associated waiver under section 212(a)(9)(B)(v). However, the record indicates that the applicant was convicted under New York Penal Law 221.05 (unlawful possession of marihuana) on June 9, 2008 and again on September 8, 2008 in the Bronx County Criminal Court. Consequently, the AAO finds he is also inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act.

In the present matter, the record reflects that the applicant has been twice convicted of a controlled substance offense involving marijuana possession. Waiver of this inadmissibility is only available to applicants who committed a single offense of 30 grams or less of marijuana possession. The applicant is thus ineligible to seek a waiver under section 212(h).



In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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.