

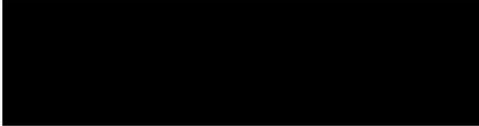
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U.S. Department of Homeland Security  
U.S. Immigration and Citizenship Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090



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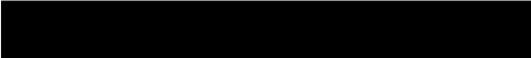


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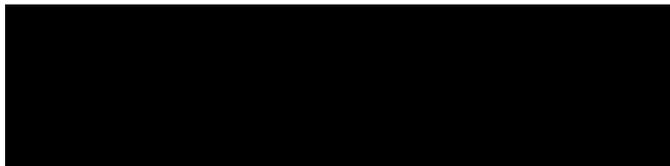
Office: LOS ANGELES, CA

FILE: 

IN RE: Applicant: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. Your appeal has been reopened on service motion for the issuance of this decision. 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.

Thank you,

*for* Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Los Angeles, California, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on November 19, 2007. On September 3, 2010, the AAO denied a motion to reconsider. Pursuant to 8 C.F.R. 103.5(a)(5), the AAO will reopen the applicant's appeal on service motion. The findings of inadmissibility under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), will be withdrawn. As the record reveals no other basis for inadmissibility, the waiver application will be deemed unnecessary, and the appeal will be dismissed.

The applicant is a native and citizen of Mexico who was originally found to be inadmissible under 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), for having been convicted of a crime involving a controlled substance.

In this motion, we will address only our prior determinations concerning the 1988 and 1992 controlled substance charges. We will not disturb our prior rulings on the applicant's other convictions, which are incorporated by reference into 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 —

...

(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)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme

hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines “conviction” for immigration purposes as:

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 submitted docket sheet states that the applicant was arrested for and charged with violation of Cal. Penal Code § 245(a)(1) – assault with deadly weapon other than a firearm – and Cal. Health and Safety Code § 11351 – possession of a controlled substance for sale. On November 2, 1988, the assault charge was reduced to a misdemeanor, the applicant pled guilty and was referred to probation. The controlled substance charge was amended to a violation of Cal. Health and Safety Code § 11350(a), or mere possession of a controlled substance, and the judge referred the applicant to probation for possible diversion. On December 7, 1988, in regard to the assault offense, the judge suspended imposition of sentence and ordered summary probation on specified conditions for 36 months. In regard to the controlled substance charge, the judge ordered that the matter be diverted for a period of 12 months under specified conditions. On August 15, 1989, the judge found the applicant had violated probation for the assault conviction and ordered that he serve 365 days in jail, with credit for 120 days served. Additionally, the judge terminated diversion for the controlled substance charge. On September 15, 1989, the judge granted the applicant’s motion for dismissal of the charge for lack of prosecution.

In view of the foregoing, in regard to the 1988 offenses, we find that that the applicant’s guilty plea was to the assault charge, and that the record does not show that the applicant entered a guilty plea, or that the judge rendered a finding of guilt, for possession of a controlled substance in violation of Cal. Health and Safety Code § 11350(a). We note that prior to January 1, 1997, California’s pretrial diversion program did not require a plea of guilty before the suspension of criminal proceedings pending completion of a drug education, treatment, or rehabilitation program. *See* Cal. Penal Code §§ 1000-1000.3 (West 1996); *see also de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1025 (9th Cir. 2007). The charge was dismissed for lack of prosecution on September 15, 1989, and there is insufficient basis in the record, as presently constituted, to support a finding that the 1988 charge resulted in a conviction for a controlled substance violation pursuant to the definition in section 101(a)(48)(A) of the Act.

The record also contains a minute order which reflects that on February 25, 1992, the applicant was again charged with violation of Cal. Health and Safety Code § 11350(a). On March 25, 1992, the applicant pled not guilty to the charge. On May 6, 1992, the judge ordered that the charge be diverted for 12 months under certain terms and conditions, such as having the applicant enroll in a

narcotic treatment program. As with the 1988 charge, California law in 1992 did not require a guilty plea or finding of guilt as a prerequisite to participation in a diversion program, and there is an insufficient basis in the record to find that the 1992 charge resulted in a conviction for a controlled substance violation pursuant to the definition in section 101(a)(48)(A) of the Act.

In conclusion, the record does not show that the 1988 and 1992 controlled substance possession charges resulted in convictions that would render the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

As the record does not reveal another basis for inadmissibility, the waiver application is unnecessary and the issue of whether the applicant has established extreme hardship to a qualifying relative need not be addressed. Accordingly, the prior determination of inadmissibility is withdrawn and the appeal is dismissed because the waiver application is unnecessary.

**ORDER:** The prior decisions of the AAO are withdrawn to the extent inconsistent with this decision. As the applicant is not inadmissible, the waiver application is unnecessary, and the appeal is dismissed.