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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: APR 2 6 2013 OFFICE: WEST PALM BEACH FILE:

IN RE:

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. 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, West Palm Beach, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Zimbabwe who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime relating to a controlled substance. The applicant 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 with his U.S. citizen spouse and their child.

The Field Office Director concluded that the record failed to establish the existence of extreme hardship for a qualifying relative and that the applicant does not merit a favorable grant of discretion and denied the application accordingly. *See Decision of the Field Office Director*, dated May 2, 2011.

On appeal, counsel for the applicant asserts that the applicant's spouse and child would suffer extreme emotional and financial hardship if separated from the applicant. Counsel further asserts that the applicant's spouse and child cannot relocate to Zimbabwe because they would be in danger, would be unable to access medical resources, and would be unable to financially support themselves.

In support of the waiver application and appeal, the applicant submitted identity documents, background information concerning conditions in Zimbabwe, a letter from his spouse, documents concerning the applicant's criminal record, medical documentation concerning the applicant's child, and financial documentation. The entire record was reviewed and considered in rendering a decision on the appeal.

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 of (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

In addition to other convictions, the record reflects that the applicant was convicted on November 30, 1998 with possession of less than 20 grams of marijuana in Courthouse, Florida. The field office director found the applicant to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for committing a crime related to a controlled substance. The applicant does not dispute this ground of inadmissibility on appeal.

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

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(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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 if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the 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 [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

As the applicant's conviction that renders him inadmissible took place on November 30, 1998, over 15 years ago, he is eligible for consideration for a waiver pursuant to section 212(h)(1)(A) of the Act. It is noted that the director's decision found that the applicant is not eligible for waiver consideration under this section of the Act since his conviction took place less than 15 years before the date of his application for adjustment of status. However, an application for admission or adjustment of status is a "continuing" application, adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). The date of decision is the date of the final decision on the application, which is dependent, in this case, on the AAO's findings in the present matter.

The applicant has a criminal record in addition to his crime relating to a controlled substance, including a theft conviction from July 7, 1993, a trespass conviction from October 7, 1996, a conducting business without occupational license on December 8, 1997, and driving with a suspended license on February 7, 1996 and November 7, 1996. It is noted that the applicant's criminal convictions all took place over 15 years ago. The record indicates that the applicant has had arrests within the past 15 years, but none of these arrests have resulted in criminal convictions.

It is noted that the applicant married his current spouse on May 15, 1998 and the applicant and his spouse had a child together on May 16, 2000. As noted, the applicant's last criminal conviction

took place on November 30, 1998. The record reflects that the applicant has not been convicted of any crime since soon after his marriage to his spouse and since the birth of their child. The applicant's spouse contends that the applicant and their son have a great bond and often take bike rides and play tennis together.

The applicant's spouse asserts that the applicant is the love of her life and that she and the applicant are established in their community. The applicant's spouse states that she and the applicant have property and automobiles leases upon which they currently make payment. The applicant's spouse asserts that the applicant was previously employed in the United States, but is currently unable to find work due to his expired work permit. The applicant's spouse also contends that she needs the applicant's income in order to meet their household financial obligations and has been forced to rely upon support from her parents. The record contains a Form G-325A from the applicant indicating that he was employed as an electrician in the United States and the applicant's spouse asserts that the applicant was a successful electrician who attended night school for computer science. The record contains tax records from the applicant and his spouse indicating that they paid taxes in the United States.

Based on the record, the AAO finds that the applicant has demonstrated rehabilitation and that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States pursuant to section 212(h)(1)(A) of the Act. For the same reasons, the AAO finds that the applicant merits a favorable exercise of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.