



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 21 2013

OFFICE: OAKLAND PARK

FILE: [REDACTED]

IN RE: [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 APPLICANT:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", with a long horizontal flourish extending to the right.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Oakland Park, Florida and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Bahamas who was found to be inadmissible to the United States pursuant to 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), 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.

The Acting Field Office Director concluded that the applicant is not eligible to apply for a section 212(h) waiver and denied the waiver application accordingly. *See Decision of the Acting Field Office Director*, dated May 24, 2011.

On appeal, counsel for the applicant¹ asserts that the applicant is eligible to apply for a section 212(h) waiver because his conviction does not constitute an aggravated felony, as he received a sentence of probation.

In support of the waiver application and appeal, the applicant submitted a letter, identity documents, financial documentation, family photographs, documents concerning the applicant's criminal convictions, a letter from the applicant's spouse, and letters of support. 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

The record reflects that the applicant was convicted of attempted trafficking in cocaine in the second degree and attempted conspiracy to traffic cocaine in the second degree on May 21, 2010 in Broward County, Florida.²

¹ It is noted that counsel for the applicant, as identified on the Form G-28 submitted on behalf of the applicant, was suspended from the practice of law before the Department of Homeland Security on June 21, 2012, for a period of six months. There is no evidence that counsel has since been reinstated. Counsel was further suspended from the practice of law until further order of the Supreme Court of Illinois, effective February 4, 2013. As such, the applicant will be considered self-represented for the purposes of his appeal.

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

Any alien who the consular officer or the Attorney General knows or has reason to believe-

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so is in admissible.

Based upon the applicant's convictions involving trafficking in controlled substances, he is also inadmissible pursuant to section 212(a)(2)(C)(i) of the Act.

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

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraphs (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 if -

(1) (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

The applicant cannot waive his inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act since his crime involving controlled substances is not limited to a single offense of simple possession of 30 grams or less of marijuana. The applicant was convicted of two separate counts involving the trafficking of cocaine, so he is not eligible for a waiver pursuant to section 212(h) of the Act. Further, there is no waiver for the applicant's inadmissibility based upon his illicit trafficking in a controlled substance, pursuant to section 212(a)(2)(C)(i) of the Act.

It is noted that the applicant asserts that it is not possible to be convicted of attempted conspiracy because both crimes are inchoate crimes. As such, the applicant, in his Form I-601 application, filed on June 24, 2010, contends that his criminal attorney is appealing his conviction for attempted conspiracy to traffic cocaine. The record does not contain any evidence that the

² It is noted that the applicant also has a conviction for grand theft in the third degree on May 21, 2010 in Broward County, Florida, for which he is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for committing a crime involving moral turpitude.

applicant's May 21, 2010 conviction for attempted conspiracy to traffic cocaine has been overturned. Further, the applicant's conviction for attempted trafficking of cocaine, on the same date, is sufficient to establish his inadmissibility pursuant to section 212(a)(2)(A)(i)(II) and section 212(a)(2)(C)(i) of the Act.

The applicant also asserts that his convictions involving cocaine trafficking do not fit the definition of aggravated felony because he was sentenced to a term of probation rather than incarceration. It is noted that the applicant is not being charged as inadmissible for committing an aggravated felony offense. Indeed, there is no language concerning aggravated felonies in either section 212(a)(2)(A)(i)(II) or section 212(a)(2)(C)(i) of the Act. As such, the applicant's arguments concerning the applicant's aggravated felony status are not material within the context of this decision.

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 not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.