



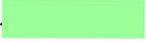
**U.S. Citizenship
and Immigration
Services**

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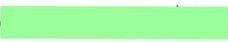


DATE: **MAR 08 2013**

OFFICE: MIAMI, FLORIDA

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. 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 with the field office or service center that originally decided your case by filing a 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 Form I-601 waiver application was denied by the Field Office Director, Miami (Hialeah), Florida and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be dismissed.

The applicant is a native and citizen of Cuba and a lawful permanent resident of the United States who has sought to file a “stand-alone” waiver application under section 212(h) of the Immigration and Nationality Act (the Act), in anticipation of being found inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude.

The field office director concluded that the applicant is not entitled to file a waiver application under section 212(h) of the Act because while deportation proceedings have not yet been initiated, he is excludable and deportable from the United States because he was convicted of cultivation of cannabis, a third degree felony, after becoming a lawful permanent resident. *See Decision of the Field Office Director*, dated September 28, 2011. The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal counsel contends that: (1) the applicant is entitled to apply for a stand-alone waiver under section 212(h) of the Act regardless of whether he is seeking admission to the United States; (2) the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act because a conviction for cultivation is not necessarily a ground of inadmissibility; and (3) the applicant’s U.S. Citizen spouse and children would suffer extreme hardship if a waiver is not granted. *See Counsel’s Appeal Brief*, dated October 17, 2011.

The record contains, but is not limited to: Form I-290B, counsel’s appeal brief and an earlier brief in support of a waiver; various immigration applications and petitions; a hardship statement; a pregnancy-related letter and lab report; letters of character reference and support; an employment confirmation letter; income tax returns; and the applicant’s criminal record. The entire record was reviewed and considered in rendering this decision on the appeal.

The first issue before the AAO is whether the applicant may file a “stand-alone” waiver application under section 212(h) of the Act. In support of the contention that he may, counsel refers to *Yeung v. INS*, 76 F.3d 337, 340-41 (11th Cir. 1996), in which the Eleventh Circuit Court of Appeals held that a lawful permanent resident, in removal proceedings before an immigration judge for having been convicted of an aggravated felony, may apply for a 212(h) waiver. As the present applicant is not in removal proceedings and he been convicted of an aggravated felony, his case is significantly distinguishable from *Yeung*. Far more similar is the present applicant’s situation to that decided recently by the Eleventh Circuit Court of Appeals in *Poveda v. Attorney General*, 692 F.3d 1168 (11th Cir. 2012). “Poveda applied for a hardship waiver of removal under section 212(h). An immigration judge determined that Poveda was removable, but granted Poveda’s application for a waiver under section 212(h) by interpreting our decisions in *Lanier* and *Yeung* to mean that an alien is eligible for a hardship waiver regardless of whether the alien has concurrently applied for an adjustment of status. The government appealed that decision to the Board of Immigration Appeals ... which vacated the immigration judge’s decision, based on the decisions of two of our sister circuits, *see Cabral v. Holder*, 632 F.3d 886 (5th Cir.2011);

Klementanovsky v. Gonzales, 501 F.3d 788 (7th Cir.2007), that an alien must ‘submit an application for a 212(h) waiver concurrently with an application for a visa, admission or adjustment of status.’ The Board also concluded that the immigration judge had misread our precedents...” *Poveda* at 1172. The Eleventh Circuit continues that the BIA “now construes section 212(h) to allow only those who seek readmission from outside of our borders or those within our borders who apply for an adjustment of status to obtain a hardship waiver,” and concludes: “That interpretation is more consistent with the plain language of section 212(h) than the earlier interpretation by the Board that we addressed in *Yeung*. The new interpretation by the Board of section 212(h) – that an alien within the United States must apply for an adjustment of his status to receive a hardship waiver – is reasonable.” *Id.* Accordingly, the Eleventh Circuit held that “as an alien within our borders, *Poveda* is ineligible for a hardship waiver unless he applies for an adjustment of his status.” *Id.* at 1173. Consistent with the Board of Immigration Appeals and with the Eleventh Circuit Court of Appeals, the circuit in which the present case lies, the AAO finds that the present applicant is ineligible to apply for a “stand-alone” waiver of inadmissibility under section 212(h) of the Act.

The filing of a Form I-601 waiver application is predicated on the necessity to demonstrate admissibility, which is a requirement for adjustment to permanent resident status. As the present applicant has already adjusted to lawful permanent resident status, he is not seeking admission into the United States, he is not currently in removal proceedings, and he has been found ineligible to apply for a “stand-alone” waiver of inadmissibility under section 212(h) of the Act, no purpose would be served in adjudicating the Form I-601. As there is no waiver of inadmissibility that may be properly examined pursuant to the present Form I-601 application, the application is unnecessary and the appeal will be dismissed.

However, in the interest of addressing novel assertions by counsel concerning the applicant’s criminal conviction which will arise again in the event that the applicant departs and attempts to re-enter the United States, the AAO will address the applicant’s inadmissibility. 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.

(C) CONTROLLED SUBSTANCE TRAFFICKERS- 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 inadmissible.

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

The Attorney General 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

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

- (i) 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 . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record shows that the applicant was convicted on December 18, 2006, in Charlotte County, Florida, for the crime of Sell/Manufacture/Deliver/Possess With Intent to Sell a Controlled Substance (Marijuana), a Felony, in violation of Florida Criminal Statute § 893.13(1)(a)(2), for his conduct on September 28, 2006. The applicant was sentenced to 3 years of probation, 50 hours community service, was assessed monetary fees and costs, had his driver's license suspended indefinitely, and was required to complete a substance abuse/chemical dependence treatment program. Based upon the foregoing, the field office director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime relating to a controlled substance. It is unclear from the decision whether the field office director additionally found that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act for being involved in the illicit trafficking of a controlled substance.

Counsel asserts that while the applicant has been convicted of a crime involving moral turpitude rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he is "NOT inadmissible under INA § 212(a)(2)(A)(i)(II) as a conviction for cultivation is not necessarily a ground of inadmissibility." The AAO finds counsel's assertion unpersuasive.

Florida Criminal Statute, Chapter 893.13 states in pertinent part:

Prohibited acts; penalties.—

(1)(a) Except as authorized by this chapter and chapter 499, it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance. Any person who violates this provision with respect to:

1. A controlled substance named or described in s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4., commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
2. A controlled substance named or described in s. 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The Florida statute under which the applicant was convicted deals solely and exclusively with crimes related to controlled substances. Thus, there is no question that the applicant has been convicted of a crime relating to a controlled substance, rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. A waiver of inadmissibility under section 212(h) of the Act is only available if the offense relates to a single offense of simple possession of 30 grams or less of marijuana. Counsel does not explain how the applicant's conviction could be construed as unrelated to a controlled substance, nor does counsel specifically assert that the applicant is eligible for consideration for a waiver and the record clearly shows that he is not. The arrest report shows that the applicant was arrested in a "grow house" of which he claimed to be the sole owner and resident. Two entire bedrooms, including the master bedroom, had been converted into grow rooms containing lighting equipment, fans, pots, irrigation and elaborate electrical panels to which he had diverted the electricity. The garage contained several large black garbage bags containing "a large amount" of marijuana while other bags contained about one hundred root balls. Based upon the foregoing and based upon the plain language of the statute under which he was

convicted, the applicant's conviction does not relate to a single offense of simple possession of 30 grams or less of marijuana, and no waiver is available.

The AAO notes that while the field office director did not make a specific finding that the applicant is inadmissible under section 212(a)(2)(C)(i), such a finding would be reasonable. In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer "knows or has reason to believe" that the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled, or endeavored to do so. Section 212(a)(2)(C) of the Act; *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer to have sufficient "reason to believe" that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) of the Act, the conclusion must be supported by "reasonable, substantial, and probative evidence." *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)).

In the present matter, the record contains reasonable, substantial, and probative evidence showing that the applicant had converted his living quarters into a grow house operation complete with sophisticated equipment, and that garbage bags filled with large amounts of marijuana and about one hundred root balls were discovered in his possession there. Counsel raises *In Re. Noyol-Montalvo* (BIA 2005), in which the BIA found that the respondent's cultivation of 15 marijuana plants and seedlings in California was "not inconsistent with personal use" and that he was not inadmissible under section 212(a)(2)(C)(i) of the Act for being involved in the illicit trafficking of a controlled substance. The AAO notes that the "reason to believe" standard is fact-driven and is determined on a case-by-case basis. In the present case, the specific law under which the applicant was convicted contains no provision for "cultivation for personal use" or "mere possession" (only possession with the intent to sell). Rather, it deals entirely with selling, manufacturing or delivering a controlled substance. And as stated above, the facts of the applicant's case include that his residence had been converted into a grow house where both the master bedroom and another room contained sophisticated lighting equipment, fans, pots, irrigation and elaborate electrical panels to which the electricity had been diverted. The garage contained several large black garbage bags containing large amounts of marijuana and about one hundred root balls. While cultivating 15 marijuana plants may not have been inconsistent with personal use in the *Noyol-Montalvo* case, the record in the present case contains reasonable, substantial, and probative evidence that the applicant was engaged in, and was in fact convicted for, manufacturing and/or possessing with intent to sell a controlled substance - here a significant amount of marijuana. Accordingly, there is sufficient reason to believe that the applicant has been involved in the illicit trafficking in a controlled substance, rendering him inadmissible under section 212(a)(2)(C)(i) of the Act. Specifically, there is reasonable, substantial, and probative evidence to support the belief that he has been an illicit trafficker in a controlled substance. See *Alarcon-Serrano v. I.N.S.* at 1119. The AAO notes that even if the applicant had not engaged in trafficking of a controlled substance rendering him inadmissible under section 212(a)(2)(C)(i), the record is clear that he was convicted for a crime related to a controlled substance rendering him inadmissible under section 212(a)(2)(A)(i)(II), and that the applicant does not qualify for consideration for a waiver under section 212(h) of the Act as his conviction does not relate to a single offense of simple possession of 30 grams or less of marijuana.

Because the applicant is statutorily ineligible for relief under both provisions described, no purpose would be served in discussing whether he has demonstrated rehabilitation, whether he has established extreme hardship to a qualifying relative, or whether he merits a waiver as a matter of discretion.

As the applicant is statutorily ineligible for relief on account of his inadmissibility under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C)(i) of the Act, and as he has been found ineligible to apply for a "stand-alone" waiver of inadmissibility under section 212(h) of the Act, the application is unnecessary and the appeal will be dismissed.

ORDER: The appeal is dismissed.