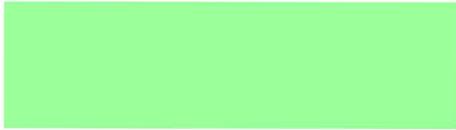




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: OFFICE: OAKLAND PARK  
SEP 11 2013

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Acting Field Office Director, Oakland Park, Florida and was subsequently appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on motion. The motion will be granted and the prior AAO decision will be affirmed.

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 and child.

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.

The AAO, reviewing the applicant's Form I-601 on appeal, concurred with the Acting Field Office Director that the applicant is not eligible for a waiver under section 212(a)(2)(A)(i)(II) of the Act. The AAO also clarified that the applicant is ineligible for a waiver because he also is inadmissible under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), based on his convictions involving trafficking in controlled substances; no waiver is available for this inadmissibility under the Act. *Decision of the AAO*, dated June 21, 2013. Consequently, the appeal was dismissed. *Id.*

On motion the applicant presents additional evidence in the form of financial documentation and a copy of the birth certificate of his son, to assert hardship to his qualifying relatives. According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be proved and be supported by affidavits or other documentary evidence. As the applicant has submitted new documentary evidence to support his claim for a waiver under section 212(h) of the Act, the motion to reopen will be granted.

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 –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such crime, or

(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 for grand theft in the third degree on May 21, 2010 in Broward County, Florida, and as a result is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for committing a crime involving moral turpitude.

The record further 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

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

Any alien who the consular officer or the Attorney General [Secretary of Homeland Security, "Secretary"] 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.

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 [Secretary] 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 [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, because his crime involving controlled substances is not limited to a single offense of simple possession of 30 grams or less of marijuana. As the applicant was convicted of two separate counts involving the trafficking of cocaine, 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.

Under section 212(h) of the Act, the applicant is eligible to apply for a waiver of inadmissibility based on his conviction for a crime involving moral turpitude. However, because the applicant also is inadmissible under section 212(a)(2)(C)(i) of the Act, for which no waiver is available, no purpose would be served in determining whether the applicant has established extreme hardship to his qualifying relatives under section 212(h) of the Act.

The applicant asserts that the prior decision of the AAO is contrary to law and violates his constitutional rights to procedural and substantive due process and his equal protection rights, as secured by the U.S. Constitution. Constitutional issues are not within the appellate jurisdiction of the AAO; therefore this assertion will not be addressed in the present decision.

The applicant further asserts that his May 21, 2010 convictions of attempted trafficking in cocaine and attempted conspiracy to traffic cocaine do not constitute aggravated felonies. As the AAO noted in its decision dismissing the applicant's appeal, the applicant has not been found inadmissible for committing an aggravated felony offense and no language concerning aggravated felonies appears in either section 212(a)(2)(A)(i)(II) or section 212(a)(2)(C)(i) of the Act. Therefore, as the AAO concluded in its previous decision, the applicant's arguments concerning whether his crimes constitute aggravated felonies are not material within the context of this decision.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The motion to reopen is granted and the prior AAO decision is affirmed.