



U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED] RELATES)

Office: NEWARK, NJ Date: JUN 26 2007

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h)

ON BEHALF OF APPLICANT: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Newark, New Jersey, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(I), 212(a)(2)(B), 212(a)(9)(A), 212(a)(9)(B)(i) and 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1182(a)(2)(B), 1182(a)(9)(A), 1182(a)(9)(B)(i) and 1182(a)(9)(C) for having been convicted of a crime involving moral turpitude, convicted of two or more offenses for which the aggregate sentences of confinement were 5 years or more, ordered removed from the United States and seeking admission within ten years, unlawfully present in the United States for more than one year and seeking readmission within 10 years of his last departure from the United States and unlawfully reentering the United States after having been previously removed. The applicant is the father of two adult U.S. citizen children and seeks a waiver of inadmissibility in order to reside in the United States.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative under section 212(h) of the Act and found that he was statutorily ineligible for a waiver pursuant to section 212(a)(9)(B)(v) of the Act. The district director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated April 2, 2005.

The record reflects that, on March 27, 1956, the applicant was admitted to the United States as a lawful permanent resident. On June 25, 1965, the applicant was convicted of possession of a narcotic drug in violation of section 1751a of the New York Penal Code (NYPC) and was sentenced to 6 months in jail, which was suspended in favor of probation. On October 21, 1965, the applicant was placed into immigration proceedings. On November 24, 1965, the immigration judge found the applicant to be removable and ordered him removed. The applicant was thereafter paroled into the United States under supervision. On January 27, 1969, the applicant left the United States and traveled to Canada. On January 28, 1969, the applicant applied for admission at the Champlain, New York Port of Entry. The applicant was found to be inadmissible and was placed into immigration proceedings. The applicant was paroled for the purpose of immigration proceedings. On January 2, 1970, the immigration judge ordered the applicant removed. The applicant was thereafter paroled into the United States under supervision. The applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on being a native of Cuba who was paroled into the United States after January 1, 1959, and thereafter having been physically present in the United States for at least one year. The district director denied the Form I-485 because the applicant had been convicted of possession of marijuana and was ineligible for adjustment of status. On July 23, 1980, the AAO (formerly Regional Commissioner) affirmed the district director's decision and denied the Form I-485. On November 18, 1980, the applicant was convicted of bribery of a public official in violation of section 200.00 of the NYPC. The applicant was sentenced to one year in jail. On October 24, 1989, the applicant pled guilty to attempted assault in the third degree and was sentenced to a \$100 fine or ten days in jail. On December 4, 1998, the applicant filed a second Form I-485, based on being a native of Cuba who was paroled into the United States after January 1, 1959, and thereafter having been physically present in the United States for at least one year. On November 22, 2000, the applicant was issued advance parole. The applicant left and returned to the United States utilizing the advance parole on January 26, 2001, and on May 20, 2001. On October 28, 2002, the applicant filed the Form I-601.

On appeal, the applicant asserts that he should be granted a waiver based on his age, and his continuous employment and payment of taxes in the United States. *Form I-290B*, filed April 13, 2005. In support of these assertions, the applicant submitted only the referenced Form I-290B and copies of documentation previously provided. The entire record was reviewed and considered in rendering a decision in this case.

Section 212(a)(2)(A)(i) 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 —

(I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime, or

(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

. . . .

(B) Multiple criminal convictions-

Any alien convicted of two or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more 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)(I), (B), (D), and (E) or 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 . . .

Section 212(a)(9)(A) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving Aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.- Any alien not described in clause (i) who-
  - (I) has been ordered removed under section 240 or any other provision of law, or
  - (II) departed the United States while an order of removal was outstanding,and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

- (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or
- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

(C) Aliens unlawfully present after previous immigration violations-

(i) In general-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of

section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
  - (A) removal;
  - (B) departure from the United States;
  - (C) reentry or reentries into the United States; or
  - (D) attempted reentry into the United States.

The AAO notes that the district director found that the record failed to contain disposition records for the applicant's November 1964 arrest for possession of marijuana, January 1976 arrest for possession of gambling records, January 1979 arrest for bribery, and January 1980 arrest for bribery of a public servant. However, the AAO found disposition records indicating that, except for the convictions listed above, all other charges were dismissed or not prosecuted.

On appeal, the applicant does not contest any of the district director's findings of inadmissibility.

The district director based the finding of inadmissibility under section 212(a)(2)(B) of the Act on the applicant's convictions for bribery of a public official and attempted assault in the third degree. A finding of inadmissibility pursuant to section 212(a)(2)(B) of the Act requires that an applicant's convictions resulted in an aggregate sentence of confinement of 5 years or more. The applicant was sentenced to one year in jail for the bribery conviction and ten days in jail for the assault conviction. As such, the AAO finds that the district director's basis for a finding of inadmissibility pursuant to section 212(a)(2)(B) of the Act is erroneous as the two convictions to which she refers do not result in an aggregate sentence of 5 years or more confinement. In considering the conviction the district director failed to consider in her decision, possession of marijuana, the AAO also finds that it does not result in inadmissibility pursuant to section 212(a)(2)(B) of the Act because the applicant's sentence was suspended in favor of probation and does not render the aggregate confinement to which the applicant was sentenced to more than five years.

The district director based the finding of inadmissibility under section 212(a)(9)(C) of the Act on the record reflecting the applicant's 1965 order of removal and her finding that the applicant reentered the United States without inspection after his removal. The AAO notes that the record does not establish that the applicant has ever entered the United States without inspection. The record reflects that the applicant attempted to unlawfully enter the United States and was then paroled into the United States for supervision after both his 1969 execution of the 1965 order of removal and the 1970 order of removal. The record reflects that the applicant has, since 1969, not attempted to enter the United States unlawfully, but as an applicant for adjustment of status (utilizing advance parole). In order to be found inadmissible pursuant to section

212(a)(9)(C) of the Act, an applicant, while he may have been ordered removed prior to April 1, 1997, must have unlawfully reentered or attempted unlawful reentry after April 1, 1997, the date of enactment of the provision. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs dated June 17, 1997.* The AAO finds that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because none of his unlawful entries or attempted unlawful entries into the United States occurred after April 1, 1997.

The district director based the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on the applicant's conviction for bribery of a public official, a crime involving moral turpitude. The AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on his conviction for bribery of a public official, a crime involving moral turpitude.

The district director based the finding of inadmissibility under section 212(a)(9)(A)(ii) of the Act on the record reflecting the applicant's 1965 order of removal. The AAO also finds that the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act based on the record reflecting his 1965 and 1970 orders of removal.

The district director based the finding of inadmissibility under section 212(a)(9)(B)(i) of the Act on the applicant's accrual of unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions of section 212(a)(9)(B)(i) of the Act, until December 28, 1998, the date on which he filed his second Form I-485. The district director found that the applicant triggered the provisions of section 212(a)(9)(B)(i) of the Act when he left and attempted to return to the United States utilizing an advance parole on May 26, 2000. The AAO notes that, on February 16, 2000, the applicant was sent to deferred inspection after he attempted to reenter the United States utilizing the advance parole and was eventually paroled into the United States on May 26, 2000.

Section 212(a)(9)(B)(ii) defines the term "unlawfully present" for purposes of section 212(a)(9)(B)(i) of the Act as an alien who is present after the expiration period of stay authorized by the Attorney General or present in the United States without being admitted or paroled. The record reflects that, after the applicant was ordered removed on January 2, 1970, he was paroled under supervision. The applicant remained in the United States until he traveled utilizing an advance parole in 2000. For purposes of section 212(a)(9)(B)(i) of the Act, aliens under an order of supervision are not present in the United States pursuant to a period of stay authorized by the attorney general. *See Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs dated June 17, 1997.* The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.*

As such, the applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until December 28, 1998, the date on which he filed the Form I-485. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. Pursuant to section 212(a)(9)(B)(i)(II), the applicant is barred from again seeking admission within ten years of his departure. The AAO also notes that the applicant has been issued advance parole and left and reentered the United States

utilizing an advance parole on a number of occasions since February 2000. The record reflects that the applicant last entered the United States utilizing advance parole on February 21, 2007.

The AAO finds that the applicant is statutorily ineligible for a waiver of his inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act under section 212(a)(9)(B)(v) of the Act. Hardship to the alien himself is not a permissible consideration under section 212(a)(9)(B)(v) of the Act. A section 212(a)(9)(B)(v) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant. It is noted that Congress specifically did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship.

As the record indicates that the applicant does not have a U.S. citizen or lawful permanent resident spouse or parents, the AAO finds that the applicant has no qualifying family members that could suffer extreme hardship. The AAO therefore finds that the applicant has failed to establish extreme hardship to a qualifying family member as required under section 212(a)(9)(B)(v) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver pursuant to section 212(h) for his inadmissibility pursuant to section 212(a)(2)(A)(i)(I) of the Act or as a matter of discretion.

The AAO notes that the applicant may also be inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), based on his conviction for possession of a narcotic drug, marijuana. The record reflects the applicant may have been in possession of 2 ounces of marijuana, or 56.70 grams of marijuana.

In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.