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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [Redacted]

Office: BUFFALO, NEW YORK

Date: **MAR 12 2001**

IN RE: Applicant: [Redacted]

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

IN BEHALF OF APPLICANT:
[Redacted]

Public Copy

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Buffalo, New York, and a subsequent appeal was affirmed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the Associate Commissioner's decision dismissing the appeal will be affirmed. The application will be denied.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States under §§ 212(a)(2)(A)(i)(II) and 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(II) and 1182(a)(6)(C)(i), for having been convicted of a violation of a law relating to a controlled substance in 1982 and for having procured admission into the United States by fraud or misrepresentation in 1998. The applicant married a United States citizen in England in September 1997 and is the beneficiary of an approved immediate relative visa petition. She seeks the above waiver of grounds of inadmissibility in order to remain in the United States and reside with her spouse.

The record reflects that the applicant was convicted in Hong Kong on March 18, 1982 of the following offenses:

- (a) possession of dangerous drugs, namely, 1,122.10 grams of cannabis for the purpose of unlawful trafficking;
- (b) two charges of simple possession of dangerous drugs, namely, (i) 19.9 grams of resinous substances containing 0.3 grams of tetrahydrocannabinol and (ii) 4 cigarettes containing 1.3 grams of cannabis; and
- (c) two charges of possession of Part I poisons, namely, (i) 5 Mogodon pills and (ii) 11 Valium pills.

As a result of the above convictions, the applicant received concurrent sentences of two years imprisonment for offense (a), four months imprisonment for offense (b) and two months imprisonment for offense (c). Documents from the Hong Kong Royal Police dated March 1, 1993 contained in the record reflect that on September 3, 1982, the applicant's sentences regarding offenses (a), (b) and (c) were set aside. With regard to offense (a), the record reflects that the applicant's conviction for possession of dangerous drugs for the purpose of unlawful trafficking was substituted with a conviction for possession of dangerous drugs and that a fine of \$2,500.00 was imposed.

When seeking admission into the United States under the Visa Waiver Waiver Program (VWPP) in 1998, the applicant signed a questionnaire

stating that she had never been arrested or convicted of an offense or any crime involving a controlled substance. The applicant's failure to disclose the true facts cut off a line of inquiry relevant to her eligibility for admission. Therefore, she was also found ineligible by a consular officer to be ineligible for admission into the United States under § 212(a)(6)(C)(i) of the Act, for having procured admission into the United States by fraud or willful misrepresentation.

In the denial of the applicant's initial waiver request, the district director found that the applicant's conviction for offense (b), as noted above, involved simple possession of less than 30 grams of marijuana. The district director also found that the applicant's conviction for offense (c), as noted above, raised her record above the threshold of a single offense of simple possession of 30 grams or less of marijuana. The district director then concluded that the applicant was therefore not eligible for a waiver of inadmissibility under § 212(h) and denied the application. In his denial of the application, the district director did not discuss the applicant's conviction for offense (a), as noted above.

On appeal of the district director's denial of the applicant's waiver request, counsel stated that the applicant's conviction for offense (c) could not legally be combined with her conviction for offense (b) to put the applicant over the threshold of a single offense of simple possession of 30 grams or less of marijuana. Counsel stated that this was a legal error which rendered the decision incorrect.

In dismissing the applicant's appeal of the district director's decision, the Associate Commissioner found that the applicant's conviction for offense (b) involved more than a single offense of simple possession of 30 grams or less of marijuana. The Associate Commissioner's decision was based on a utilization of the Drug Equivalency Table to ascertain that 0.3 grams of tetrahydrocannabinol (THC) equaled 50.1 grams of marijuana. In addition to finding the applicant statutorily ineligible for a waiver of inadmissibility under § 212(h), the Associate Commissioner concluded that the applicant's eligibility for a waiver of inadmissibility under § 212(i) must be dismissed because the applicant is not otherwise admissible. The Associate Commissioner then affirmed the decision of the district director to deny the application.

On motion, counsel argues that the decision of the Associate Commissioner to dismiss the appeal was incorrect. Citing Matter of Lennon, 15 I & N Dec. 9, 25-26 (BIA 1974), rev'd for lack of proof of mens rea, Lennon v. INS, 527 F.2d 187 (2d Cir. 1975), counsel argues that the Service cannot create a distinction between cannabis resin (THC) and marijuana under the Act. Citing Matter of K-V-D, Int. Dec. 3422 (BIA 1999), counsel also argues that it is

wrong as a matter of law to appropriate criminal sentencing enhancement provisions in deciding definitions under the Act. And, citing Matter of Roberts, 20 I&N Dec. 294 (BIA 1991), and Elramy v. INS, 73 F 3d 220, 223 (9th Cir. 1985), counsel asserts that it is impermissible to characterize possession of less than 30 grams of marijuana as a very serious drug crime.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) 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 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 § 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(h) WAIVER OF SUBSECTION (a)(2)(A)(i)(I), (II), (B), (D), AND (E).-The Attorney General may, in his discretion, waive application of subparagraph (A)(i)(II) 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 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 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, 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 for adjustment of status.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

To recapitulate, the applicant was initially convicted in March 1982 of possession of a dangerous drug, namely, 1,221.10 grams of cannabis for the purpose of unlawful trafficking. In September 1982, the part of the applicant's conviction "for the purpose of unlawful trafficking" was quashed and the conviction was substituted with a conviction of simple possession of a dangerous drug. The evidence in the record indicates that the amount (1,122.10 grams) and type (cannabis) of the dangerous drug for which the applicant was convicted of possession remained the same. It is also noted that the record contains a document from the Hong Kong Court of Appeal dated September 3, 1982 which states that "[t]he applicants admitted in court below that they were in possession of all the exhibits found by the officers in their

flat..." Furthermore, the applicant pleaded guilty and was convicted of possession of valium and mogodon. The applicant is therefore statutorily ineligible for admission into the United States under 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a violation of a law relating to a controlled substance. Because her conviction involves other than a single offense of simple possession of 30 grams or less of marijuana, she is statutorily ineligible for a waiver under § 212(h) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under § 212(h), the burden of proving eligibility remains entirely with the applicant. Here, the applicant has not met that burden. Since the applicant is statutorily ineligible for the granting of a waiver under § 212(h) of the Act, the appeal regarding the waiver under § 212(i) of the Act must also be dismissed as the applicant is not otherwise admissible. Accordingly, the Associate Commissioner's order dismissing the appeal will be affirmed and the application will be denied.

ORDER: The Associate Commissioner's order of April 19, 2000 dismissing the appeal is affirmed. The application is denied.