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FILE: [REDACTED] Office: ATHENS, GREECE Date: **JUL 13 2007**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Athens, Greece and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the applicant is not inadmissible, thus the relevant waiver application is moot.

The applicant is a native and citizen of Libya who was found to be inadmissible to the United States under 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 violating any law relating to a controlled substance and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation. The application has a U.S. citizen spouse and a U.S. citizen daughter. He seeks a waiver of inadmissibility so that he may reside in the United States with his wife and daughter.

The Officer in Charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge*, dated February 7, 2006.

On appeal, counsel contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) nor under section 212(a)(6)(C)(i) of the Act. In the alternative, counsel asserts that should inadmissibility be found, the applicant has established extreme hardship to his qualifying relatives. Counsel also states that the adjudicator failed to consider that it has been 15 years since the applicant's criminal conviction. *Form I-290B and attorney's brief*, dated March 10, 2006.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to numerous letters of support from family and friends; country conditions information on Libya; school report cards for the applicant's daughter; letters from the applicant's daughter's teachers; letters from the applicant's spouse; medical prescriptions for the applicant's spouse's brother; mental health letters for the applicant's spouse's brother; medical records for the applicant's spouse's mother; a printout of FBI records; *Court record, Superior Court, Los Angeles County*, dated June 5, 2003; *Petition, Superior Court of Los Angeles County*, dated June 2, 2003; *LAecourtOnline, Traffic Citation*; a December 10, 2004 statement from the applicant; tax statements for the applicant's spouse; letters from the applicant's daughter; employment letters for the applicant's spouse and a bank statement for the applicant's spouse. The entire record was 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 (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.

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 subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(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)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], 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 [Secretary] 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.

The record reflects that the applicant married his spouse in 1984 and received his lawful permanent resident status in 1985. *See marriage certificate*, dated September 7, 1984; *Form I-181, Approval of Permanent Residence*, dated November 20, 1985. On September 11, 1989, they had a daughter born in the United States. *See birth certificate*. On May 9, 1996, the couple divorced. *See divorce certificate*. In March 2000, the applicant returned to Libya and has remained there to the present time. *Form DS-230*. By remaining outside

the United States for more than one year, he has abandoned his permanent resident status. 8 C.F.R. § 211.1(a)(2). Counsel states that although divorced, the couple began to reconcile and in 2001 decided to remarry. *Attorney's brief*. On July 24, 2002, the applicant's ex-wife filed a Form I-129F, Petition for Alien Fiancé(e), on his behalf, which was subsequently approved on February 6, 2003. *Form I-129F*. On July 9, 2003, the Consular Section of the U.S. Embassy in Cairo, Egypt requested revocation of the Form I-129F, questioning the validity of the marriage. *Memorandum, Consular Section, American Embassy, Cairo*. The AAO notes that the record does not reflect a ruling made on this request for revocation. On October 29, 2004, the applicant remarried his former spouse. *Marriage certificate*. The applicant's spouse filed a Form I-130, Petition for Alien Relative, on behalf of the applicant, which was approved on November 2, 2004. *Form I-130*. The AAO acknowledges counsel's assertions that the marriage between the couple is valid. The validity of the applicant's marriage is not an issue in this appeal, as the Form I-130 was approved and the case is on appeal solely to address inadmissibility and waiver issues.

On December 5, 1990, the applicant pled guilty and was convicted under section 11357(B) of the California Health & Safety Code of Possession of Marijuana, under 1 oz. *Court record, Superior Court Los Angeles County*, dated June 5, 2003. He was sentenced to pay a fine of \$235. *Id.* On June 2, 2003, the applicant's conviction was expunged. *Petition, Superior Court of Los Angeles County*, dated June 2, 2003. On April 2, 1994, the applicant was arrested for battery. *FBI printout record*, dated November 8, 2004. This charge was subsequently dismissed. *Id.* On August 18, 1999, the applicant was arrested for grand theft, embezzlement and failure to appear. *Id.* The charges for grand theft and embezzlement were dismissed. *Id.* According to a statement made by the applicant, the failure to appear charge was for unpaid parking tickets that had been converted into a warrant. *Statement of the applicant*, dated December 10, 2004; *see also LAecourtOnline, Traffic Citation*.

Prior to addressing whether the applicant qualifies for a waiver, the AAO will consider the issues related to the applicant's inadmissibility. The Office in Charge found that during his Form I-129F interview in Cairo, the applicant, under oath to a U.S. consular officer, misrepresented several times his arrest record while in the United States. *Decision of the Officer in Charge*, dated February 7, 2006. According to the Officer in Charge, the applicant admitted to only a single arrest leading to his conviction for possession of marijuana and failed to mention his other arrests, which were revealed by an FBI fingerprint record check. *Id.* Based on this failure to mention his additional arrests, the Office in Charge found the applicant inadmissible to the United States under section 212(a)(6)(C)(i) of the Act for misrepresentation. *Id.* The AAO observes that on July 9, 2003, the Consular Section of the U.S. Embassy in Cairo requested that the applicant's Form I-129F be revoked. *Memorandum, Consular Section, American Embassy, Cairo*. In this memorandum, the consular section indicates that, at the time of his Form I-129F interview, the applicant mentioned his marijuana conviction but failed to reveal any other arrests. *Id.* On appeal, counsel asserts that the applicant verbally described the arrests of 1994 and 1999 to the consular officer. *Attorney's brief*. The AAO notes that on November 2, 2004, the applicant filed the Form DS-230, Application for Immigrant Visa and Alien Registration, with a consular officer in Nicosia, Cyprus. On the Form DS-230, the applicant checked "yes" when asked if he had ever been charged, arrested or convicted of any offense or crime. *Form DS-230*. In an attached statement, the applicant notes his 1990 conviction for possession of marijuana but does not report any other arrests. The issue, therefore, becomes whether the applicant's failure to address his additional arrests on the statement attached to the Form DS-230 constitutes a willful misrepresentation of a material fact that would render him inadmissible under section 212(a)(6)(C)(i) of the Act.

The AAO concludes that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act. In that the applicant was forthcoming about his conviction for possession of marijuana, the AAO does not find that he engaged in willful misrepresentation by failing to mention the other charges brought against him, which had been dismissed. The record also contains a statement made by the applicant on December 10, 2004 that describes the 1994 and 1999 arrests. *Statement of the Applicant*, dated December 10, 2004. This statement supports a finding that the applicant was not willfully failing to disclose his criminal history. Additionally, the misrepresentation committed by the applicant must be material. According to the Department of State's Foreign Affairs Manual, a misrepresentation is material if either: (1) The alien is excludable on the true facts; or (2) The misrepresentation tends to shut off a line of inquiry that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. The additional arrests did not result in convictions and the applicant never made any admissions as to the elements of the crimes. Had the applicant mentioned these arrests, they would not have resulted in his inadmissibility or exclusion. Therefore, these arrests are not material and the applicant's omission is not a material misrepresentation. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. See *Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

As the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, the AAO turns to whether the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Counsel asserts that the applicant is not inadmissible, as his conviction was expunged and the 9th Circuit found in *Lujan-Aremendariz v. INS*, 22 F.3d 728 (9th Cir. 2000) that a state expungement for simple possession of a controlled substance has removed issues of inadmissibility for the applicant. *Attorney's brief*. The AAO concurs.

In *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995), the Board of Immigration Appeals (BIA) held that the Federal First Offender Act extended to aliens where 1) the alien is a first offender, 2) the alien has pled to or been found guilty of the offense of simple possession of a controlled substance, 3) the alien has not previously been accorded first offender treatment under any law, and 4) the court has entered an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation. This allowed an alien who had been accorded rehabilitative treatment under a state statute to avoid deportation if he established that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a)(1988). *Id.* Thus a conviction for simple possession of a controlled substance that had been expunged would no longer be a conviction for immigration purposes. However, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the BIA determined that treatment under state rehabilitative statutes or state "first offender" equivalents would still be considered a conviction for immigration purposes. In *Lujan-Aremendariz v. INS*, the Ninth Circuit reversed *Roldan* and found that state equivalents to the Federal First Offender Act with regard to first-time simple drug possession charges if expunged may not be used as convictions under the Act. Although *Matter of Roldan* continues to be the prevailing law in every circuit court except for the Ninth Circuit, the expungement of the applicant's for possession of marijuana occurred in California, within the jurisdiction of the Ninth Circuit. Accordingly, his offense is not a conviction for immigration purposes and he is not, therefore, inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Based on the record, the AAO finds that the applicant did not willfully misrepresent a material fact or commit fraud and is not inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO also finds that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating any law relating to a controlled substance. The waiver application is therefore moot.

In proceedings for an application for a waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant is not required to file the waiver request. Accordingly, the appeal will be dismissed as moot.

ORDER: The appeal is dismissed.