

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



L2

FILE:



Office: PHOENIX, ARIZONA

Date: SEP 28 2007

IN RE:



APPLICATION: Application to Adjust Status under Section 245 of the Immigration and Nationality Act

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting District Director, Phoenix, Arizona denied the application for adjustment of status (Form I-485) and certified his decision to the Administrative Appeals Office (AAO). The acting district director's decision will be withdrawn. The application will be approved.

The applicant is a native and citizen of Mexico, born on July 1, 1973, who submitted a Form I-485 Application to Adjust Status on April 24, 2001 pursuant to section § 245 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255. He is the beneficiary of an approved Form I-130, Petition for Alien Relative, filed by his U.S. citizen wife.

The acting district director found that the applicant was inadmissible under section 212(a)(2)(A)(i) of the Act for admitting to committing acts which constitute the essential elements of violations of laws of the State of Arizona and the United States relating to a controlled substance. Specifically, in an interview on January 26, 2004 in connection with the present application, the applicant stated that he used marijuana "on and off" from the age of 18 until approximately one month prior to the interview, a period of approximately 12 years. The acting district director found that the applicant did not qualify for the exceptions found in section 212(a)(2)(A)(ii) or 212(h) of the Act, as he admitted to committing more than one offense of possession and use of marijuana. The application was denied accordingly. *Decision of the District Director*, dated December 27, 2004.

On February 2, 2005, the applicant filed a motion to reopen and reconsider the application. Counsel for the applicant asserted that the applicant was not convicted of a crime in Mexico or the United States. *Motion to Reopen and Reconsider*, filed February 2, 2005. Counsel further asserted that the applicant was not informed of the definition and essential elements of the crime or crimes he allegedly committed prior to his admissions, and thus his admissions may not serve as a basis for inadmissibility. *Id.* at 4-5. Counsel stated that the applicant's admissions were given under duress, as he faced the threat of the denial of his application. *Id.* at 5.

The acting district director granted the motion to reopen and reconsider, yet he again denied the application based on the reasons provided in the decision of December 27, 2004. The acting district director found that the applicant was afforded the required procedural safeguards relating to an admission of the essential elements of a crime. *Decision of the Acting District Director*, dated February 3, 2006. The acting district director stated that, during the applicant's interview, "it was established that [he] knew it was unlawful under both Federal and State law to possess/use marijuana, and that [he] did knowingly possess/use marijuana." *Id.* at 3-4. The acting district director stated that Citizenship and Immigration Services (CIS) met its burden to provide a definition of the crimes the applicant allegedly committed. *Id.* at 4. Thus, the acting district director found that the applicant did not overcome the finding that he is inadmissible under section 212(a)(2)(A)(i) of the Act. The acting district director further weighed the positive and negative factors in the applicant's case, and found that the applicant failed to establish that he warrants a favorable exercise of discretion. *Id.* at 5-6. The acting district director certified the decision to the AAO.

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 –
 - (I) a crime involving moral turpitude (other than a purely political offense) 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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
 - (I) the crime was committed when the alien was under 18 years of age and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

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

Section 212(h)(1)(B) of the Act provides, in pertinent part, that:

[I]n 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 [now the Secretary of Homeland Security (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

In order for the admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission, and; 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957).

Upon review, the record does not reflect that the applicant was provided with the essential elements of the criminal law or laws which he allegedly admitted to violating. *Id.* The AAO has reviewed all evidence in the record, including notes in connection with the applicant's adjustment of status interview. The only reference in the record to a criminal code or statute with respect to the applicant's admitted drug-related conduct consists of the acting district director's quoting of Arizona Revised Statutes Title 13 Section 3405, which proscribes knowingly possessing and using marijuana. *Decision of the Acting District Director* at 3. As this reference was made in the context of denying the applicant's Form I-485 application, it does not reflect that the applicant was informed of the essential elements of Arizona Revised Statutes Title 13 Section 3405 prior to his admissions. The fact that the applicant indicated that he knew that using marijuana was illegal does not alleviate CIS's duty to inform him of the essential elements of the crime or crimes to which he is allegedly admitting. *Matter of K-* at 596-98.

The acting district director stated that the relevant precedent case law does not describe the level of detail with which CIS must define the elements of a crime before an applicant admits to such elements. *Decision of the Acting District Director* at 3 (citing *Matter of K-*, 7 I&N Dec. 594, 598 (BIA 1957) and *Matter of J-*, 2 I&N Dec. 287, 288 (BIA 1945)). The acting district director provided that "the essential elements of the crime of possession/use of illegal drugs in Arizona are simple and understandable," including "knowledge, possession, and the involvement of an illegal drug." *Id.* Though the elements of Arizona Revised Statutes Title 13 Section 3405 are few and easily understood, CIS still must directly inform an applicant of such elements before an admission may meet the standards defined by the Board of Immigration Appeals (BIA) in *Matter of K-*. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). The record does not show that the applicant was provided the essential elements of any criminal law prior to his admission to marijuana use.

The acting district director identified procedural differences between the present matter involving an application for adjustment of status and matters involving individuals in deportation, removal, or exclusion proceedings such as those before the BIA in *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957) and *Matter of J-*, 2 I&N Dec. 287, 288 (BIA 1945). *Decision of the Acting District Director* at 4. The acting district director stated that, in deportation, removal, or exclusion proceedings, an individual's criminal history is typically already part of the record, thus it is not difficult to inform such individual of the elements of crimes he may have committed before obtaining an admission. *Id.* The acting district director noted that, "in an adjustment of status case where prima facie eligibility is being established, it is not possible, nor does it appear that case law makes such a requirement, for the interviewing officer to give an applicant the definitions of every possible crime that may have a bearing on the applicant's character prior to questioning the applicant about his or her criminal history, conduct, or background." *Id.*

The AAO recognizes the burden on an interviewing officer due to the requirement to cite the elements of specific criminal law in an adjustment interview, particularly given the great range of topics or criminal conduct that may arise in the course of the discussion. However, finding an applicant inadmissible based on criminal conduct in the absence of a conviction in a court of law is a very serious matter. Where an applicant has not been afforded a criminal trial with respect to his conduct, or where he may not have the opportunity to be represented by counsel experienced in criminal matters, the decision of the BIA in *Matter of K-* sets a minimum requirement that such applicant is informed of the elements of the criminal law or laws which he has allegedly transgressed prior to taking an admission and using that admission as a basis for inadmissibility. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). The AAO finds no indication in the relevant case law that a different standard should be applied in adjustment of status proceedings than in deportation, removal, or exclusion proceedings. As the record does not reflect that any essential elements of a crime were discussed with the applicant prior to his admission of using marijuana, the record does not establish that his admission may be used as a basis for inadmissibility.

Counsel for the applicant asserted that the applicant's admission was not voluntary, as he made statements regarding his use of marijuana while facing the possibility that his application for adjustment of status might be denied. However, any application presents the potential for denial should the applicant not meet his burden to establish eligibility for the benefit sought. An interview is regularly scheduled in connection with an application for adjustment of status, and such applicants are placed under oath and asked questions relating to their eligibility. These circumstances are an ordinary and reasonable part of the application process, and the fear of possible denial does not render an applicant's statements involuntary. The record contains no indication that the interviewing officer engaged in conduct that caused the applicant undue pressure. The assertion that the applicant's admission was not voluntary is not persuasive.

Based on the foregoing, the AAO finds that the applicant's statements in his adjustment interview regarding his prior use of marijuana do not constitute the admission of committing acts which constitute the essential elements of a crime relating to a controlled substance, as contemplated by section 212(a)(2)(i)(II) of the Act, due to the fact that the criteria for admissions provided by the BIA in *Matter of K-* were not met. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). The record contains no further evidence that the applicant is inadmissible under section 212(a)(2)(i)(II) of the Act, or any other provision of the Act. Accordingly, inadmissibility is not a basis for denial of the present Form I-485 application.

The acting district director further denied the application on discretionary grounds, finding that negative factors outweigh those in the applicant's favor. The acting district director cited negative factors, including: a history of violating immigration laws and laws of the United States; illegal entry to the United States; a lengthy unlawful stay in the United States; several arrests on allegations of criminal conduct; an attempt to obtain employment without authorization using the identification card of another individual; the use of marijuana, particularly before and after the birth of his daughter; failing to reveal all arrests and drug use on Form I-485, and; failing to show remorse for wrong-doing.

The acting district director cited positive factors that weigh in the applicant's favor, including: having a U.S. citizen spouse; having two U.S. citizen children, and; being the beneficiary of an approved Form I-130, Petition for Alien Relative.

Upon review of negative factors in the present case, the AAO finds that the applicant's illegal entry to and unlawful stay in the United States weighs against him. Though not a basis for inadmissibility, the applicant's use of marijuana when he believed it to be illegal exhibits a lack of respect for the laws of the United States. The applicant's failure to reveal his prior arrests on Form I-485 further reflects negatively on the applicant's truthfulness with government authorities. However, contrary to the acting district director's finding, the applicant's arrests do not impeach his character, as the record does not show that any of the arrests led to a conviction, fine, or other determination of wrongdoing. There is no evidence that the applicant engaged in the alleged conduct that was the basis for the arrests.

The acting district director indicated that the applicant failed to show remorse for his violations of law. Subsequent to the acting district director's denial, the applicant submitted a statement expressing his regret for transgressing U.S. law. *Statement from the Applicant*, dated February 25, 2006. This statement appears to have been provided in reaction to the acting district director's decision of February 3, 2006. The AAO accepts that the applicant feels remorse for his legal violations. Yet, the fact that he provided his statement after the acting district director commented on his lack of remorse reduces its evidentiary weight. The AAO finds the matter of the applicant's remorse is thus neither positive nor negative.

As positive factors, the AAO observes that: the applicant has a U.S. citizen wife and two U.S. citizen children; the applicant has a steady history of employment and paying taxes in the United States; the applicant owns a home with his wife, which suggests that he makes an effort to provide a stable home for his children and family; the applicant and his wife stated that the applicant is a good father and husband; the applicant's wife explained that the applicant has served as a father figure to his two stepsons in addition to his own two children, and; the applicant has no criminal convictions.

The acting district director noted that the applicant developed familial and economic ties to the United States after his illegal entry and unlawful residence in the country. *Decision of the Acting District Director* at 5. The acting district director indicated that, pursuant to the Ninth Circuit's opinion in *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), these ties to the United States are deemed after-acquired equities and are not given great weight in considering whether the applicant warrants a favorable exercise of discretion. *Id.* However, the respondent in *Carnalla-Munoz v. INS* acquired additional family ties to the United States after he had received an order of deportation. *Carnalla-Munoz v. INS*, 627 F.2d 1004 (9th Cir. 1980). The Ninth Circuit stated that "since this development occurred after petitioners were under deportation orders, it was not entitled to great weight." *Id.* In the present matter, the applicant has not received an order of deportation. Nor does the record support that the applicant is inadmissible under the Act, as discussed above. Accordingly, the record does not reflect that any factors weighing in the applicant's favor should be given less weight as after-acquired equities.

Although the applicant's violation of immigration law cannot be condoned, the AAO finds that the positive factors in this case outweigh the negative factors. The AAO therefore withdraws the acting district director's denial of the Application for Adjustment of Status.

ORDER: The acting district director's February 3, 2006 decision is withdrawn. The application is approved.