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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H2

[redacted]

Date: MAR 1 2 2012 Office: KENDALL, FL FILE: [redacted]

IN RE: Applicant [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rhumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kendall, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Argentina 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 been convicted of a crime relating to a controlled substance. The director indicated that the applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant was concluded of possession of drug paraphernalia and was not eligible for a waiver of inadmissibility, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel states that, as shown in the submitted document reflecting that the applicant's criminal case was a "no action" and expunged, the applicant was not convicted of possession of drug paraphernalia.

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 –
>
> . . .
>
> (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.

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)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 permanent resident spouse, parent, son, or daughter of such alien.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The record shows that on January 22, 1999, the applicant was arrested for loitering and prowling and possession of drug paraphernalia in violation of Florida law. The document by the Deputy Clerk with the Circuit and County Courts, Miami-Dade County, Florida, dated July 14, 2009 stated that the disposition of loitering and prowling offense was nolle prossed, and that adjudication was withheld and a fine and court costs were imposed for the possession of drug paraphernalia offense. We therefore find unconvincing counsel's claim that the judge took "no action" with the possession of drug paraphernalia charge. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. The applicant has not demonstrated that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of violation of a law relating to a controlled substance.

In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), a case involving a controlled substance conviction for possession or use of drug paraphernalia, the Board discussed whether an alien can file a 212(h) waiver. The respondent in *Martinez Espinoza* asserted that drug paraphernalia is not prohibited under Federal law. 25 I&N Dec. at 118, 122. The Board noted that "section 212(a)(2)(A)(i)(II) of the Act does not require that a State offense be punishable under Federal law in order to support a charge of inadmissibility." *Id.* The Board stated that although section 212(a)(2)(A)(i)(II) contains the phrase "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)," the phrase "modifies only its immediate antecedent (i.e., 'controlled substance'), not the whole text of the section." The Board viewed the phrase "relating to a controlled substance" under section 212(a)(2)(A)(i)(II) of the Act and concluded that "a law prohibiting the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance necessarily pertains to a controlled substance." *Id.* at 120. The Board held that possession of "a pipe for smoking marijuana is a crime within the scope of [section 212(a)(2)(A)(i)(II)] because drug paraphernalia relates to the drug with which it is used." 25 I&N Dec. at 120 (citation omitted).

In the instant case, the applicant was convicted of possession of drug paraphernalia in violation of Florida law. At the time of his arrest, F.S.A. § 893.147 provided that:

> (1) Use or possession of drug paraphernalia.—It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

> (a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or
> (b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.
> Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

F.S.A. § 893.02 stated that:

> (4) "Controlled substance" means any substance named or described in Schedules I through V of s. 893.03. Laws controlling the manufacture, distribution, preparation, dispensing, or administration of such substances are drug abuse laws.

In *Martinez Espinoza*, the Board held that "an alien who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act may apply for a section 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either 'a single offense of simple possession of 30 grams or less of marijuana' or an act that 'relate[d] to' such an offense," such as the possession or use of drug paraphernalia. 25 I&N Dec. at 125. The Board stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Id.* at 124 ("it is hard to imagine any offense—apart from a few inchoate offenses—that could 'relate to' it categorically without actually *being* a simple marijuana possession offense."). The Board determined that it was the intent of Congress to have "a factual inquiry into whether an alien's criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana that it should be treated with the same degree of forbearance under the immigration laws as the simple possession offense itself." *Id.* at 124-25.

Pursuant to *Martinez Espinoza*, *supra*, we must look at the factual circumstances behind the applicant's conviction to determine whether it relates to simple possession of 30 grams or less of marijuana. The arrest record indicates that the possession of paraphernalia charge related to cocaine. Therefore, we have a factual basis to determine that the applicant is not eligible for a section 212(h) waiver.

Additionally, the criminal record shows that the applicant was arrested on July 4, 1998 in Florida for dangerous drugs cocaine possession in violation of Florida law. In regard to this crime, the applicant furnished a petition to expunge, an affidavit in support of petition to expunge, a certificate of eligibility to petition for a seal or expunge order, and a notice of hearing. However, the applicant has not provided the complete criminal record. As previously stated, section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility for the benefit sought. We find that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of violation of a law relating to a controlled substance, and he is not eligible for a section 212(h) waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.