U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: APR 29 2013 Office: SACRAMENTO FILE:

IN RE: Applicant:

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director, Sacramento, California, denied the Application for Waiver of Grounds if Inadmissibility (Form I-601) and the Administrative Appeals Office (AAO) dismissed the applicant's appeal. On March 9, 2010, the applicant filed a motion to reconsider the AAO's decision. The applicant's motion will be dismissed and the underlying application remains denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible 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 having been convicted of violating any law or regulation relating to a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. citizen wife and children.

In a decision dated May 14, 2007, the Acting Field Office Director denied the applicant's waiver application as a matter of law after finding him inadmissible for a controlled substance violation. In a decision dated February 18, 2010, the AAO found that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a crime related to the manufacture and possession of methamphetamine, a controlled substance for which there is no waiver. Consequently, the applicant's appeal was dismissed.

On motion, the applicant asserts that he did not speak English at the time of his criminal conviction and that "the interpreter available did not know how to interpret." The applicant states that he pled guilty to the charges against him because he "was told by an officer to agree[] to whatever charges or spend 27 years in jail/prison without an option to appeal ever." The applicant avers that he is submitting an appeal of the Klamath Circuit Court's judgment, and that he will try to vacate the criminal conviction against him. No evidence was submitted in support of the motion to reconsider.

The regulation at 8 C.F.R. § 103.5(a) governs motions and states, in pertinent part:

> (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .
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> . . .
>
> (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO will dismiss the applicant's motion to reconsider. In response to the applicant's assertions regarding the circumstances surrounding his conviction, we note that it is a well-established principle of immigration law that immigration adjudicators cannot entertain collateral attacks on a judgment of conviction unless that judgment is void on its face, and cannot go behind the judicial record of conviction to relitigate the facts that led to the applicant's grand theft conviction. *See*

Matter of Madrigal, 21 I&N Dec. 323, 327 (BIA 1996); *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (observing that for purposes of deportability, immigration adjudicators cannot go behind the record of conviction to redetermine the alien's guilt or innocence). Additionally, the AAO notes that the applicant was found guilty of the charged crime, and the record of proceedings indicates that his conviction constitutes a final conviction for immigration purposes. *Matter of Ozkok*, 19 I & N Dec. 546, 551 (BIA 1988); *see also Marino v. INS*, 537 F.2d 686 (2d Cir.1976). Though the applicant indicates that he will file an appeal of the Klamath Circuit Court's decision and will try to "remove the[] charges", the record does not contain any evidence indicating that the applicant's conviction has been vacated on substantive or procedural grounds. Consequently, the AAO cannot entertain the applicant's claims regarding the circumstances and facts leading to his November 26, 1997 criminal conviction. The applicant's asserted collateral attack of his conviction therefore does not affect his inadmissibility.

The applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

> (i) [A]ny 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.

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), (B), (D), and (E) of 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 if –
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> (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 rehabilitated.

Here, the admissible portion of the applicant's record of conviction shows that on , the applicant was convicted in the Circuit Court of the State of Oregon, for the County of Klamath, of manufacturing and possessing methamphetamine, a schedule II controlled substance. Specifically, the Judgment of Conviction and Sentence for this case reflects that "the defendant [applicant] is convicted of Manufacture of a Controlled Substance, Count 1, [and] Possession of a Controlled Substance, Count 3." Count 1 of the Indictment provides that "on or about the 25th day of October, 1997 in Klamath County, Oregon, [the applicant] did unlawfully and intentionally manufacture a controlled substance, to wit: methamphetamine." Further, Count 3 of the Indictment provides that "on or about the 25th of October, 1997 in Klamath County, Oregon, [the applicant' did unlawfully and knowingly possess a controlled substance, to wit: methamphetamine." For this offense, the applicant was sentenced to 30 days in county jail and 36 months of probation.

Based on these facts, the AAO correctly determined that the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of manufacturing and possessing methamphetamine, crimes related to a controlled substance.

The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a crime related to a controlled substance which is more than simple possession of 30 grams of marijuana. That is, no waiver is available to an alien who has been convicted of a crime related to a controlled substance if the crime is for more than simple possession of 30 grams or less of marijuana. *See* Section 212(h) of the Act.

Here, the record of proceedings conclusively demonstrates that the applicant was convicted of felony manufacture of methamphetamine and felony possession of methamphetamine. Consequently, he is not eligible for a waiver of inadmissibility under section 212(h) of the Act. On motion, the applicant has not asserted nor shown that he was convicted for an offense relating to 30 grams or less of marijuana that would render him eligible for a waiver of inadmissibility under section 212(h) of the Act. Accordingly, the applicant is statutorily ineligible for consideration for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II)of the Act, and the AAO correctly dismissed the applicant's appeal.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing statutory eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met that burden. Accordingly, the applicant's motion to reconsider is dismissed and the underlying application remains denied.

ORDER: The motion is dismissed.