U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF E-U-R-

DATE: DEC. 8, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918 SUPPLEMENT A, PETITION FOR QUALIFYING FAMILY MEMBER OF U-1 RECIPIENT

The Petitioner, who seeks "U-1" nonimmigrant classification for herself, also seeks U-4 nonimmigrant classification of the Derivative as a qualifying family member of a person granted U-1 status. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(U)(ii), 8 U.S.C. § 1101(a)(15)(U)(ii). The U classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity, and affords derivative status for qualifying family members.

The Director, Vermont Service Center, denied the Form I-918A, Petition for Qualifying Family Member of U-1 Recipient (derivative petition) because the record established the Derivative's inadmissibility under sections 212(a)(1)(A)(iv), 212(a)(2)(A)(i)(II), 212(a)(6)(A)(i), 212(a)(6)(C)(i), 212(a)(9)(A)(ii), 212(a)(9)(B)(i)(II), 212(a)(9)(C)(I) and 212(a)(9)(C)(II) of the Act, 8 U.S.C. §§ 1182(a)(1)(A)(iv), 1182(a)(2)(A)(i)(II), 1182(a)(6)(A)(i), 1182(a)(6)(C)(i), 1182(a)(9)(A)(ii), 1182(a)(9)(B)(i)(II), 1182(a)(9)(C)(I) and 1182(a)(9)(C)(II), and his Form I-192, Application for Advance Permission to Enter as Nonimmigrant (waiver application), had been denied.

The matter is now before us on appeal. The Petitioner asserts that the Derivative is not inadmissible as a drug abuser/addict, that the Director incorrectly blamed her for the confusing evidence regarding the Derivative's convictions, and that U.S. Citizenship and Immigration Services (USCIS) should grant the Derivative's waiver.

Upon *de novo* review we will dismiss the appeal.

## I. LAW

Section 212(d)(14) of the Act requires USCIS to determine whether any grounds of inadmissibility exist when adjudicating a U petition and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. A petitioner bears the burden of establishing that he or she is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R. § 214.1(a)(3)(i).

For individuals seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a waiver application in conjunction with the U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states, in pertinent part: "[t]here is no appeal of a decision to deny a waiver." Although the regulations do not provide for appellate review of the Director's discretionary denial of a waiver application, we may, however, consider whether the Director's underlying determination of inadmissibility was correct.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

> . . . .
>
> (1) Health-related grounds
>
> (A) In general Any alien—
>
> . . . .
>
> (iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.
>
> . . . .
>
> (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 section 802 of Title 21), is inadmissible.. . . .
>
> is inadmissible.
>
> (ii) Exception
>
> Clause (i)(I) shall not apply to an alien who committed only one crime if—

. . . .

(I) 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).

. . . .

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

(i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

. . . .

(C) Misrepresentation

(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.

. . . .

(7) Documentation requirements

. . . .

(B) Nonimmigrants

(i) In general

Any nonimmigrant who--

(I) who is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period

. . . .

is inadmissible.

(9) Aliens previously removed

(A) Certain aliens previously removed

. . . .

(ii) Other aliens

Any alien not described in clause (i) who—

(I) has been ordered removed under section 1229a of this title or any other provision of law

. . . .

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(B) Aliens unlawfully present

(i) In general

Any alien (other than an alien lawfully admitted for permanent residence) who—

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States,

is inadmissible.

. . . .

(C) Aliens unlawfully present after previous immigration violations

(i) In general

Any alien who—

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 1225(b)(1) of this title, section 1229a of this title, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted, is inadmissible.

## II. ANALYSIS

On [redacted] 2003, an Immigration Judge ordered the Derivative removed from the United States as he was present without inspection, admission, or parole.[1] The Derivative was removed from the United States on the same day. The Derivative claims to have last entered the United States without inspection, admission, or parole in March 2003. The Petitioner filed the instant derivative petition with a waiver application from the Derivative. The Director issued a request for evidence regarding the Derivative's admissibility and eligibility for a waiver, to which the Petitioner responded with additional evidence.

The Director determined that the Derivative was inadmissible under the following provisions of the Act:

- Section 212(a)(1)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iv): Health related ground-drug abuser or addict;
- Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II): Conviction of two crimes relating to a controlled substance;
- Section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i): Present without inspection, admission or parole;
- Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i): Gaining entry into the United States by fraud;
- Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii): Ordered removed from the United States and seeks entry within 10 years of removal or departure;

[1] The Derivative admitted that he had been unlawfully present in the United States for more than one year.

- Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II): Unlawful presence of more than one year;
- Section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I): Re-entry into the United States without admission after more than one year of unlawful presence;
- Section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II): Re-entry into the United States without admission after having been removed from the United States.

After reviewing the evidence submitted in support of the waiver application, the Director determined that the Derivative had not demonstrated that he warranted a favorable exercise of discretion. The Director consequently denied the derivative petition because the Derivative is inadmissible and his waiver application was denied. The Petitioner now appeals the Director's determination that the Derivative is inadmissible for being a drug abuser/addict, and questions whether the Director blamed the Petitioner for the inconsistencies in the Derivative's conviction records, but does not contest the other grounds of inadmissibility.

The record reflects that the Director found the Derivative to be a drug abuser/addict based on his arrests on drug-related charges and his admission to being a daily drug user and drug addict for a significant portion of the time he has been present in the United States. However, an individual must be deemed a drug abuser or addict "in accordance with regulations prescribed by the Secretary of Health and Human Services." *See* 8 U.S.C. § 1182(a)(1)(A)(iv). Only medical examiners, such as panel physicians, civil surgeons, or other physicians designated by the Director of Health and Human Services (HHS) can make this determination before USCIS can find an individual inadmissible under section 212(a)(1)(A)(iv) of the Act. *See* 42 C.F.R. § 34.3(a)(4). As the record does not contain a medical examination from a panel physician, civil surgeon, or other physician designated by the Director of HHS determining that the Derivative is a drug abuser/addict, he is not inadmissible pursuant to section 212(a)(1)(A)(iv) of the Act. We therefore withdraw the Director's finding to contrary.

As the Derivative admitted to gaining entry into the United States by presenting a fake lawful permanent resident card in January 1998, was unlawfully present for more than one year prior to his removal from the United States in 2003, and reentered the United States without inspection, admission or parole, he is inadmissible pursuant to sections 212(a)(6)(A)(i), 212(a)(6)(C)(i), 212(a)(9)(C)(i)(I), and 212(a)(9)(C)(i)(II) of the Act.

However, the record does not establish that the Derivative has departed the United States since his reentry into the United States in 2003 and it has been more than ten years since his [redacted] 2003 removal. Because the Derivative is seeking admission more than ten years after his 2003 removal, sections 212(a)(9)(A)(ii) and 212(a)(9)(B)(i)(II) of the Act are not applicable. Accordingly, the Derivative does not appear to be inadmissible under sections 212(a)(9)(A)(ii) and 212(a)(9)(B)(i)(II) of the Act. We withdraw the Director's finding to the contrary.

On appeal, the Petitioner questions whether the Director erred in blaming her for the confusion regarding the Derivative's convictions. It is unclear whether the Petitioner is contesting the

Derivative's inadmissibility under section 212(a)(2)(A)(i)(II). However, we will address the documentation establishing the Derivative's inadmissibility under section 212(a)(2)(A)(i)(II). Based on a fingerprint match to the Derivative, it appears that he has two convictions relating to a controlled substance. The finger print match indicates that the Derivative was:

- Arrested on [redacted] 1996, for possession of a controlled substance and charged with a violation of section 11350(a) of the California Health and Safety Code (possession of a designated controlled substance).
- Arrested on [redacted] 2002, for being under the influence of a controlled substance and possessing controlled substance paraphernalia, and was charged with violations of sections 11364 and 11550(a) of the California Health and Safety Code (possession of drug paraphernalia and use/under the influence of a controlled substance), and sections 647 and 853 of the California Penal Code (disorderly conduct and failure to appear).
- Arrested on [redacted] 2004, for possession of a controlled substance and controlled substance paraphernalia, and was charged with a violation of 11364 of the California Health and Safety Code (possession of drug paraphernalia).

The Petitioner submitted court documents reflecting that:

- The charge of violating section 11350(a) of the California Health and Safety Code was dismissed and the Derivative was convicted of possession of a controlled substance in violation of 11377(a) of the California Health and Safety Code, for which he was sentenced to 60 days in jail that was suspended, probation for three years, and a fine on [redacted] 1996.
- The charges of violating sections 11364 and 11550(a) of the California Health and Safety Code, and section 853 of the California Penal Code were dismissed. However, the Derivative pled guilty to and was convicted of disorderly conduct in violation of sections 647(b)-(d) of the California Penal Code, for which his sentence was suspended for three years with 25 days in a Public Service Work Program, completion of a drug treatment program, attendance of AA/NA meetings, and a fine on [redacted] 2004.
- On [redacted] 2004, the Derivative's probation for the [redacted] 2004, conviction was revoked. It appears that at some time probation was reinstated and then terminated on [redacted] 2009.

The arrest and case numbers on the documents regarding the [redacted] 2004, conviction appear to be mixed up or altered by an unknown individual and the record contains an [redacted] 2013, response from the Superior Court of California, [redacted] indicating that court documents related to the Derivative's case number [redacted] have been purged and are not available.[2] This case number does not relate to the court documents listed above and is therefore

[2] We note that the response indicated that the Derivative could obtain further information by calling or writing the Department of Justice. However, the record does not contain any correspondence with the Department of Justice seeking further information.

likely to be related to the fingerprint match for the Derivative's arrest on [redacted] 2004, while the conviction records dated [redacted] 2004, relate to the Derivative's [redacted] 2002, arrest. While the fingerprint match indicates that in relation to the Derivative's [redacted] 2004, arrest, he was charged with violating section 11364 of the California Health and Safety Code (possession of drug paraphernalia), it also indicates that the charge was dismissed and the Derivative pled guilty to a violation of section 11377(a) of the California Health and Safety Code (possession of a controlled substance) and was sentenced to three years of probation and a fine. While the Petitioner asserts that the alterations to the documents may be accounted for through routine changes to case numbers between upper and lower courts, it is the Petitioner's burden to show that the Derivative is admissible to the United States. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner did not exhaust her ability to obtain further information regarding case number [redacted] The Petitioner also did not provide sufficient evidence to undercut the Derivative's fingerprint match to a second arrest under section 11377(a) of the California Health and Safety Code (possession of a controlled substance). We therefore agree with the Director's finding that the Derivative is inadmissible under section 212(a)(2)(A)(i)(II) of the Act because he was convicted of two crimes related to a controlled substance. Even if the Derivative was only convicted of one crime relating to a controlled substance, he would still be inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Besides the grounds of inadmissibility found by the Director, it appears that the Derivative is also now inadmissible under section 212(a)(7)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(B)(i)(I), as the Derivative's passport expired on August 28, 2015.

The Petitioner's remaining assertions on appeal relate only to factors that the Director would consider when determining whether to exercise her discretion favorably and approve the Derivative's waiver application. The Derivative is inadmissible to the United States and therefore requires an approved waiver application. As the Petitioner remains inadmissible, and we have no jurisdiction to consider the Director's decision on the waiver application, we must dismiss the appeal.

## III. CONCLUSION

In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Otiende* at 128. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of E-U-R-*, ID# 44470 (AAO Dec. 8, 2016)