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FILE:



Office: LONDON

Date:

APR 26 2005

IN RE:



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

ON BEHALF OF PETITIONER:

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge, London, (OIC) and is now before the Administrative Appeals Office (AAO) on certification. The OIC's decision will be affirmed.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States under two separate grounds of inadmissibility corresponding to various criminal violations. First, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), relating to numerous convictions relating to assault and destruction of property charges between the years of 1970 and 1988, as described in the OIC's decision, which are crimes involving moral turpitude. *See Decision of the Officer in Charge*, dated October 1, 2003. Second, the applicant is inadmissible pursuant to 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 violation relating to a controlled substance. Specifically, the applicant was convicted on October 31, 1983, in the United Kingdom, of Possession of A class, B Drug-Cannabis Resin, (21 grams), and received a fine.

The applicant married a citizen of the United States on May 11, 2002, and is the beneficiary of a Petition for Alien Relative approved overseas on August 4, 2002. The applicant seeks waivers of inadmissibility pursuant to sections 212(h) of the Act, 8 U.S.C. § 1182(h), in order to return to the United States to reside with his U.S. citizen spouse.

The OIC concluded that although the applicant had submitted evidence in support of a claim of hardship, the evidence did not support a finding that extreme hardship would be imposed upon a qualifying relative. The OIC also found that the applicant's conviction for possessing 21 grams of cannabis resin equated to more than 30 grams of marijuana, and thus raised an additional ground of inadmissibility that could not be waived. The OIC then denied the Application for Waiver of Grounds of Excludability (Form I-601). *Decision of the Officer in Charge*, dated October 1, 2003.

The OIC certified the decision to the AAO and advised the applicant of that fact. The applicant and his spouse have submitted a letter in support of the waiver for the AAO to consider on certification. The letter asserts that the evidence supports a finding of extreme hardship and also asserts that under the Board of Immigration Appeals (BIA) decision in *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992), the applicant's convictions that are 15 years or older cannot be considered. The entire record was reviewed and considered in rendering a decision on the appeal.

#### Evidence in Support of the Applicant's Waiver Application

The waiver requests are contained in the Form I-601 seeking to waive the grounds of inadmissibility arising from the convictions. The record in support of the waiver application contains only the individual statements from the applicant and his spouse.

#### Waivers Available to the Applicant

Section 212(a)(2) of the Act states in pertinent part, that:

(A)(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 (or a conspiracy to 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 . . .

#### The Officer in Charge's Decision and the Issues Raised on Certification

The OIC's decision recited the facts and cited the applicable provisions of law under which the applicant was found inadmissible, and noted the applicable waiver provisions. The decision consisted of a detailed summary of the applicant's criminal history, and a discussion of the evidence submitted in support of the requested waiver. The OIC's decision considered the statements and letters submitted by the applicant and his spouse in support of the waiver and found that the statements "described the living situation of many couples who chose to live apart," noted that some assertions regarding limited income were unsupported, and concluded that the evidence as a whole failed to identify factors that would result in a finding of extreme hardship. *See Decision of the Officer in Charge*, at p. 4. In response to the applicant's spouse's contention that the applicant should not be refused entry because of a mistake made twenty years earlier, the OIC found that the applicant's most recent conviction occurred less than fifteen years earlier. The OIC additionally

found that no evidence was submitted that discussed the applicant's behavior and character since the time of his most recent conviction in 1988. In addition to finding that the applicant had failed to establish extreme hardship, the OIC also cited two additional reasons supporting the denial of the application. First, the OIC noted that the applicant had failed to establish that he merited the relief in the exercise of discretion. In addition, the OIC found that notwithstanding the applicant's eligibility on statutory and discretionary grounds, the waiver would also be denied because the applicant's conviction for possessing 21 grams of cannabis resin was the equivalent of a conviction for possessing more than 30 grams of marijuana, thus making the applicant inadmissible under a provision of law that could not be waived.<sup>1</sup>

The main issues presented on certification are whether the OIC was correct in finding that the applicant had not established extreme hardship, whether the applicant's case was evaluated under all applicable provisions of law, and whether the OIC correctly determined that the applicant's conviction for possession of cannabis resin rendered him ineligible for a waiver. The AAO will address each of these issues. The entire record was reviewed and considered in rendering a decision.

Based upon our review of the case the AAO agrees with the OIC's conclusion that the applicant has not established eligibility for the requested waiver, but does so based on a different analysis than that set forth in the OIC's decision. Before addressing the specific issues, the AAO notes one minor error in the OIC's decision that bears mentioning. Although it does not appear to have affected the OIC's analysis of the case, the decision notes at various points that the applicant was seeking a waiver of inadmissibility pursuant to sections 212(h) and (i) of the Act. However, the only waiver required by the applicant is a 212(h) waiver of the criminal grounds of inadmissibility previously described. A section 212(i) waiver would be necessary if the applicant was seeking to waive a ground of inadmissibility relating to fraud or willful misrepresentation of a material fact. It does not appear, from the AAO's review of the record, that the applicant is seeking, or requires, a section 212(i) waiver.

#### The Applicant's Eligibility for a Waiver Based on the Age of the Convictions

With respect to the OIC's analysis of the applicant's eligibility for a waiver, the applicant and his spouse have raised the issue of whether the applicant's convictions are of such an age that they no longer render him inadmissible. See *Statement of Barbara Hutchinson Submitted with Form I-601*, undated; See also *Letter from Keith and Barbara Hutchinson*, dated October 20, 2003. The letter submitted on certification references the BIA decision in *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). While the applicant's argument is not clearly articulated, the AAO understands it to be a claim that the applicant is eligible for a waiver of inadmissibility under section 212(h)(1)(A), due to the fact that the applicant's convictions occurred more than fifteen years ago. The OIC found that the applicant was ineligible for a waiver under section 212(h)(1)(A), as he concluded that the applicant's last conviction occurred less than fifteen years prior to the OIC's decision. However, the record reflects that the applicant's most recent conviction occurred, by the OIC's own finding, on March 23, 1988. The OIC's decision was issued on October 1, 2003, six months after the fifteenth anniversary of the conviction. Thus, it appears that the applicant was correct that because more than fifteen

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<sup>1</sup> Although the OIC's decision does not specifically identify the ground of inadmissibility, the OIC was apparently referring to section 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C), relating to controlled substance traffickers.

years had elapsed since the time of the conviction, he was eligible for a waiver, under not just section 212(h)(1)(B), but also under section 212(h)(1)(A).

The AAO finds that the applicant's eligibility should have been considered under subsection (A) in addition to, and not in lieu of, considering the applicant's eligibility under subsection (B). The two provisions have differing standards for eligibility. An applicant's eligibility under subsection (B) requires the applicant to demonstrate extreme hardship to a qualifying relative. In contrast, eligibility under subsection (A) does not require such a relationship or a showing of extreme hardship. Rather, an applicant must demonstrate that the conviction occurred more than fifteen years earlier; that the applicant's admission would not be contrary to the national welfare, safety, or security of the United States; and that the applicant has been rehabilitated. The applicant is eligible to apply for a waiver under either provision. The AAO will review the OIC's decision evaluating the applicant's eligibility under subsection (B), and will then assess the applicant's eligibility under the alternative basis of subsection (A). The AAO will also review the OIC's determination that the applicant's conviction for possession of cannabis resin renders the applicant otherwise inadmissible.

#### The OIC's Extreme Hardship Analysis

The decision whether to grant a waiver under section 212(h)(1)(B) consists of a two-step process. First, the OIC must find that the applicant has satisfied the statutory requirements for the waiver. In the applicant's case, the applicant has demonstrated that the required family relationship exists, by virtue of his marriage to a U.S. citizen. He must also demonstrate that denial of the waiver would result in extreme hardship to the qualifying relative.

The OIC's decision considered the minimal evidence in the record and concluded that while the evidence related some hardships that the U.S. citizen spouse would encounter due to the separation, the situation described was one that was common to couples who chose to live apart and could not be considered to be extreme hardship. *See Decision of the Officer in Charge*, dated October 1, 2003, at p. 4.

*Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The only evidence offered by the applicant and his spouse consists of their own assertions reflected in their statements and letters submitted in support of the application. While the submissions raise several grounds of potential hardship, they are unsupported by any objective evidence or even sufficient detail to justify a finding that they rise to the level of extreme hardship. The evidence indicates that the applicant's spouse, who claims to have retired on disability, is on a fixed income and would be unable to maintain the same level of medical care in the United Kingdom. *See Statement of Barbara Hutchinson*, undated. However, no evidence from a medical practitioner was submitted to document her claims, nor was any evidence offered in support of her

claim that she is disabled and receiving financial and other assistance for her condition that would not be available to her elsewhere. Furthermore, her own statement indicates that she could obtain assistance in the United Kingdom by becoming a permanent resident, an option that is possibly available to her due to her marriage to the applicant. In terms of the effect upon her health due to the applicant's absence, the record contains simply her statement that the applicant "physically assists in daily duties and health needs" that she is limited in her ability to perform. However, no further explanation or support for this statement is provided. Furthermore, it appears that the applicant and his spouse are residing apart from each other at the present time, and she has apparently been able to manage without him.

In addition to the claim relating to the spouse's health, the spouse asserts that she would suffer extreme hardship if required to separate from her son who lives in Louisiana. The statement asserts that she is very close to the son but that he is not in a position to travel to maintain the close family relationship. Other than the statements of the spouse, there is no evidence in the record relating to the spouse's son or his relationship with her. There is no indication that the son is a minor, and consequently it is likely that he leads a life separate from the applicant's spouse. There is no evidence of any hardship that would befall the spouse due to her absence from her son or any claim of dependence upon the son. Although it is understandable that there will be some emotional hardship from a separation, such a separation does not constitute extreme hardship.

The remaining basis of hardship to the applicant's U.S. citizen spouse stems from the couple's financial interests. Specifically, the applicant and spouse claim that they manage their own property and adjacent rental property, which the couple asserts is necessary for their retirement income in the future. The spouse indicates if the waiver is denied, they may be forced to sell the property, as they may not be able to pay someone to manage it for them. The additional financial hardship factor stems from the couple's involvement in possible litigation relating to an automobile accident.

The AAO finds that the OIC did not err in concluding that these factors did not rise to the level of extreme hardship. In general, the assertions are general and speculative in nature. They generally lack supporting evidence, or anything that could lead the AAO to conclude that the hardships are so significant that they can be considered extreme in nature. In addition, the applicant's spouse can avoid much of the hardship she fears by choosing to remain in the United States. As a citizen, there is nothing that requires her to depart the country.

The record does not establish that the hardships anticipated by the applicant's spouse to herself in terms of the separation and inability to have regular contact with her son as well as her concerns about her ability to continue managing her real property and other financial interests rise to the level of extreme hardship or are any different from those hardships normally associated with the severing of family and community ties. U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS*, *supra*, held further that the uprooting of family and separation from friends

does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The AAO recognizes that the applicant's spouse will endure hardship as a result of separation from the applicant. However, her situation, based on the record, is typical of individuals separated as a result of deportation or exclusion and does not rise to the level of extreme hardship.

The AAO concludes, therefore, that the OIC's finding that the evidence submitted in support of the application, while detailing ordinary hardships anticipated, and relating the anxiety being experienced by the U.S. citizen spouse, do not indicate that the spouse will suffer extreme hardship. As we have determined that the applicant has not demonstrated extreme hardship to a qualifying relative, it is not required that we move on to the next step of analyzing whether the applicant warrants a favorable exercise of discretion. Nevertheless, after discussing the applicant's eligibility pursuant to subsection (A), the AAO will proceed to conduct such an evaluation in order to examine whether, in the alternative, the applicant would have merited such an exercise of discretion.

#### The Applicant's Eligibility Under Section 212(h)(1)(A)

The record reflects that the applicant meets the technical time related requirements for the 212(h)(1)(A) waiver. The convictions are of a sufficient age that he qualifies for the waiver provided that the applicant can meet the two additional requirements, i.e., that his admission to the United States would not be contrary to the national welfare, safety or security of the United States, and that he has been rehabilitated. The evidence in the record is scant and does little to address these issues. As noted previously, it consists of the submissions from the applicant and his spouse. On the issue of rehabilitation, the applicant states that after his drug conviction, he examined his life and decided that he no longer needed or wanted to be involved with drugs. As a result, he claims to have rehabilitated himself by getting an education and subsequently learning a trade in the construction industry and becoming a civil engineer. *See Statement of Keith Hutchinson*, undated. *Submitted With the Form I-601*. In addition, the joint letter submitted by the applicant and his spouse indicates that they were not asked to provide additional evidence of his rehabilitation as it was their understanding that the police and court records "clearly show that he has changed in the last 15 years and stayed out of trouble and lived a clean and good citizen's life since that time." *See Letter from Keith and Barbara Hutchinson*, dated October 20, 2003. However, the absence of convictions does not, by itself, show rehabilitation. Although the applicant states that he has turned his life around by becoming a civil engineer, no objective evidence of such education exists. The applicant further claims to have worked in the construction trade, but has not submitted a letter from an employer, or pay records. Neither has any evidence been submitted from members of the community who know the applicant and can attest to how he has turned his life around and what positive contributions he has made that demonstrate that he has lived a "clean and good" life since the time of his convictions.<sup>2</sup> The absence of such evidence precludes a finding that the applicant has, in fact, been rehabilitated.

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<sup>2</sup> An examination of the Biographic Information form (Form G-325A) submitted by the applicant in connection with the spouse's Form I-130 filed on the applicant's behalf indicates that the applicant has been retired since 1997, when he was forty-eight, but worked prior to that time for an identified construction company in England. However, the record is devoid of any evidence regarding this employment. Consequently, it would be reasonable to expect to see evidence of his financial stability as well. The applicant's financial independence would also indicate that he is in a position to assist his spouse whether or not she elects to remain in the United States.

In addition to establishing rehabilitation, a waiver application pursuant to subsection (A) must also establish that the alien's admission would not be contrary to the national welfare, safety, or security of the United States. An individual with a lengthy and violent criminal record such as the applicant's can be said to be an individual whose admission would be contrary to the welfare and security of the country. The mere fact that the crimes occurred many years ago is not itself a sufficient factor to establish that the applicant's presence would not be contrary to the interests of the United States because, by definition, eligibility under subsection (A) is contingent upon the crimes being at least fifteen years old. Therefore, additional evidence is required on this issue, evidence that the applicant has not supplied. Even if the applicant's assertions as to how he has changed his life were sufficient, no evidence exists in the record that could lead to a finding that the applicant no longer poses a threat to the United States.

Additional Factors Affecting the Applicant's Eligibility for a Section 212(h) Waiver as a Matter of Discretion

Even if the evidence in the record established that the applicant satisfied the basic requirements for eligibility for a waiver under either subsection, the AAO finds that the applicant must satisfy two additional requirements. First, because of the nature of the applicant's criminal offenses, the applicant must meet the requirements of 8 C.F.R. § 212.7(d), which applies to aliens who are seeking to waive criminal grounds of inadmissibility relating to violent or dangerous offenses in order to have discretion exercised in his favor. Second, the exercise of discretion in this case is also affected by the nature of the alien's drug conviction. It is in this regard that the AAO will address the OIC's finding that the applicant remained ineligible for adjustment of status on account of his drug conviction.

With respect to the applicant's eligibility under 8 C.F.R. § 212.7(d), that section provides as follows:

*(d) Criminal grounds of inadmissibility involving violent or dangerous crimes.*

The Attorney General [Secretary of Homeland Security], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the aliens' underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h) of the Act.

The AAO finds that the OIC should have considered the applicant's eligibility for a subsection (A) waiver including whether the applicant satisfied the regulatory requirements relating to the exercise of discretion. In conducting its own assessment under the regulations, the AAO finds that the applicant's case does not warrant a favorable exercise of discretion on account of any national security or foreign policy considerations. That leaves the AAO to consider the matter under the remaining basis which requires a finding that the denial of the application would result in exceptional and extremely unusual hardship. Having previously found that the evidence does not support a finding of extreme hardship, it follows that the higher standard is likewise not met.

The Applicant's Eligibility for a Waiver of Inadmissibility Relating to his Drug Conviction

The AAO turns next to the effect of the applicant's drug conviction upon his eligibility for a waiver of inadmissibility. It is not entirely clear from the OIC's decision whether the OIC considered the applicant's drug conviction as a factor leading to the discretionary denial of the waiver application, or simply as an observation as to the applicant's ultimate inadmissibility under an additional ground. The AAO will discuss the issue because, significantly, a finding that the applicant was convicted of possessing more than 30 grams of marijuana necessarily results in a finding that due to the nature of the conviction, the ground of inadmissibility is not waivable. Alternatively, the drug conviction may have an effect upon the applicant's eligibility for a waiver as a matter of discretion. The applicant argues on certification that the OIC made a legal error regarding the nature and effect of the applicant's drug conviction. Specifically, the applicant asserts that the OIC erred in concluding that the applicant's conviction for possessing 21 grams of cannabis resin equates to possession of more than 30 grams of marijuana. The OIC's conclusion resulted in a finding that the amount possessed was beyond the amount for which a 212(h) waiver was available. The OIC also found the applicant inadmissible under an additional ground of inadmissibility that cannot be waived. Because of the complexity of the issue, the AAO will address the issue in some detail.

Section 212(h) of the Act allows for the waiver of a ground of inadmissibility based upon a conviction for marijuana possession so long as the conviction is for a single offense of simple possession of 30 grams or less of marijuana. The question that the OIC was confronted with was whether the applicant's conviction for possession of cannabis resin equated to a conviction for an equivalent amount of marijuana, or because of its differing nature, was equivalent to a higher amount of marijuana thus possibly rendering the applicant ineligible for a waiver of inadmissibility. For reasons that are not set forth in the OIC's decision, the OIC concluded that the applicant's conviction for possession of a controlled substance was equivalent to a higher amount than 30 grams of marijuana, and therefore, created "a ground of inadmissibility that cannot be waived by operation of law."<sup>3</sup>

The applicant disagrees that his 21 grams of cannabis resin was equivalent to an amount greater than 30 grams of marijuana and thus fell outside of the scope of the statutory waiver provision. The applicant, in support of his position, references an attached legal opinion from the Office of the General Counsel of the former Immigration and Naturalization Service. The applicant goes on to state, "This conviction was a one time charge and was for personal possession and use as you can see on the court report. He was found not guilty of possession with intent so to make the assumption per the opinion that anyone with more than 5 grams of resin is distributing is clearly in error." *See Letter from Keith and Barbara Hutchinson*, dated October 20, 2003.

The AAO agrees with the applicant in part, and with the OIC in part. First, it is appropriate to examine the treatment of cannabis resin in the law, and how the aforementioned legal opinion addressed the issue. Marijuana is defined at 21 U.S.C. § 802(16) as follows:

(16) The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every

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<sup>3</sup> Although the ground of inadmissibility is not stated in the OIC's decision, it appears that could be either section 212(a)(A)(i)(II) or 212(a)(2)(C), relating to Controlled Substance Traffickers the distinction of importance to this case being that while a section 212(h) waiver is available for possession of 30 grams or less of marijuana, no waiver is available for aliens inadmissible as controlled substance traffickers.

compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted there from), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

While the statute encompasses cannabis resin as the equivalent of marijuana, the legal opinion discusses whether equal amounts of cannabis resin and marijuana leaves by weight should be treated as equivalent for purposes of eligibility for a section 212(h) waiver. The opinion determined that previous interpretations which limited the applicability of section 212(h) to those situations involving marijuana leaves only, was too restrictive, and concluded that any alien convicted of simple possession of 30 grams or less of any cannabis product as defined in 21 U.S.C. § 802(16), including cannabis resin, would be eligible for a waiver. *See Genco Opinion 96-3, Section 212(h) Waiver for Controlled Substance Violations-Forms of Marijuana Other than Marijuana Leaves*, dated April 23, 1996. Therefore, the OIC's conclusion that possession of 21 grams of cannabis resin should be treated as the equivalent of more than 30 grams of marijuana leaves and thus rendered the applicant statutorily ineligible for a waiver was in error.

However, while the applicant remains statutorily eligible to be considered for a waiver of inadmissibility based upon that conviction, that does not mean that possession of an equivalent amount of cannabis resin cannot and should not be considered a more serious offense. As noted in the General Counsel opinion,

We note that despite their common origin, cannabis leaves and other cannabis products are distinguishable. Simple possession of some cannabis products is much more serious an offense than simple possession of cannabis leaves. The law recognizes this distinction. For sentencing, 30 grams of cannabis resin is equivalent to 150 grams of marijuana. 18 U.S.C. App. 4 § 2D1.1(Drug Equivalency Table, Schedule I, marijuana).

...

In adjudicating cases involving forms of the same drug that have different potencies, and that are treated differently for sentencing, it is appropriate for the Service to take note of these distinctions . . . . For purposes of sentencing, for example, 6 grams of cannabis resin is the equivalent of 30 grams of marijuana leaves. 18 U.S.C. App. 4 § 2D1.1 (Drug Equivalency Table, Schedule I, Marijuana) (providing a 1-to-5 ratio for equivalency).

...

*General Counsel Opinion 96-3 at pp 2-4.*

The opinion, while finding that the statute treats as equivalent the various types of marijuana products for purposes of establishing statutory eligibility for a waiver of inadmissibility, recommends that the agency:

Limit [its] discretion in section 212(h) cases so that a section 212(h) waiver will be denied in most cases in which the alien possessed an amount of marijuana, other than leaves, that is the equivalent of more than 30 grams of marijuana leaves under the Federal Sentencing Guidelines, 18 U.S.C. App. 4.

*Id.*<sup>4</sup>

In addition, and of particular relevance for the adjudication of the applicant's case, the opinion goes on to state,

In most cases, possession of more than 6 grams of cannabis resin would suggest that the alien was a trafficker, and not a mere user. At the very least, possession of larger quantities of a more potent form of marijuana, although less than 30 grams, would tend to cast doubt on whether the alien's act amounts to "simple possession," or in a section 241(a)(2)(B)(i) case, possession for one's own use. If a full examination of the facts of a given case bore out the conclusion that the alien was a trafficker, you could then find the alien subject to exclusion under INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C), as well as section 212(a)(2)(A)(i)(II).

The opinion, in addition to providing that a waiver could be denied in the exercise of discretion, noted specifically that a discretionary denial would be appropriate as a waiver under section 212(h) would provide no real benefit to an alien who was also potentially excludable under section 212(a)(2)(C). *Id. at p. 4*. It appears that it was on this basis that the OIC concluded that the applicant was otherwise inadmissible. Given the conversion equivalents of the cannabis resin to marijuana leaves under the sentencing guidelines, the OIC presumably concluded that the amount of cannabis resin possessed by the applicant indicated that he was engaged in trafficking.<sup>5</sup> The applicant, however, argues that because the conviction records reflect that he was convicted only of possession, and was "found not guilty of possession with intent" to distribute, the OIC's presumption was unreasonable, and thus he should be found to qualify for the waiver.

The AAO does not agree with either the findings of the OIC, or with the applicant's argument. The AAO does not find that the evidence in the record is sufficient to conclude that the applicant was a trafficker, and thus would not be eligible for a 212(h) waiver. Perhaps additional evidence in the form of a statement of the underlying charges or police reports would support such a finding, but the AAO declines to make such a finding on the basis of the limited information in the record. At the same time, however, the AAO does not accept the applicant's assertion that the record clearly supports a finding that the conviction for possession of cannabis resin was only for personal use. The conviction records offered by the applicant indicate that the conviction occurred as a result of a plea, and thus no conclusions can be drawn from the conviction records themselves regarding whether the applicant was a controlled substance trafficker.

Moreover, the fact that the applicant was convicted only of possession of a controlled substance does not preclude a finding that the nature of the conviction would subject the applicant to a denial in the exercise of discretion. The AAO finds that it is reasonable to conclude that possession of 21 grams of cannabis resin, which is equivalent to 105 grams of marijuana leaves (*see U.S. Sentencing Guidelines § 2D1.1(c)(15)*), is a dangerous crime. The AAO has previously discussed the reasons why the applicant has not satisfied the requirements of this section with respect to his assault and possession conviction, not even taking into account the comparison of the amount of cannabis resin to the amount of marijuana. Having conducted that comparison, the AAO finds it is even more apparent that the applicant has committed a very serious offense that is not overcome by countervailing equities.

<sup>4</sup> The opinion withdrew a previous Office of General Counsel opinion and related memoranda that, like the decision of the OIC, treated forms of marijuana other than leaves, as potentially equal to higher amounts of marijuana.

<sup>5</sup> Applying the 5 to 1 ratio previously described results in a finding that the applicant's possession of 21 grams of cannabis resin was the equivalent of 105 grams of marijuana leaves.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996), the Board held that establishing extreme hardship and eligibility for section 212(h)(1)(B) relief does not create an entitlement to that relief, and that extreme hardship, once established, is but one favorable discretionary factor to be considered. The Attorney General has the authority to consider all negative factors in deciding whether or not to grant a favorable exercise of discretion. See *Matter of Cervantes-Gonzalez*, *supra*, at 12. Considering the seriousness of the applicant's crime and his lengthy record of serious offenses, the AAO finds that the application should also be denied in the exercise of discretion.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met that burden.

**ORDER:** The appeal is dismissed.