

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



H2

FILE:



Office: BALTIMORE

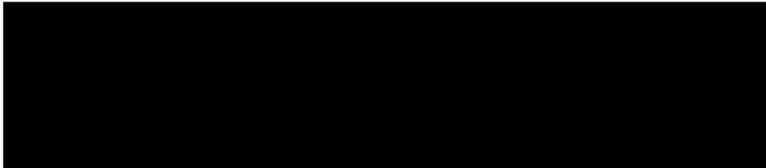
Date: JUN 07 2006

IN RE:



PETITION: 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 PETITIONER:



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, Chief  
Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua who was found to be inadmissible to the United States 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 crimes involving a controlled substance. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen daughter and permanent resident mother.

The district director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility and denied the application accordingly. *Decision of the District Director*, dated July 30, 2004.

On appeal, counsel for the applicant contends that the applicant is eligible for a waiver of inadmissibility, as the proceedings against him resulted in less than a criminal conviction, and the applicant's two crimes should be treated as a single offense rendering him eligible for an exception under section 212(a)(2)(A)(ii). *Brief from Counsel in Support of Appeal*, dated July 30, 2004.

The record contains a brief from counsel; statements from the applicant's mother and girlfriend, and; documentation of the applicant's immigration history and criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.

....

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 101(a) of the Act provides, in pertinent part:

As used in this Act-

(48)(A) The term "conviction" means, with respect to an alien, 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.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The record reflects that on January 7, 2000, the applicant pleaded guilty to the offenses of CDS Possession of Paraphernalia and CDS Possession – Marihuana before the District Court of Maryland for Montgomery County (“the Maryland court”). On both charges, the Maryland court entered a verdict of “guilty” and “probation before judgment.” The applicant was sentenced to one year of probation and a \$500 fine, and one year of probation and a \$1,000 fine respectively. Regarding the applicant’s fines, all but \$200 was suspended.

On appeal, counsel contends that the applicant is eligible for a waiver of inadmissibility, as the proceedings against him resulted in less than a criminal conviction. *Brief from Counsel in Support of Appeal*, dated July 30, 2004. Counsel asserts that, as the Maryland court indicated that its verdict was “probation before judgment,” the applicant was not in fact convicted of a crime in a court of law. *Id.* at 3. Counsel cites the decision of the Board of Immigration Appeals in *Matter of Winter* to stand for the proposition that the applicant’s guilty pleas do not constitute admissions of guilt or convictions. *Id.*; *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967). Counsel suggests that the judgments of the Maryland court were less than convictions, and thus they do not support inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act.

Counsel asserts that the applicant’s two crimes should be treated as a single offense, rendering him eligible for an exception under section 212(a)(2)(A)(ii). *Id.* at 2. Counsel contends that the offenses of possession of marijuana and possession of paraphernalia “cannot [be broken] . . . into two instances of ‘Moral Turpitude.’”

*Id.* at 3. Counsel states that “the possession of paraphernalia is unlawful *only because* of its relation to the Marihuana.” *Id.* (emphasis in original)(citation omitted).

Counsel further provides that the applicant was not in fact culpable for the conduct for which he was convicted, as the marijuana and paraphernalia that led to criminal proceedings against him belonged to another individual. *Id.* at 4.

Upon review, the applicant has not established that he is eligible to apply for a waiver of inadmissibility. The applicant pleaded guilty to the offenses of CDS Possession of Paraphernalia and CDS Possession – Marihuana. Though the Maryland court indicated that its decisions were, in part, “probation before judgment,” the record does not support that the applicant was not in fact convicted of each crime. As noted above, a “conviction” includes an instance “where adjudication of guilt has been withheld” when “the alien has entered a plea of guilty” and “the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.” Section 101(a)(48)(A) of the Act. Each of these conditions were met regarding both of the applicant’s possession charges. The applicant entered a guilty plea for each charge, and the Maryland court imposed sentences of probation and fines. Thus, whether the Maryland court indicated that its decisions were “probation before judgment” has no bearing on whether the applicant has been convicted for purposes of determining admissibility under the Act.

Counsel cites the decision of the Board of Immigration Appeals (“BIA”) in *Matter of Winter* to stand for the proposition that the applicant’s guilty pleas do not constitute admissions of guilt or convictions. *Id.*; *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967). However, the facts in *Matter of Winter* differ significantly from the present matter. In *Matter of Winter*, the BIA analyzed a Massachusetts criminal proceeding in which the Massachusetts court declined to impose a sentence and placed the case on file. *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967). The BIA determined that the applicant in question had not been convicted for purposes under the Act. *Id.* However, in the present matter, the applicant received sentences for each of the possession charges. Accordingly, the applicant has been convicted for purposes of section 212(a)(2)(A)(i)(II) of the Act. *See* section 101(a)(48)(A) of the Act.

Counsel asserts that the applicant’s two crimes should be treated as a single offense, rendering him eligible for an exception under section 212(a)(2)(A)(ii). *Brief from Counsel in Support of Appeal* at 2. Counsel contends that the offenses of possession of marijuana and possession of paraphernalia “cannot [be broken] . . . into two instances of ‘Moral Turpitude.’”<sup>1</sup> *Id.* at 3. However, the applicant has clearly been convicted of two separate crimes under two separate provisions of Maryland law. While counsel suggests that possession of paraphernalia necessarily requires possession of marijuana, one can be convicted of possession of paraphernalia in Maryland without the actual presence or possession of a controlled substance. *See* Md. Code Ann. § 5-101(g)(2001); Md. Code Ann. § 5-619(a), (c)(2001). Likewise, it is clear that one can be convicted of possession of marijuana without the presence or possession of associated paraphernalia.

---

<sup>1</sup> Counsel refers to crimes involving moral turpitude. However, the applicant has been found inadmissible for crimes relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act, not crimes involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

Counsel further suggests that the applicant's conviction for possession of paraphernalia is not a crime relating to a controlled substance, as paraphernalia is potentially merely a container that could have other uses. *Brief from Counsel in Support of Appeal* at 3. Yet, counsel states that "the possession of paraphernalia is unlawful only because of its relation to the Marijuana." *Id.* (emphasis in original)(citation omitted). Under Maryland law, an object is defined as paraphernalia precisely for its specific relationship to a controlled substance in the context of a particular instance. *See* Md. Code Ann. § 5-101(g)(2001); Md. Code Ann. § 5-619(a), (c)(2001). Consideration is given to alternate uses for an item under consideration as possible paraphernalia, and its designation as paraphernalia ultimately turns on its connection to a controlled substance. *See id.* Thus, the record reflects that the applicant's conviction for possession of paraphernalia involved the applicant's possession of an object or objects related to a controlled substance. The applicant has not alleged or established otherwise. Accordingly, the applicant's conviction for possession of paraphernalia constitutes a conviction for a crime "relating to a controlled substance" as contemplated by section 212(a)(2)(A)(i)(II) of the Act. *See e.g., Luu-Le v. I.N.S.*, 224 F.3d 911, 916 (9<sup>th</sup> Cir. 2000).

Counsel provides that the applicant was not in fact culpable for the conduct for which he was convicted, as the marijuana and paraphernalia that led to criminal proceedings against him belonged to his girlfriend. *Brief from Counsel in Support of Appeal* at 4. However, the applicant has not presented evidence to show that his convictions have been revisited or amended by a court with jurisdiction over the matters. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the applicant has not shown that his convictions have been reversed, expunged, or otherwise amended such that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Based on the foregoing, the record shows that the applicant has been convicted of two crimes relating to a controlled substance, and he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. As correctly found by the district director, there is no provision under the Act that allows for a waiver of inadmissibility when an applicant has been convicted of more than one crime relating to a controlled substance.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen daughter or permanent resident mother, or whether he merits a waiver as a matter 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 his burden.

**ORDER:** The appeal is dismissed.