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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: CHICAGO, IL Date:

**APR 24 2008**

IN RE:

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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Chicago, Illinois and the matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn. The appeal will be dismissed as the underlying application is moot.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having admitted to committing acts that constitute the essential elements of a violation of law relating to a controlled substance. The applicant claims a U.S. citizen spouse and three U.S. citizen children. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The district director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative and he denied the application accordingly. *Decision of the District Director*, dated July 22, 2002.

On appeal, counsel for the applicant asserts that the district director erred in finding that the applicant had failed to establish that his U.S. family would suffer extreme hardship if he is removed from the United States. *Form I-290B, Notice of Appeal to the Administrative Appeals Office*, dated August 12, 2002; *Counsel's Brief on Appeal*, dated September 11, 2002.

Section 212(a)(2)(A) of the Act states 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 violation (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 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

- (1)(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 AAO notes that the district director has found the applicant to be inadmissible to the United States based on his admission to having possessed marijuana on several occasions while in the United States. *Director's Decision on Application for Permanent Residence*, undated. While the AAO agrees that an applicant for adjustment may be found inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act for admitting to acts that constitute the essential elements of a violation of a controlled substance law, it does not find the record in the present case to offer sufficient evidence that the applicant has made such an admission.

Board of Immigration Appeals (BIA) and court decisions have established rules of procedure for determining whether an individual who has not been convicted of a crime, is, nevertheless, inadmissible for having admitted to acts that constitute the essential elements of that crime. *See Matter of P--*, I&N Dec. 33 (BIA 1941); *Matter of J--*, 2 I&N Dec. 285 (BIA 1945); *Memorandum of Solicitor General*, dated May 29, 1945; *Matter of K--*, 7 I&N Dec. 594 (BIA 1957); *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9<sup>th</sup> Cir. 2002). To have an admission qualify as having been validly obtained, the record must establish that certain procedural requirements have been met: the admitted conduct must constitute the essential elements of a crime in the jurisdiction in which it occurred; the applicant must have been provided with the definition and essential elements of the crime prior to his admission; the applicant must admit the conduct constituting the essential elements of the crime and that he committed the offense; and the applicant's admission must be voluntary. *Id.*

These requirements have been incorporated into the Foreign Affairs Manual (FAM) of the Department of State for use by consular officers overseas in determining inadmissibilities and are found in section 40.21(a), Note 5.1 of Volume 9 of the FAM. Although the language in section 40.21(a), Note 5.1 refers to crimes involving moral turpitude, the AAO notes that the procedural requirements listed below are equally applicable to instances where an individual is questioned with regard to a violation relating to controlled substance laws. *See Pazcoguin v. Radcliffe*, *supra*.

Section 40.21(a), Note 5.1 states, in pertinent part:

If it is necessary to question an alien for the purpose of determining whether the alien is ineligible to receive a visa as a person who has admitted the commission of the essential elements of a crime involving moral turpitude, the consular officer shall make the verbatim transcript of the proceedings under oath a part of the record. In eliciting admissions from visa applicants concerning the commission of criminal offenses, consular officers shall observe carefully the following rules of procedure:

- (1) The consular officer shall give the applicant a full explanation of the purpose of the questioning. The applicant shall then be placed under oath and the proceedings shall be recorded verbatim.

- (2) The crime, which the alien has admitted, must appear to constitute moral turpitude based on the statute and statements from the alien. It is not necessary for the alien to admit that the crime involves moral turpitude.
- (3) Before the actual questioning, the consular officer shall give the applicant an adequate definition of the crime, including all essential elements. The consular officer must explain the definition to the applicant in terms he or she understands, making certain it conforms to the law of the jurisdiction where the offense is alleged to have been committed.
- (4) The applicant must then admit all the factual elements which constituted the crime.
- (5) The applicant's admission of the crime must be explicit, unequivocal and unqualified.

In the present case, the applicant was arrested on August 24, 1992 and charged under section 550/4 of Title 720 (Chapter 56 ½, par. 704) of the Illinois Compiled Statutes (ILCS), 720 ILCS 550/4, which states that it is unlawful for any person knowingly to possess cannabis, i.e., marijuana. This charge was dismissed on July 1, 1998.

At the time of his adjustment interview on January 3, 2002, the applicant was questioned with regard to his drug use. *Form I-485, Application to Register Permanent Resident or Adjust Status*. A sworn statement was subsequently taken from the applicant on July 9, 2003, at which time he was asked whether he had ever used marijuana, how many times he had used or smoked marijuana, whether he had sold marijuana or used it only for his personal consumption, the form of marijuana he had consumed and its street value, whether he had used drugs other than marijuana, whether he had gotten high from the marijuana, and whether he currently used marijuana. *Sworn Statement*, dated July 9, 2003. Based on the applicant's statements at his adjustment interview and his answers to the questions asked of him on July 9, 2003, the district director found the applicant to have admitted to possession of marijuana and, therefore, to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II).

The record, however, does not reflect that, on the occasions the applicant was questioned about his drug use, the district director followed the procedures set forth in the FAM for determining whether an applicant has admitted to committing the essential elements of a crime. It is not clear from the notes made on the Form I-485 or the sworn statement in the record that the applicant was given a full explanation of the purpose of the questions he would be asked or that he was provided with a definition of what it means "knowingly to possess cannabis" under 720 ILCS 550/4 before he was questioned. Further, the applicant's sworn statement indicates that he admitted to using or smoking marijuana, not to knowingly possessing marijuana, the essential element for conviction under 720 ILCS 550/4. The AAO has not found the use of marijuana to be specifically prohibited under 720 ILCS 550.

The procedures articulated in BIA and U.S. court decisions, and set forth in the FAM are in place for important policy reasons. The applicant has not been convicted in any criminal proceeding of knowing possession of marijuana and to find him to have admitted to the essential elements of this crime requires the due process noted above. Based on the record before it, the AAO does not find the applicant's statements

regarding his use of marijuana to have been validly obtained or to establish that he has admitted to the essential elements of a controlled substance violation under Illinois state law. Accordingly, the applicant is not inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act based on his statements concerning his use of marijuana and, therefore, is not required to seek a waiver of inadmissibility.

**ORDER:** The district director's decision is withdrawn. The appeal is dismissed as the underlying application is moot.