

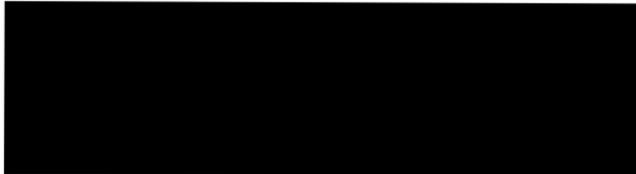
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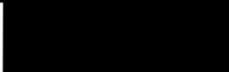
U.S. Citizenship
and Immigration
Services

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FILE:



Office: PHOENIX, AZ Date:

MAR 26 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Phoenix, Arizona 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 The district director's decision will be withdrawn.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 been convicted of a violation of a U.S. law relating to a controlled substance. The record indicates that the applicant is married to a U.S. citizen and had one U.S. citizen child at the time of filing. 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 December 22, 2004.

On appeal, the applicant asserts that the district director failed to recognize the medical, emotional, psychological and financial impacts that relocation would have on his spouse, [REDACTED]. The applicant further contends that the decision ignores the importance of family unity in U.S. immigration law and misreads the decision in *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994). *Form I-290B*, Notice of Appeal to the Administrative Appeals Office, dated January 20, 2005.

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 district director's decision notes that the applicant was arrested on October 26, 2001 and cited for possession of marijuana by the Carson City, Nevada Sheriff's Office after the arresting officer found marijuana in baggies in his pocket. The decision further indicates that on December 11, 2001, the applicant was convicted on the charge of "Drugs Which May Not Be Introduced For Inter-State Commerce."

In interpreting criminal statutes, the federal courts and the Board of Immigration Appeals (BIA) rely on a categorical approach, focusing solely on the elements and nature of the offense of conviction, rather than the particular facts relating to the applicant's crime. The AAO, therefore, finds the district director in the present case to have erred in relying on the information provided in the arrest report and criminal complaint filed against the applicant to conclude that his conviction under Chapter 8.04.125 of the Carson City Municipal Code (CCMC) renders him inadmissible under section 212(a)(2)(A) of the Act. Accordingly, it will consider whether the drug charge on which the applicant was convicted involves a violation of a U.S. law relating to a controlled substance, as defined in 21 U.S.C. § 802.

The applicant was convicted under Chapter 8.04.125 of the CCMC, which states in pertinent part:

1. Any person within the state who possesses, procures, obtains, processes, produces, drives, manufactures, sells, offers for sale, gives away or otherwise furnishes any drug which may not be lawfully introduced into interstate commerce under the Federal Food, Drug and Cosmetic Act is guilty of a misdemeanor

A review of the CCMC does not find it to define the term "drug" as it is used in Chapter 8.04.125. The AAO has, therefore, turned to the Federal Food, Drug and Cosmetic Act (FFDCA), 21 U.S.C., to determine whether a "drug which may not be lawfully introduced into interstate commerce under the Federal Food, Drug and Cosmetic Act," may also be a controlled substance, as it is defined in 21 U.S.C. § 802.

The term "drug" as it is used in the FFDCA is defined in section 321(g):

- (1) The term "drug" means
 - (A) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and
 - (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and
 - (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and
 - (D) articles intended for use as a component of any article specified in clause (A), (B), or (C). A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(4)(1)(B) and 343(r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title

is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) of this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.

Section 802(6) of the FFDCa, 21 U.S.C. § 802(6) defines a “controlled substance” as:

a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

That a reference to the term “drug” in the FFDCa may not be viewed as a reference to a “controlled substance,” as defined in 21 U.S.C. § 802(6), is established by the language of section 802(12) of the FFDCa:

The term “drug” has the meaning given that term by section 321(g)(1) of this title.

The AAO notes that the FFDCa offers a definition of the term “drug” that is separate and distinct from that it provides for “controlled substance” and that the term “drug,” as it is used in the FFDCa, is specifically not a “controlled substance,” unless so identified. Therefore, the AAO finds that the applicant’s conviction for a crime relating to “a drug which may not be lawfully introduced into interstate commerce under the Federal Food, Drug and Cosmetic Act” under Chapter 8.04.125 of the CCMC is not a conviction for having violated a U.S. law or regulation related to a controlled substance, as defined by 21 U.S.C. § 802. Accordingly, the record does not establish that the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act. The district director’s decision will be withdrawn and the appeal will be dismissed as the underlying application is moot.

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