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U.S. Citizenship  
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FILE:

Office: MANILA, PHILIPPINES

Date: JUN 17 2009

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the  
Immigration and Nationality Act (the 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Officer in Charge (OIC), Manila, Philippines, and certified for review to the Administrative Appeals Office (AAO). The decision of the OIC will be withdrawn, the applicant's waiver application declared moot, and the matter returned to the OIC for further processing of the immigrant visa application.

The applicant is a native and citizen of the Philippines 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 admitting to having committed acts which constitute the essential elements of a violation of a law relating to controlled substances. The applicant is the son of a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), so that he may reside in the United States with his mother and siblings.

The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his mother. The applicant submitted an Application for Immigrant Visa and Alien Registration (Form DS-230) on or about September 26, 2003 at the U.S. Embassy in Manila. The applicant subsequently filed an Application for Waiver of Grounds of Inadmissibility (Form I-601).

The OIC determined that since the applicant's intended destination is California, his case is within the jurisdiction of the Ninth Circuit. *Decision of OIC*, dated March 15, 2006. Because the medical and psychiatric examinations conducted in conjunction with the immigrant visa process revealed that the applicant admitted to using marijuana on four occasions in 2001, the OIC found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) and the Ninth Circuit's decision in *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9<sup>th</sup> Cir. 2002). *Id.* The OIC concluded that because the applicant admitted to having committed acts which constitute the essential elements of the crime of use of a controlled substance, and because he had admitted to multiple offenses, no waiver of inadmissibility is available. *Id.* The OIC rejected the waiver application accordingly. *Id.*

The OIC certified the decision for review to the AAO and gave the applicant notice that he could submit a brief or written statement to the AAO within 30 days.

In a brief submitted to the AAO, counsel contends that the OIC erred in rejecting the waiver application because the Advisory Opinions Division of the U.S. State Department had issued a binding opinion that the applicant was eligible to apply for a waiver of inadmissibility. *Brief in Support of INA §212(h) Waiver*, dated April 11, 2006, at 3-4. Counsel further asserts that the OIC improperly rejected the waiver application on "threshold eligibility" grounds as the determination that the applicant admitted the essential elements of criminal statute was erroneous. *Id.* at 5-7. Counsel observes that the essential elements of a law, foreign or domestic, that the applicant was alleged to have violated is neither specified nor applied by the OIC, and no factual determination was made regarding the nature and quantity of the controlled substance, or the basis for the applicant's personal knowledge that the substance he used was in fact a controlled substance. *Id.* at 8. Counsel also states that there is no distinction in U.S. federal law between "use" and "possession" of a controlled substance, and there is no indication that the applicant possessed more than 30 grams of marijuana in 2001. *Id.* at 9-10. Counsel asserts that the applicant, if he is inadmissible, is eligible for a waiver under 212(h) of the Act. *Id.* at 10.

Counsel summarizes the evidence of hardship the applicant's mother and contends that it demonstrates that she would suffer extreme hardship if the waiver application is denied. *Id.* at 10-14.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

The record reflects that the applicant submitted to medical examinations in conjunction with his application for an immigrant visa. During an examination on September 23, 2003, the applicant apparently admitted to [REDACTED], a psychiatrist, that he "smoked marijuana on four separate occasions from February, 2001 to October, 2001." He recalled that he smoked "the drug once a month in February, April, July and October. . . ." This information is repeated in the Medical Examination for Immigrant or Refugee Applicant (Form DS-2053).

The AAO notes that the OIC's determination that this case arises in the Ninth Circuit is erroneous. The controlling law in this matter is determined by the residence of the applicant, not by an intended residence. The applicant's residence is the Philippines. Neither the applicant nor the office that made the decision that is under review is located within the Ninth Circuit. The petitioner in *Pazcoguin*, also a citizen of the Philippines, became subject to the jurisdiction of the Ninth Circuit Court of Appeals only after he sought admission to the United States and was found to be excludable by an immigration court in Honolulu, Hawaii, which is within the territorial limits of that circuit. See 292 F.3d at 1212. Consequently, *Pazcoguin* is not controlling in this matter.

The decision in *Pazcoguin* was based on a petition for review from a decision by the BIA, but that decision has not been designated as a precedent decision and is not controlling in this matter. See 8 C.F.R. § 103.37(g).

In *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), the Board of Immigration Appeals (BIA) established a standard for determining the "validity" of an admission for purposes of inadmissibility under section 212(a)(2)(A)(i) of the Act (formerly section 212(a)(9)). The BIA held that a "valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms," a rule intended to insure "that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude." *Id.* at 597. It is further noted that the BIA held that the admission at issue in that case, which was made to a police officer and included in a sworn statement signed by the alien, could not be considered an admission of acts constituting the essential elements of a crime involving moral turpitude because the notification requirement had not been met. *Id.* at 596-97.

In the present case, it appears that the applicant admitted to use of a controlled substance only during an examination by [REDACTED], and there is no evidence showing that he was provided with an adequate definition of any crime, including all essential elements, in understandable terms by Dr.

█ or by anyone else at that or any other time. It is also noted that there is no other statement by the applicant in the record in which he admits to committing a crime or committing the essential elements of a crime relating to a controlled substance. The applicant has never been charged with or convicted of such a crime, and the OIC does not specify in his decision a statute or law for which the acts admitted to by the applicant would constitute a violation, other than citing to the Ninth Circuit's decision in *Pazcoquin*.

The AAO notes that in *Pazcoquin* the Ninth Circuit Court of Appeals considered a similar set of circumstances in determining that the petitioner's admission of prior drug use to a psychiatrist could be used in finding the petitioner inadmissible under section 212(a)(2)(A)(i)(II) of the Act despite the fact that the psychiatrist did not provide the petitioner with a definition of a crime to which he was admitting the essential elements. 292 F.3d at 1216. The court noted that the BIA had not addressed the issue at length in the unpublished decision on review, but had explained only that the "record reveals that the Service attempted to comply with requirements set forth in *Matter of K*, *supra*, during the inspection process and at the exclusion hearing. However, it was the applicant who was unwilling to proceed." *Id.* Nevertheless, the *Pazcoquin* court found that because the psychiatrist was not examining the petitioner for the purpose of obtaining an admission of a crime, as was the police officer who interrogated the respondent in *Matter of K-*, the admission to the psychiatrist could be the basis for a finding of inadmissibility under section of the Act even though the psychiatrist failed to provide the petitioner with a definition of a crime. 292 F.3d at 1217.

The AAO finds the Ninth Circuit's rationale for not strictly applying the standard set forth in *Matter of K-* unpersuasive, and will continue to apply the requirements articulated by the BIA in *Matter of K-* in cases arising outside that circuit. The psychiatrist in the present case, like the psychiatrist in *Pazcoquin*, is a physician that conducts examinations for the benefit of the U.S. government to determine if grounds exist that render aliens inadmissible to the United States. The AAO finds no support in the language of *Matter of K-* for exempting a certain category or categories of admissions obtained in the process of determining admissibility, or indeed, for exempting any admissions that are used to find an applicant inadmissible under section 212(a)(2)(A)(i)(ii) of the Act. The AAO cannot set aside BIA precedent as pertaining to admissions made by the applicant to █, the *Pazcoquin* decision and any non-precedent BIA decisions notwithstanding.

Therefore, the AAO finds that the evidence in the record is insufficient to support a finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and the OIC's decision cannot be affirmed. The Secretary of Homeland Security (and by delegation, the AAO) has final responsibility over guidance to consular officers concerning inadmissibility for visa applicants. *See Memorandum of Understanding Between Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002*, issued September 30, 2003, at ¶ 3. Because the applicant is not inadmissible under section 212(a)(2)(A)(i)(II), and the AAO is aware of no other basis of inadmissibility, the applicant's waiver application is unnecessary and must be dismissed as moot.

**ORDER:** The decision of the OIC is withdrawn, the applicant's waiver application is dismissed as moot, and the matter is returned to the OIC for further processing of the immigrant visa application.