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JUN 25 2009

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.

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 District Director, Tampa, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Japan 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 her U.S. citizen husband.

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 December 6, 2006.

On appeal, counsel for the applicant contends that the applicant's convictions were expunged under the laws of Japan and thus she does not have a conviction that may give rise to inadmissibility. *Brief from Counsel*, dated January 12, 2007.

The record contains a brief from counsel; a statement from the applicant; numerous letters attesting to the applicant's good character and hardship her husband will face if she departs the United States, 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 June 14, 1990, the applicant was convicted in Japan of possession of marijuana for which she received a sentence of three years of probation. On March 31, 1992, she was convicted in Japan of possession of marijuana and crystal methamphetamine for which she was sentenced to serve one year of incarceration.

Under Article 34-2 of the Japanese Penal Code, once 10 years have elapsed after a person has completed her sentence for a criminal conviction without receiving another sentence or graver penalty, that sentence loses its effect. As the applicant completed her prison sentence in or about August 1993, and she has not been prosecuted for further criminal activity, the sentence was effectively expunged in August 2003.

On appeal, counsel contends that, as the government of Japan expunged the applicant's criminal convictions, she no longer has convictions that render her inadmissible. *Brief from Counsel* at 3. Counsel cites the decision of the Board of Immigration Appeals (BIA) in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). *Id.* at 3-4. Counsel suggests that the BIA determined that an applicant must

have pled guilty or *nolo contendere*, or otherwise admitted guilt, in order for USCIS to hold that an expungement does not effectively end inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Id. at 4. Counsel bases this assertion on a quote from language in the decision of *Matter of Roldan* by stating that “[t]he Board held that a respondent ‘*who pleaded guilty* and was ordered by the judge to be punished for his offense, was convicted under the statutory definition [of conviction]’ regardless of whether the conviction was later expunged or adjudication withheld altogether.” Id. (quoting *Matter of Roldan* at 518) (emphasis in original).

Upon examination of *Matter of Roldan*, it is observed that counsel did not provide a complete quote of the BIA’s language. The full sentence partially quoted by counsel reads: “It cannot be disputed that this respondent, for whom judgment was withheld, but who pleaded guilty and was ordered by the judge to be punished for his offense, was convicted under the statutory definition.” *Matter of Roldan* at 518. Thus, the BIA did not make a general statement of law that a guilty plea is required, but merely noted that the applicant in the case at issue had pled guilty. Thus, counsel’s contention that a guilty or *nolo contendere* plea is required to render an expungement ineffective is not persuasive.

Counsel asserts that section 101(a)(48)(A) of the Act requires that an applicant must have pled guilty or *nolo contendere* in order for a conviction to serve as a basis for inadmissibility. However, in pertinent part, section 101(a)(48)(A) of the Act states that an applicant has a conviction for immigration purposes where she “has entered a plea of guilty or *nolo contendere*,” or “has admitted sufficient facts to warrant a finding of guilt,” or “a judge or jury has found [her] guilty.” Section 101(a)(48)(A)(i) of the Act. Accordingly, regardless of an applicant’s plea, where a judge has found her guilty, section 101(a)(48)(A)(i) of the Act is satisfied for the purpose of determining whether she has a conviction for immigration purposes.

In the present matter, there is ample evidence to show that a judge found the applicant guilty of possession of marijuana in 1990 and possession of marijuana and crystal methamphetamine in 1992. It is inconsequential whether the applicant pled guilty or *nolo contendere*, as the record of proceeding contains documentation to show that she was tried in a court of law and found guilty by a judge. See section 101(a)(48)(A)(i) of the Act. It is noted that the applicant received sentences for her convictions and she served a term of imprisonment for one year. Thus, section 101(a)(48)(A)(ii) of the Act is satisfied.

Based on the foregoing, the applicant’s convictions for drug offenses in 1990 and 1992 meet the definition of conviction found in section 101(a)(48)(A) of the Act. As the applicant has multiple convictions in Japan relating to controlled substances, she is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. She does not meet the waiver provision found in section 212(h) of the Act due to the fact that she has more than one conviction relating to a controlled substance. 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 she has established extreme hardship to her U.S. citizen husband, or whether she 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 her burden.

**ORDER:** The appeal is dismissed.