

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

H2

FILE:

Office: VERMONT SERVICE CENTER

Date: MAR 19 2009

IN RE:

Applicant:

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.

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 Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of the Netherlands and a Canadian national. He is the husband of a U.S. citizen.<sup>1</sup> He 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 a crime involving a controlled substance. The applicant sought a waiver of inadmissibility pursuant to 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 wife.

The district director concluded that waiver of inadmissibility was not available to the applicant because he had been convicted of a violation of a law related to a controlled substance, other than simple possession of 30 grams or less of marijuana. On appeal, counsel urged that the applicant's conviction is not a conviction of a crime involving a controlled substance.

The AAO will first address in this decision the director's finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Section 212(a)(2)(A)(i)(II) of the Act states that an alien who is convicted of a violation of a law related to a controlled substance is inadmissible. That section refers to 21 U.S.C. § 802 for a definition of "controlled substance." The statute at 21 U.S.C. § 802 subsection (6) defines "controlled substance" as anything on Schedules I through V of Part B. Part B states that marijuana is a Schedule I drug.

The record contains various documents, provided by the applicant, which reflect that the applicant was arrested, on August 5, 1999, in Burke County, North Dakota, for a violation of 12.1-31.1-03 North Dakota Criminal Codes, possession of drug paraphernalia. The drug paraphernalia was a pipe which tested positive for marijuana residue. On that same date, the applicant was convicted, pursuant to his plea, of that offense, charged as a Class A misdemeanor. The applicant was fined \$500 and sentenced to 365 days incarceration. The imposition of the incarceration portion of the sentence was suspended.

Counsel provided the text of North Dakota's more recent statute pertinent to possession of paraphernalia. In argument, counsel provided a quote of that statute with portions expunged and argued that one convicted of a Class A misdemeanor under that statute has not been convicted of a violation of a law involving a controlled substance.<sup>2</sup>

---

<sup>1</sup> The applicant also stated, on a G-325A Biographic Information form in the record, that his son is lawful permanent resident of the United States, but provided no evidence in support of that assertion. In any event, the applicant has not claimed that his son would suffer any hardship if the applicant were refused admission, and his son's immigration status is, therefore, irrelevant to this decision.

<sup>2</sup> In the decision of denial, the director included statutes pertinent to inadmissibility for conviction of an aggravated felony. On appeal, counsel argued, correctly, that the applicant's offense was not an aggravated felony. The AAO believes that the inclusion of law related to aggravated felonies was the result of a clerical error and declines to discuss it further.

The statute from which counsel quoted states that one who uses, or possesses with intent to use, drug paraphernalia for use with a Schedule I, II, or III drug, other than marijuana, is guilty of a Class C felony. One who uses drug paraphernalia, or possesses it with intent to use it, to manufacture, grow, ingest, etc. marijuana or some controlled substance not on Schedules I, II, or III is guilty of a Class A misdemeanor. A conviction under that statute, whether of a misdemeanor or a felony, necessarily involves a controlled substance. In the instant case, the controlled substance involved was marijuana.

This office notes, further, that the statute from which counsel quoted was passed into law on April 12, 2001, and is clearly not, therefore, the statute pursuant to which the applicant was convicted. However, the statute under which the applicant was convicted, Section 12.1-31.1-03 of the North Dakota Criminal Code, was similar in all relevant respects to the statute cited by counsel.

In any event, in *Minh Duc Luu-Le v. Immigration and Naturalization Service* 224 F.3d 911 (9<sup>th</sup> Cir. 2000), the Ninth Circuit Court of Appeals upheld a decision of the Board of Immigration Appeals (BIA) affirming an Immigration Judge's determination that a conviction for possession of drug paraphernalia is a conviction for violation of a law relating to a controlled substance.

The record demonstrates that the applicant was convicted of a violation of a law involving a controlled substance within the meaning of section 212(a)(2)(A)(i)(II) of the Act and is inadmissible. The remainder of this decision will address whether the applicant is eligible for a waiver under section 212(h) of the Act and that he has established extreme hardship to his qualifying relatives.

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

The Attorney General may, in his discretion, waive the application of . . . [212(a)(2)(A)(i)(II) of the Act] . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if – . . . in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

A section 212(h) waiver is generally not available to section 212(a)(2)(A)(i)(II) cases involving controlled substance crimes. Section 212(h) waiver applies to controlled substance cases only if they involve a single offense of possession of 30 grams or less of marijuana. No waiver is otherwise available for inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act.

The conviction that triggered the applicant's inadmissibility is not for simple possession of 30 grams or less of marijuana. It is for possession of drug paraphernalia. Therefore, as was noted in *Minh Duc Luu-Le, supra*, no waiver is available. Because the AAO has found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings pertinent to application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See*



Page 4

section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.