

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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

H2

FILE:

Office: ALBANY, NY Date:

DEC 23 2010

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h), 8 U.S.C. § 1182(h), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the field office director, Albany, New York. A subsequent appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted, but the prior decision of the AAO will be affirmed.

The applicant, [REDACTED] is a native and citizen of Israel who was found to be inadmissible to the United States pursuant to 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 relating to a controlled substance; and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), and section 212(i) of the Act, 8 U.S.C. § 1182(i).

In a decision dated September 27, 2007, the field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of marijuana in Israel, and also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose his prior arrests in applying for a nonimmigrant visa. The field office director did not discuss the amount of marijuana involved in the applicant's conviction, or state specifically that the amount was less than 30 grams and that the applicant was therefore eligible for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Instead, it appears that the field office director mistakenly considered the applicant for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which relates to inadmissibility for unlawful presence under section 212(a)(9)(B)(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i). After reviewing the evidence of hardship submitted by the applicant, the field office director concluded that the applicant had failed to demonstrate that denial of the waiver application would result in extreme hardship to the applicant's spouse. The field office director denied the waiver application accordingly.

On appeal, counsel argued that the field office director made factual and legal errors in evaluating the evidence of hardship submitted by the applicant. Counsel asserted that the field office director failed to consider some relevant evidence, did not give proper weight to certain hardship factors, made unfounded assumptions, and did not apply the appropriate legal standards to the case.

After conducting a *de novo* review of the matter, the AAO issued a decision dated July 13, 2010, in which we found that the field officer director had erred in considering the applicant for a waiver of inadmissibility, as the record shows that the applicant's conviction was based on his admission to possessing controlled substances equivalent to more than 30 grams of marijuana. Based on this finding, and on evidence suggesting that the applicant may also be inadmissible as a drug trafficker under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), we dismissed the applicant's appeal.

On the present motion, dated August 13, 2010, counsel contends that the AAO erred in finding the applicant inadmissible for trafficking and for possessing more than 30 grams of marijuana. Counsel asserts that the only evidence referenced in the AAO decision is a "police report" and "charging document," and that the AAO erred in concluding that the applicant admitted to all the facts of the charging document. Counsel submits an affidavit from the applicant to demonstrate that the applicant did not admit the allegations in the charging document. Counsel also argues that the basis

upon which the AAO dismissed the appeal was not never raised prior to the appeal, and that the AAO should have allowed the applicant the opportunity to respond before issuing its decision.

The regulation at 8 C.F.R. § 103.5(a) states, in pertinent part:

- (a) Motions to reopen or reconsider
 - (1) (i) . . . Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner. . . .
 - (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .
 - (3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.
 - (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

We find that the present motion meets the requirements found in 8 C.F.R. § 103.5(a). We thus reopen the matter to consider counsel's assertions and the new evidence submitted. However, after careful review of the documentation submitted, we determine that our prior decision was correct.

At issue in the present motion is the applicant's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and his eligibility for a waiver of inadmissibility under section 212(h) of the Act.

Section 212(a) of the Act states, in pertinent part:

- (2) 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:

The Attorney General may, in his discretion, waive the application of . . . subparagraph (A)(i)(II) . . . 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.

Addressing counsel’s second argument, that the applicant should have been given an opportunity to respond to the AAO’s grounds for dismissing his appeal, we note that the AAO conducts appellate review on a *de novo* basis; thus, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The field office director erred in considering the applicant for a waiver under section 212(a)(9)(B)(v), and it is unclear that the field office director ever calculated the amount of marijuana or its equivalent possessed by the applicant, determined that it was less than 30 grams, and concluded that he was eligible for a waiver under section 212(h) of the Act as a consequence.

Had the information supporting the AAO’s decision not been known to the applicant, we would have been required to advise the applicant of the information and to provide him with an opportunity to rebut the information, as specified in 8 C.F.R. § 103.2(a)(16). However, counsel has not disputed that the applicant was aware of the evidence in the record concerning his conviction, and it appears that the applicant submitted that evidence in the first instance. Regardless, the applicant has now had the opportunity to respond to the grounds upon which the AAO dismissed his appeal, and we have considered all of the evidence submitted on motion.

In the applicant’s affidavit sworn to on August 13, 2010, the applicant states that he was convicted of “simply possession of marijuana.” He asserts that at the time of his arrest, the passenger in his car (the co-defendant in his criminal case) possessed hashish, but that he, the applicant, did not know about it. He further asserts:

Apparently, my passenger put the hashish under the seat of the car. He also apparently told the police officers when we were arrested that I gave him the hashish. That is not true. . . .

When I pled guilty to possession of marijuana, I admitted only the claims in the charges against me that related to marijuana. I never admitted to possession of hashish or giving hashish to another person. . . .

We find that the applicant's statements are inconsistent with the record of conviction previously submitted to the AAO. Contrary to the assertions of counsel, the factual basis of the AAO's prior decision is information found in the court record of the applicant's plea agreement, which incorporates by reference the allegations of the indictment. As stated in our prior decision, the translation of the indictment, as presented in the Magistrate's Court in Jerusalem by the State of Israel Prosecutions Division, contains a recitation of the following facts:

1. On April 22, 2002, at around 22:00, on Rashbag St. in Jerusalem, Defendant 1 [the applicant] unlawfully held in his jacket pocket a dangerous narcotic, type hashish, with the net weight of 1.61 grams, further unlawfully held in his pants pocket 1 gram of a dangerous narcotic, cannabis type, with a net weight of 1.44 grams. [The applicant] further unlawfully held a dangerous narcotic, hashish type, with a net weight of 0.59 grams, which he threw out of the vehicle in which he was traveling.
2. In the same circumstances, [the applicant] unlawfully supplied [redacted] with a dangerous narcotic, type hashish, with the net weight of 5.72 grams. The narcotic was held by [redacted] under the chair by the driver in the vehicle of [the applicant.]

The translated record of the plea agreement executed on October 22, 2003, states that the applicant admitted the facts of the indictment. It indicates that after the statement of indictment was read to the applicant, he conceded that "[t]he facts in the statement of indictment are correct." In the verdict section of the plea agreement, the judge states the following with regards to the applicant:

On the foundation of the Defendant's response to the statement of indictment, which includes an admission of the facts in the statement of indictment, I convict him of an offense in accordance with Article 7(A) + the latter part of (C) of the Dangerous Narcotics Ordinance [New Version], 5733-2003.

It is well-established that the AAO cannot go behind the judicial record to determine the guilt or innocence of an alien for a criminal offense. [redacted], 17 I&N Dec. 518 (BIA 1980). Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). We find that the record of conviction clearly shows that the applicant admitted the facts contained in the indictment, one of which is that the applicant "unlawfully supplied" his co-defendant with hashish weighing 5.72 grams, and we find the applicant's present assertions to the contrary unpersuasive. Whether or not the original source of the information in the indictment was the applicant's co-defendant, the applicant's conviction was predicated on his admitting before the court the allegations

found in the indictment after these had been read to him. We therefore affirm our determination that the record of conviction shows that the applicant admitted, and was convicted on the basis of this admission, that he possessed marijuana and the equivalent of marijuana totaling in excess of 30 grams¹, a portion of which he supplied to his co-defendant prior to apprehension, and that the applicant is therefore inadmissible under section 212(a)(2)(A)(i)(II) of the Act and ineligible for a waiver of inadmissibility under section 212(h) of the Act.

As the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act and ineligible for a waiver of inadmissibility, it is unnecessary to determine whether the applicant is also inadmissible on other grounds. We noted in our prior decision that the record of conviction *may* provide “reason to believe” that the applicant is a drug trafficker inadmissible under section 212(a)(2)(C) of the Act. Neither counsel nor the applicant have disputed the legal rationale for a finding of inadmissibility under section 212(a)(2)(C) of the Act, but have instead asserted that the factual assertions of the indictment are false and that the applicant never supplied hashish to his co-defendant. As already stated, we do not find these assertions persuasive. However, we also wish to clarify that the AAO did not, and does not in this decision, make a definitive finding that the applicant is inadmissible under section 212(a)(2)(C) of the Act. We merely note that the record contains evidence that could support such a finding, depending in part on the meaning of the phrase “unlawfully supplied” as found in indictment. We conclude from the language of the indictment that the applicant may not have relinquished possession of the hashish he supplied to his co-defendant permanently, but rather gave it to his co-defendant for him to hold temporarily. However, such a reading only bolsters our finding in this case, that the applicant’s conviction was based on his admission to having possessed all of the controlled substances referenced in the indictment.

We affirm our prior decision that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance and is ineligible for a waiver of inadmissibility under section 212(h) because his inadmissibility does not relate to a single offense of simple possession of 30 grams or less of marijuana. In proceedings for a waiver of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The prior decision of the AAO is affirmed. The waiver application is denied.

¹ In our prior decision, we determined that, in accordance with the drug equivalency tables found in the U.S. sentencing guidelines, the applicant possessed marijuana or its equivalent in a total amount of 49.79 grams. We acknowledge a slight error in this calculation, as it appears the correct total is 48.35 grams.