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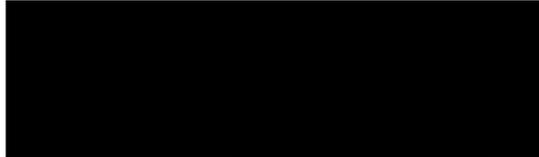
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



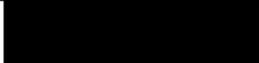
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FILE:



Office: BALTIMORE

Date: MAY 28 2010

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:

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 \$585. 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 application was denied by the District Director, Baltimore, and is now before the Administrative Appeals Office (AAO) on appeal.

The applicant is a native and citizen of Ghana 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 committed a controlled substance violation. The applicant seeks 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 mother.

The record reflects that on September 18, 2000, the applicant was convicted in the District Court of Maryland for Rockville/Montgomery County of "CDS: Poss Paraphernalia" [REDACTED]. On August 28, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an underlying Petition for Alien Relative (Form I-130). On July 6, 2007, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601).

The director concluded that the applicant's conviction for possession of drug paraphernalia renders him ineligible for a waiver of inadmissibility, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of Director*, dated September 27, 2007.

On appeal, counsel asserts that "the instant Maryland State Possession of Drug Paraphernalia conviction does not come within the purview of the Controlled Substances Act, 21 U.S.C. Section 802." *Notice of Appeal or Motion (Form I-290B)*, dated October 26, 2007.

Section 212(a)(2) of the Act states in pertinent part:

- (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 –
    - ....
    - (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 [Secretary of Homeland Security] 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 . . . .

- ....
- (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 . . . .

At the time of the applicant's conviction for *possession of drug paraphernalia*, Maryland Code Article 27, section 287A, provided, in pertinent parts:

(a) Definition. -- As used in this section, the term "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled dangerous substance in violation of this subheading.

...

(c) Use or possession with intent to use. -- It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance in violation of this subheading. . . .

On appeal, counsel asserts, "the instant Maryland State Possession of Drug Paraphernalia conviction does not come within the purview of the Controlled Substances Act, 21 U.S.C. Section 802." Counsel states that the Controlled Substances Act "does not specially enumerate 'drug paraphernalia' as one of the items the Act seeks to restrict." Counsel states, "[t]he instant possession of paraphernalia did not involve the act of adding a drug, substance or precursor." Counsel notes, "[t]he possession of paraphernalia is not one of the prohibited drugs or chemicals specifically enumerated in the Controlled Substances Act, nor in the Controlled Substance Import and Export Act, or the Maritime Drug Law Enforcement Act." *Notice of Appeal or Motion (Form I-290B)*, dated October 26, 2007.

In the recent precedent decision, *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the BIA addressed the issue of whether an alien can file a 212(h) waiver in a case involving a controlled substance conviction for possession or use of drug paraphernalia. As with the instant appeal, the respondent in *Martinez Espinoza* asserted that drug paraphernalia is not prohibited under Federal law. 25 I. & N. Dec. at 118, 122. The BIA noted that this argument is without merit since "section 212(a)(2)(A)(i)(II) of the Act does not require that a State offense be punishable under Federal law in order to support a charge of inadmissibility." *Id.* The BIA stated that although section 212(a)(2)(A)(i)(II) contains the phrase "as defined in section 102 of the Controlled Substances Act

(21 U.S.C. 802),” the phrase “modifies only its immediate antecedent (i.e., ‘controlled substance’), not the whole text of the section.” The BIA viewed the phrase “relating to a controlled substance” under section 212(a)(2)(A)(i)(II) of the Act and concluded that “a law prohibiting the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance necessarily pertains to a controlled substance.” *Id.* at 120. The BIA held that possession of “a pipe for smoking marijuana is a crime within the scope of [section 212(a)(2)(A)(i)(II)] because drug paraphernalia relates to the drug with which it is used.” 25 I&N Dec. at 120 (citation omitted).

In the instant case, the applicant was convicted of possession of drug paraphernalia in violation of Maryland law. Maryland Code Article 27, section 287A(c), provided that “[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled dangerous substance.” This offense relates to a controlled substance because it prohibits “the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance.” *Matter of Martinez Espinoza* 25 I. & N. Dec. at 120. Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a violation of a law relating to a controlled substance.

A section 212(h) the Act waiver of the bar to admission, resulting from the violation of section 212(a)(2)(A)(i)(II) of the Act, is only available for a single offense of simple possession of 30 grams or less of marijuana. In *Martinez Espinoza*, the BIA held that “an alien who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act may apply for a section 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either ‘a single offense of simple possession of 30 grams or less of marijuana’ or an act that ‘relate[d] to’ such an offense,” such as the possession or use of drug paraphernalia. 25 I&N Dec. at 125. The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Id.* at 124 (“it is hard to imagine any offense—apart from a few inchoate offenses—that could ‘relate to’ it categorically without actually *being* a simple marijuana possession offense.”). The BIA determined that it was the intent of Congress to have “a factual inquiry into whether an alien’s criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana that it should be treated with the same degree of forbearance under the immigration laws as the simple possession offense itself.” *Id.* at 124-25.

Pursuant to *Martinez Espinoza, supra*, we must look at the factual circumstances behind the applicant’s conviction to determine whether it relates to a simple possession of 30 grams or less of marijuana. However, the applicant has not provided court or police records to show the factual circumstances of his conviction. The applicant has only provided a computer generated disposition of the possession of paraphernalia charge that was filed against him. The applicant has not furnished the record of conviction, which may include the indictment, the judgment of conviction, jury instructions, signed guilty plea, or the transcript from the plea proceedings. Nor has the applicant furnished the police report, warrant of arrest, or any relevant police records. Therefore, the AAO does not have a factual basis to determine whether the applicant is eligible for a section 212(h) waiver.

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