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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

Date: DEC 01 2011 Office: PHILADELPHIA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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:

SELF-REPRESENTED

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,

A handwritten signature in cursive script that reads "Michael Shumway".

f. Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica 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. He seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen wife and children.

The field office director denied the Form I-601 application for a waiver, concluding that the applicant is statutorily ineligible for a waiver of inadmissibility. *Decision of the Field Office Director*, dated July 21, 2009.

On appeal, the applicant's wife asserts that she will suffer significant hardship should the present waiver application be denied. *Statement from the Applicant's Wife*, dated August 4, 2009.

The record contains, but is not limited to: statements from the applicant's wife, son, and others in support of the appeal; documentation relating to the applicant's and his wife's employment and financial circumstances; and documentation regarding the applicant's criminal history. 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 —

...

(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.

The record shows that the applicant has been charged with multiple offenses relating to possession and sale of a controlled substance. The applicant was arrested in New York on or about November 1, 1989 and charged with Criminal Sale of a Controlled Substance 3<sup>rd</sup> Degree and Criminal Possession of a Controlled Substance 3<sup>rd</sup> Degree. *Court of the County of Suffolk, State of New York*

*Indictment No. 19-90.* While the applicant has not provided complete records of his criminal history, the record shows that he pled guilty to Attempted Criminal Possession of a Controlled Substance 3<sup>rd</sup> Degree, ostensibly as part of a plea agreement in satisfaction of the aforementioned charges. *Sentence and Commitment*, dated July 2, 1990. The record does not indicate the type or amount of controlled substance associated with the applicant's conviction, and the applicant has not disclosed this information. The applicant has not disputed the finding that his conviction renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, or demonstrated that he is eligible for the limited waiver provided in section 212(h) of the Act. The burden of proving admissibility, or eligibility for a waiver of inadmissibility, is on the applicant. Therefore, for purposes of this appeal, we presume that the applicant's conviction relates to a controlled substance listed in section 102 of the Controlled Substances Act (21 U.S.C. 802).

At the time of the applicant's conviction, possession of a controlled substance 3<sup>rd</sup> degree was defined by New York Penal Law § 220.16, as follows:

A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses:

1. a narcotic drug with intent to sell it; or
2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide, with intent to sell it and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or
3. one gram or more of a stimulant with intent to sell it; or
4. one milligram or more of lysergic acid diethylamide with intent to sell it; or
5. twenty-five milligrams or more of a hallucinogen with intent to sell it; or
6. one gram or more of a hallucinogenic substance with intent to sell it; or
7. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-eighth ounce or more containing methamphetamine, its salts, isomers or salts of isomers with intent to sell it; or
8. five grams or more of a stimulant; or
9. five milligrams or more of lysergic acid diethylamide; or
10. one hundred twenty-five milligrams of a hallucinogen; or
11. five grams or more of a hallucinogenic substance; or

12. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing a narcotic drug.

13. one thousand two hundred fifty milligrams or more of phencyclidine.

Criminal possession of a controlled substance in the third degree is a class B felony.

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 . . . .

Thus, the applicant may be considered for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act if he was only convicted of a single offense relating to simple possession of 30 grams or less of marijuana. As stated above, the record of the applicant's conviction under New York Penal Law § 220.16 does not indicate the controlled substance for which he was charged, and the applicant has not presented other evidence or explanation to determine the substance. At the time of the applicant's conviction, simple possession of marijuana was proscribed by a separate section of law, New York Penal Law § 221.05, which supports that the applicant's conviction under New York Penal Law § 220.16 related to acts other than simple possession of marijuana.

The field office director found that the applicant's conviction involved an intent to sell a controlled substance. Numerous offenses under New York Penal Law § 220.16 have "intent to sell" as an element of the crime. New York Penal Law §§ 220.16(1) – (7). However, other offenses in the section relate to mere possession of specific or categories of controlled substances. The record of the applicant's conviction does not state the subsection under which he was convicted, so it does not clearly show that he was convicted with an intent to sell a controlled substance. However, marijuana is not among the substances identified in the sections that proscribe mere possession. Specifically, New York Penal Law §§ 220.16(8) and (10)–(12) reference substances that are a "stimulant", "hallucinogen", "hallucinogenic substance", or "narcotic drug". New York Penal Law § 220.00 defines these substances as follows:

7. "Narcotic drug" means any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone.

...

9. "Hallucinogen" means any controlled substance listed in schedule I(d) (5), (18), (19), (20), (21) and (22).

10. "Hallucinogenic substance" means any controlled substance listed in schedule I(d) other than concentrated cannabis, lysergic acid diethylamide, or an hallucinogen.

11. "Stimulant" means any controlled substance listed in schedule I(f), II(d).

In examining the identified schedules under New York Public Health Law § 3306 at the time of the applicant's conviction, marijuana<sup>1</sup> is listed at Schedule I(d)(13). New York Penal Law § 220.16(11) proscribes possession of five grams or more of a hallucinogenic substance, which includes substances listed in schedule I(d), but specifically excludes "concentrated cannabis". At the time of the applicant's conviction, New York Penal Law § 220.00(6) stated that "'Marihuana' means 'marihuana' or 'concentrated cannabis' as those terms are defined in section thirty-three hundred two of the public health law." Accordingly, marijuana was specifically excluded from the definition of hallucinogenic substance in New York Penal Law § 220.00. Therefore, it appears that New York Penal Law § 220.16 does not address possession of marijuana, further bolstering the finding that applicant was convicted for an offense relating to a different controlled substance.

Based on the foregoing, the applicant has not shown that he was convicted for a single offense relating to simple possession of 30 grams or less of marijuana. Accordingly, he is statutorily ineligible for consideration for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

The AAO acknowledges that the applicant's wife will endure hardship as a result of denial of the present waiver application. However,, United States Citizenship and Immigration Services (USCIS) lacks discretion or a statutory basis to approve the applicant's Form I-601 application.

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) 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.

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<sup>1</sup> Marijuana is identified with the alternate spelling "Marihuana" in New York Public Health Law § 3306.