



U.S. Citizenship
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[REDACTED]

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FILE: [REDACTED] Office: HOUSTON, TX

Date: JUN 20 2011

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:

[REDACTED]

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

f. Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Houston, Texas who subsequently affirmed his denial in response to a motion filed by the applicant. The applicant has appealed this decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Pakistan 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)(I), for having been convicted of a controlled substance violation. The applicant is the spouse and father of U.S. citizens. He 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.

The Field Office Director found that the applicant was not eligible for waiver consideration and denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. *Decision of the Field Office Director*, dated May 11, 2010. In response to the applicant's motion, the Field Office Director concluded that the additional evidence submitted by the applicant did not establish that he had incorrectly applied law or policy, and he affirmed his prior decision. *Decision of the Field Office Director*, dated September 14, 2010.

On appeal, counsel states that the Field Office Director erred in determining that the applicant is not eligible for waiver consideration under section 212(h) of the Act. *Form I-290B, Notice of Appeal or Motion*, dated October 13, 2010.

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; statements from the applicant and his spouse; medical documentation relating to the applicant's spouse and daughter; a psychological evaluation of the applicant's spouse; country conditions information on Pakistan; documentation relating to the applicant's and his spouse's financial obligations; and court records concerning the applicant's U.S. convictions. The entire record was reviewed and all relevant evidence was considered in reaching a decision on the appeal.

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

The record reflects that the applicant was charged with Unlawfully Carrying a Weapon, Texas Penal Code § 46.02, on April 10, 1993; with two counts of Aggravated Robbery, Serious Bodily Injury, Texas Penal Code § 29.03, on April 19 and April 29, 1993; and Aggravated Assault with a Deadly Weapon, Texas Penal Code § 22.02, on May 3, 1993. While released on bail, the applicant fled the United States for Germany. On October 18, 1995, the Monchengladbach (Germany) police arrested the applicant on a cocaine possession charge and he was convicted of this offense on July 19, 1996. On June 10, 1997, the applicant was paroled back into the United States after having been extradited from Germany to stand trial on the 1993 charges. On June 13, 1997, the applicant was convicted of Unlawfully Carrying a Weapon and sentenced to 45 days in jail. On August 3, 1998, he was convicted on both counts of Aggravated Robbery and was sentenced to 15 years on each count, with the sentences to be served concurrently. The charge of Aggravated Assault with a Deadly Weapon was dismissed.

On appeal, counsel contends that the applicant was not convicted of cocaine possession in Germany, as evidenced by the two German Certificates of Good Conduct and a BCI International Criminal Background Report submitted for the record. He asserts that the only reason the applicant was held by German authorities was for extradition to the United States. Counsel further asserts that the Field Office Director's finding regarding the applicant's conviction for cocaine possession is contradicted by the applicant's immigration record over the past 20 years, which makes no mention of a controlled substance conviction. Counsel states that United States Citizenship and Immigration Services (USCIS) may not deny the applicant an immigration benefit based on an alleged ground that it has not previously identified, has never proved and which the applicant has not been allowed to rebut. He specifically notes that U.S. Immigration & Customs Enforcement (ICE) never charged the applicant with a drug offense or mentioned any cocaine conviction in removal proceedings and cites to *Matter of Juan Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997) and sections 239(a)(1)(A) and 242(b) of the Act. Counsel also asserts that USCIS has not provided clear, unequivocal and convincing proof of the applicant's conviction and, therefore, has not met its burden of proof in this matter, citing to *Woodby v. INS*, 385 U.S. 276 (1966).

Counsel further contends that the Field Office Director based his finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act on an admission made by the applicant in an August 23, 2006 letter to the Pakistani consulate and that the statement relied on by the Field Office Director was the result of an error made by the individual who drafted the letter for the applicant, whose English-language writing skills were limited. Counsel states that the applicant has subsequently corrected the error, sending a rewritten letter to the Pakistani Consular and ICE. Counsel also asserts that even if the applicant had made such a statement it would be insufficient to establish his inadmissibility as it does not qualify as an admission of a crime or the essential elements of a crime under section 212(a)(2)(A)(i)(II) of the Act.¹

We do not find counsel's assertions persuasive. We turn first to counsel's claim that that the Field Office Director's inadmissibility determination relied on an admission made by the applicant in an August 23, 2006 letter to [REDACTED]

The AAO observes that the record contains a copy of an August 23, 2006 letter the applicant wrote to the Pakistani Consulate seeking a travel document, which includes the following statement:

I had fled to Germany from [the] United States to flee prosecution and there in Germany unfortunately, I was convicted for International Drug Trafficking in 1995. (Two years sentence served accordingly in German Prison System).

The record does not, however, reflect that the Field Office Director relied on the applicant's letter as the basis for his determination of the applicant's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Instead, it indicates that a fingerprint check of Federal Bureau of Investigation data bases identified an Interpol record that shows the applicant was convicted of possession of cocaine on July 19, 1996 in Germany. While the Field Office Director did note the applicant's August 23, 2006 letter in his discussion of the applicant's cocaine conviction, he referenced it as confirmation of the documentary evidence in the record.

Counsel also asserts that USCIS must view the applicant's statement in his August 23, 2006 as an admission subject to the rules of procedure established by the Board of Immigration Appeals (BIA) and court decisions for determining whether an individual who has not been convicted of a crime, is, nevertheless, inadmissible for having admitted to a crime or acts that constitute the essential elements of that crime. *See Matter of P--*, I&N Dec. 33 (BIA 1941); *Matter of J--*, 2 I&N Dec. 285 (BIA 1945); *Memorandum of Solicitor General*, dated May 29, 1945; *Matter of K--*, 7 I&N Dec. 594 (BIA 1957); *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002). These rules, however, are not applicable to the present case as the applicant's statement is not an admission to a drug offense in the absence of a conviction, but an admission to having been convicted of a drug offense. We note that in immigration proceedings, any evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof. *See* 8 C.F.R. § 1003.41(d). Accordingly, we find the Field Office Director to have properly considered the applicant's August 23, 2006 statement regarding his conviction for possession of cocaine. We also observe that the evidence of record contains two additional letters written by the applicant to Pakistani authorities, dated October 10, 2004 and January 7, 2005, which include references to his 1996 controlled substance conviction.

¹ The AAO notes that counsel also asserts that the Field Office Director stated that the applicant was not entitled to relief because he is subject to a final order of removal. A review of the May 11 and September 14, 2010 decisions issued by the Field Office Director does not find him to have made this statement.

The applicant's January 7, 2005 letter states that he was convicted of "drug traffic[ing] of 150 grams of cocaine in Germany."

The AAO acknowledges that the Certificates of Good Conduct issued by the German Federal Office of Justice under the name of [REDACTED] indicate that the German Federal Central Criminal Register reports no criminal records for the applicant. However, these certificates do not establish that the applicant was not convicted for possession of cocaine in 1996. We note that under German law, not all of the information in the Federal Central Criminal Register is made available in response to a request for a certificate of conduct. Pursuant to Articles 33 and 34 of the Federal Central Criminal Register Act (BZRG), convictions are no longer included in certificates of conduct after the expiration of certain periods of time: three years after convictions punished with a suspended sentence of less than one year and five years for most other convictions, with the exception of convictions for sexual offenses punished by more than one year of imprisonment, which require the elapse of ten years. The period starts as of the date of conviction and is extended by the length of the prison sentence.

In the present case, the record establishes that the applicant was convicted of cocaine possession on July 19, 1996 and sentenced to two years and 6 months in prison. Relying on the information provided by the German Federal Central Criminal Register Act, we conclude that the applicant's cocaine conviction would no longer have been reported in a Certificate of Good Conduct after the passage of seven and one-half years, i.e., five years plus the length of his sentence. In that the applicant's conviction preceded his 2010 requests for Certificates of Good Conduct by approximately 14 years, the certificates he has submitted do not prove that he was not convicted for cocaine possession in 1996.

The AAO also notes counsel's assertions that the Field Office Director's finding is contradicted by the applicant's immigration record of 20 years, which makes no mention of a controlled substance conviction and that USCIS may not deny the applicant an immigration benefit on an alleged ground for which it has not previously charged him, for which it has offered no proof, and for which it has failed to provide an opportunity for rebuttal. Counsel, however, has conflated removal and inadmissibility under the Act, relying on statute and precedent decisions that relate to removal proceedings, rather than inadmissibility determinations. The absence of any reference to the applicant's controlled substance conviction in the Notice of Intent to Issue a Final Administrative Order of Removal, Final Administrative Order of Removal, Records of Inadmissibility/Deportability, issued to him during the removal process does not, therefore, predetermine the grounds on which he may be found inadmissible to the United States. The AAO also notes that while the burden of proof in removal proceedings is on the government, this burden is on the applicant in waiver proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. Accordingly, in the present matter, it is the applicant's burden to prove that he is admissible to the United States, rather than for USCIS to prove that he is not.

Having considered the evidence before us, the AAO finds the record to establish that the applicant has been convicted of a controlled substance violation involving cocaine and that he is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act. As the applicant's controlled substance violation is other than simple possession of less than 30 grams of marijuana, no waiver is available to him under section 212(h) of the Act.

The AAO notes, however, that even if the applicant were eligible for waiver consideration under

section 212(h) of the Act, his 1998 convictions for Aggravated Robbery, Serious Bodily Injury would preclude a favorable exercise of the Attorney General's (now Secretary of Homeland Security's) discretion in his case. We have reached this conclusion even though the serious health concerns of the applicant's U.S. citizen spouse and daughter would likely satisfy the "exceptional and extremely unusual" hardship standard of the regulation at 8 C.F.R. § 212.7(d), which is imposed on individuals who, like the applicant, have been convicted of violent or dangerous crimes. However, this heightened level of hardship would not override the applicant's convictions for a robbery in which he twice shot and wounded one of his victims. The gravity of the applicant's offense would preclude a favorable exercise of discretion in his case.

In that the applicant is statutorily inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act and no waiver is available, he is not eligible for consideration under section 212(h) of the Act. Accordingly, the appeal will be dismissed.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

ORDER: The appeal is dismissed.