

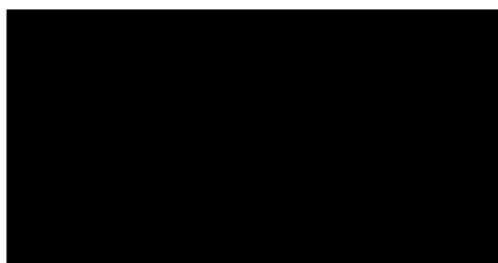
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



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



H<sub>2</sub>

Date: **AUG 06 2012**

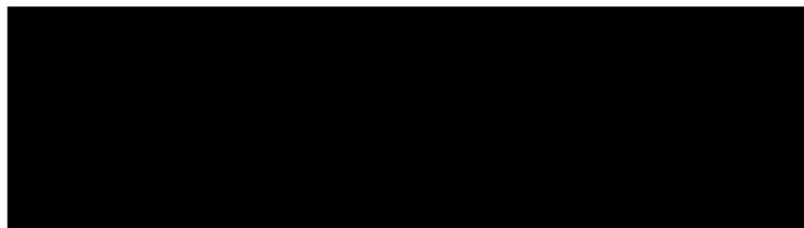
Office: NEW YORK CITY

FILE:

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.

Thank you,

*fr* Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, New York City District Office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Canada 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. The applicant seeks a waiver of inadmissibility. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that the applicant is statutorily ineligible for a waiver of inadmissibility pursuant to section 212(h) of the Act.

On appeal, counsel points out the reasons why the applicant's conviction on February 14, 1997 for possession of a narcotic pursuant to section 3(1) of the Narcotic Control Act under Canadian law qualifies for the section 212(h) waiver. Counsel claims that the submitted evidence of an affidavit from a former federal prosecutor in Canada stated that the amount of marijuana that the applicant pleaded guilty to possessing "was probably less than 30 grams." Additionally, counsel contends that the U.S. Customs and Border Protection had previously granted the applicant a waiver for the controlled substance violation and admitted the applicant into the United States on numerous occasions. Counsel also argues that as the letter from the Ontario Ministry of the Attorney General letter dated March 25, 2010, stated that records pertaining to the applicant's offense are no longer available due to the seven-year retention period for summary convictions, the applicant could use the former prosecutor's affidavit to meet his burden of proving, by a preponderance of the evidence, statutory eligibility for the section 212(h) waiver. Counsel also argues that the instant case is similar to a prior decision in which the AAO concluded that, on the basis of the applicant's detailed explanation of the quantity of cannabis resin at issue in his conviction, the lack of additional records, as well as the statement from a law firm which was retained by the Canadian Department of Justice as Drug Prosecutor, the applicant met his burden of proof as to establishing his eligibility for the section 212(h) waiver.

Citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989), counsel asserts that the preponderance of the evidence standard requires that the evidence demonstrate that the applicant's claim is probably true, wherein the determination of truth is based on the factual circumstances of the particular case. Counsel further states that in evaluating the evidence, *Matter of E-M-* stated that the truth is to be determined by the quantity and quality of evidence. *Id.* Thus, counsel contends that in view of the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence; and that the documents, which have been provided, are to be accorded substantial evidentiary weight, and evaluated for relevance, probative value, and credibility, both individually and in the context of the totality of the evidence, so as to determine whether the fact to be proven is probably true. Counsel argues that the applicant submits relevant probative and credible evidence which should lead the director to conclude that the applicant's claim as to possessing less than 30 grams of marijuana is "probably true" or "more likely than not," and thereby has satisfied the standard of proof. Counsel cites *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987), as defining "more likely than not" as a greater than 50 percent probability of something occurring.

In sum, counsel argues that, based on the factors of the unavailability of evidence pertaining to the applicant's conviction, the applicant's detailed affidavit regarding his conviction, the expert witness affidavit of the former prosecutor, there is a preponderance of the evidence that the applicant, more likely than not, possessed less than 30 grams of marihuana and is consequently statutorily eligible for a section 212(h) waiver.

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.

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)(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.

The letters from the Clerk of the Court with the Court Records Department of the Ontario Ministry of the Attorney General dated March 11, 2010 and the Client Services Officer of the Toronto Region Court Services Division of the Ontario Ministry of the Attorney General dated March 25, 2010 established that, on February 14, 1997, the applicant was summarily convicted of possession of a narcotic (cannabis Marihuana) in violation of section 3(1) of the Narcotic Control Act, and ordered to a fine of \$200.

Section 3(1) of the Narcotic Control Act stated that: "Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession."

This conviction renders the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act. However, the precise amount of marijuana that the applicant was convicted of possessing cannot be determined from the criminal statute under which he was convicted. The waiver under section 212(h) of the Act relates to a single offense related to simple possession of 30 grams or less of marijuana. In *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988), the Board held that when the record of conviction is absent or silent, a respondent could present other credible evidence of the amount of marijuana involved. 19 I&N Dec. at 718; *see also Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124-25 (BIA 2009) (holding that a purely categorical inquiry concerning the nature and amount of the controlled substance is clearly insufficient; Congress intended to permit a broader factual inquiry in order to resolve these issues.) The Board stated that police reports are considered probative evidence of the circumstances surrounding an arrest and conviction for possession of marijuana. 19 I&N Dec. at 722.

In the instant case, the applicant stated in the affidavit dated June 4, 2010 that on October 27, 1996 the applicant was arrested for and convicted of possession of one gram of marijuana. The applicant also stated that he had provided four affidavits in conjunction with a waiver for a visitor visa in which the applicant, in his original affidavit, mistakenly transposed the words "cocaine" and "marijuana" and duplicated that error in his later affidavits. In letters dated February 25, 2000, October 20, 2000, and October 4, 2001 the applicant had stated that he pleaded guilty to possession of cocaine. The applicant stated in these letters that he was charged with possession of one gram of cocaine and one gram of marijuana and was fined \$200 for possession of cocaine, and his marijuana charge was withdrawn. However, as the Clerk of the Court's letter dated March 11, 2010 stated that the applicant was charged with two counts of possession of cannabis marijuana, it is clear from the evidence in the record that the applicant was not charged with or convicted of possession of cocaine in 1996 or 1997.

Counsel argues that in the absence of the applicant's conviction record, the applicant could use the former prosecutor's affidavit to meet his burden of proving that his offense involved 30 grams or less of marijuana. As previously discussed, if the conviction record is silent concerning the amount of marijuana involved, or is unavailable, the alien may present any competent evidence to prove that the amount did not exceed 30 grams. *See Matter of Grijalva, supra.* [REDACTED] stated in the affidavit dated May 28, 2010, that he had, in the capacity as a prosecutor, represented the Department of Justice in Canada in drug cases from February 1995 until January 1999. [REDACTED] stated that, in February 1997, possession under section 3(1) of the Narcotic Control Act was a "crown election offense" that criminalized possession of personal use of quantities of marijuana. [REDACTED] further stated that section 3(2) of the Narcotic Control Act provided for a summary conviction for a first offense: a fine not exceeding one thousand dollars or imprisonment for a term not exceeding six months or both. [REDACTED] indicated that when a prosecutor proceeded by summary judgment conviction, as was the applicant's case, the prosecutor had determined that the facts underlying the criminal offense were less serious. [REDACTED] asserted that in 1997 the range of likely sentencing dispositions facing a first offender who pleaded guilty to simple possession of less than 30 grams of marijuana ranged from an absolute discharge under section 735 of the Criminal Code to a fine. [REDACTED] contended that it was his belief that, in view of the sentencing tariff for possession of less than 30 grams of marijuana and the practices of the Department of Justice at the Ontario Court of Justice in Toronto in February 1997, marijuana sentencing law in Canada at the

time of the applicant's guilty plea, the crown's summary election, and the fine was at the low end of the range, the amount of marihuana the applicant was convicted of possessing was for personal use and less than 30 grams. [REDACTED] curriculum vitae indicates that [REDACTED] is the co-author of Sentencing Drug Offenders (Canada Law Book, 2004), and was a guest instructor in training programs for police officers in Canada.

Counsel cites a prior AAO decision in which the AAO found that the applicant met his burden of providing that the applicant's drug conviction in 1974 involved "simple possession of 30 grams or less." In that case, AAO concluded that the applicant's submission of evidence of a letter from a law firm retained by the Canadian Department of Justice as Drug Prosecutor, the applicant's detailed explanation of the quantity of cannabis resin at issue in his conviction, and the lack of additional records showed by a preponderance of the evidence that the applicant possessed three grams of cannabis resin, which was equivalent to 15 grams or less of marijuana, and thereby qualified for the limited section 212(h) waiver.

As to the applicant's case, we find that the applicant has established, in accordance with the requirements in 8 C.F.R. § 103.2(b)(2), that the documents comprising his record of conviction are unavailable. The letter from the clerk of the court established that the applicant was convicted of possession of cannabis marihuana, and former prosecutor [REDACTED] stated in his letter that the applicant's conviction would have been for possession for personal use less than 30 grams of marijuana. We therefore conclude that the applicant has demonstrated by a preponderance of the evidence that his conviction involved less than 30 grams of marijuana and that he is eligible for the limited waiver under section 212(h) of the Act.

The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated . . .

Section 212(h)(1)(A) of the Act provides that the Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa,

admission, or adjustment of status. Since the activities rendering the applicant inadmissible occurred more than 15 years ago, the applicant's inadmissibility can be waived under section 212(h)(1)(A)(i) of the Act. An application for admission is a "continuing" application, and admissibility is adjudicated on the basis of the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Section 212(h)(1)(A)(ii) and (iii) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States; and that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of the pardon by the National Parole Board of Canada on September 19, 2001 for the controlled substance conviction, the affidavit from the applicant's spouse commending the applicant's character, and the lack of the applicant's having any other criminal convictions. The AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once eligibility for a waiver is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion in favor of the waiver. Furthermore, the Board stated that:

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

*Id.* at 301.

The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factor in the present case is the criminal conviction of use of a controlled substance. The favorable factors include the passage of 15 years since the applicant's crime, the pardon of the conviction by the National Parole Board of Canada, and hardship to the applicant's spouse. The AAO does not condone the crime committed by the applicant, but when taken together, we find the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has now met that burden. Accordingly, the appeal will be sustained and the waiver application will be approved.

**ORDER:** The appeal is sustained.