



U.S. Citizenship  
and Immigration  
Services



tlz

Date: **DEC 14 2012**

Office: BANGKOK, THAILAND

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Bangkok, Thailand, and a subsequent appeal was rejected as untimely by the Administrative Appeals Office (AAO). The applicant's spouse filed suit in the United States District Court for the Northern District of California. In an order dated September 6, 2012, United States Magistrate Judge Laurel Beeler determined that the applicant's appeal was timely and remanded the case to the AAO for consideration on the merits. The appeal will be sustained and the application approved.

The applicant is a native and citizen of Japan who was found to be inadmissible under 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 violating a law of a foreign country relating to a controlled substance. The applicant is the spouse of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. §1182(h).

In the decision dated August 22, 2008, the District Director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on the basis that the applicant was ineligible for a section 212(h) waiver because her conviction was for possession of marijuana in an amount greater than 30 grams. On September 29, 2008, the applicant filed an appeal. On April 7, 2011, the AAO rejected the applicant's appeal as untimely and returned it to the District Director for consideration as a motion. In a decision dated August 2, 2011, the District Director affirmed the prior denial of the waiver application.

On July 29, 2011, the applicant's spouse, [REDACTED] filed a lawsuit as plaintiff in the United States District Court, Northern District of California, San Francisco Division, naming the Secretary of the Department of Homeland Security (DHS) as defendant. On September 6, 2012, the Court issued an order overturning the AAO's decision to reject the Form I-601 appeal as untimely. *See Marsh v. Napolitano*, Order Remanding Case to the AAO, Granting Leave to Amend, and Denying Cross-Motions for Summary Judgment, No. 11-cv-03734-LB 2012 WL 3877675 (N.D.Cal. 2012). The Court stayed further action for 60 days and remanded the case to the AAO to consider the Form I-601 appeal on its merits. On October 15, 2012, the AAO issued a request for further evidence to the applicant, to be submitted to the AAO on or before November 16, 2012. The AAO granted a subsequent request from applicant's counsel for a 10-day extension to this deadline. In collaboration with the U.S. Department of State, applicant's counsel requested criminal records and other relevant documents from the authorities in Japan. The applicant's subsequent submission to the AAO includes a Japanese police certificate dated November 12, 2012, updated employment and travel records for the applicant's spouse, and a "consolidated" legal brief from applicant's counsel.

Counsel declares that the complete record of conviction is unavailable. We accept counsel's assertion that no further documents from the record of conviction, or other police or government records, are available. Counsel has also referenced news articles related to the applicant's conviction and the acts upon which it was based, but no such articles have been submitted. The documents in the record regarding the applicant's conviction are as follows:

- United Nations version, dated November 27, 1984, of the Cannabis Control Law of Japan, 1977 (original law No. 124 of July 10, 1948) (English translation provided by the Foreign Ministry of Japan);
- Translation by the Japanese government of portions of the Japanese Penal Code;
- Translation of the Japanese Cannabis Control Law (July 10, 1948) obtained at the website [www.japanhemp.org](http://www.japanhemp.org) on April 4, 2011;
- Indictment (with certified translation) dated July 13, 1995, presented to the Hiroshima District Court naming the applicant as a co-defendant in colluding in the purchase of approximately 36 grams of cannabis on June 21, 1995, in violation of Section 2-1 of Article 24 of the Cannabis Control Law and Article 60 of the Penal Code;
- Written Judgment (with certified translation) dated October 5, 1995, from the Hiroshima District Court, Criminal Division 1, including information from the Indictment and indicating that the applicant was sentenced to one year's imprisonment suspended for three years;
- Certificates, dated January 16, 2008 and November 12, 2012, from the Japanese police, with only partial translation into English, certifying that the applicant has no criminal records in Japan as of those dates;
- Statements from the applicant submitted with her immigrant visa application and the waiver application detailing the circumstances of her crime and conviction, as well as her declaration submitted in response to the request for evidence.

In the consolidated brief, and as discussed in the order remanding the matter to the AAO, counsel contends that the applicant's conviction has been expunged, and that she does not have a conviction for immigration purposes. However, in light of our decision to approve the waiver of inadmissibility, it is not necessary to address that issue.

Counsel also argues that even assuming that the applicant has a conviction for immigration purposes, the applicant is eligible for a waiver of inadmissibility because the determination that the applicant's crime was for possession of "approximately 36 grams" of marijuana is contrary to the evidence in the record. Counsel contends that the statute under which the applicant was convicted contains no minimum or maximum amount requirement, and that the indictment stated that the amount of marijuana involved was "approximately 36 grams." Counsel notes that the applicant has stated that the total amount was less than 36 grams because this fact created the dispute between the applicant's friend and the drug dealer that ultimately led to her arrest. Counsel asserts that the applicant's testimony is that she never possessed the marijuana and that she paid for, and it was her intent to receive, only five grams of marijuana.

Counsel also argues that "[e]ven though the Court disposition references the Indictment, it does not appear that the Indictment itself was ever produced (or that it can be produced now that the record is expunged)." Counsel's cites *Chanmouny v. Ashcroft*, 376 F.3d 810, 812 (8<sup>th</sup> Cir. 2004) and *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999), to assert that "[t]he use of a police report or indictment is not the same as a court record," and the record of conviction includes the indictment, plea, verdict, and sentence. Counsel claims that the indictment has not been produced, that "the official record used in this matter is not an official court record," and that "[i]t is not proper to mix together the unreliable court record of an expunged proceeding." Counsel also contends that "the Government has ignored

what may be the most significant piece of evidence – the lack of any criminal record at all for Ms. [REDACTED].” Counsel cites *Jeune v. Atty. Gen. of U.S.*, 476 F.3d 199, 204-205 (3d Cir. 2007) for the proposition that the “formal categorical approach” of looking only to the statutory definitions of the offense, and not the particular facts underlying a conviction, determines whether the applicant qualifies for a waiver. Counsel argues that the “statute of conviction must be categorically a statute in which any conviction would render an individual inadmissible,” and that Section 2-1 of Article 24 of the *Cannabis Control Act* “is a statute that is not categorically one of inadmissibility.” Counsel contends that the “Government cannot reach into uncertain and unreliable portions of a now-expunged record to assert such inadmissibility.”

Assuming a conviction exists, counsel asserts that as the applicant’s crime occurred more than 15 years ago, the applicant may be considered for a waiver of inadmissibility under section 212(h)(1)(A)(i) of the Act. Counsel contends that the applicant has demonstrated both rehabilitation and that her admission is not against the public interest. Counsel argues that the applicant has also demonstrated extreme hardship to her spouse, as would be required if the waiver is considered under section 212(h)(1)(B) of the Act. Counsel argues that the standard for hardship as articulated in *Matter of Cervantes*, 22 I&N Dec. 560 (BIA 1999), is in error, and that “[once] a contemporary, comprehensive and correct definition of extreme hardship is applied, the facts” show that the applicant deserves to be granted a waiver, citing *INS v. Wang*, 450 U.S. 139, 144 (1981). Counsel cites various statistics as proof that separation from a family member is not the norm when individuals are removed from the United States. Counsel also contends that the record shows that the applicant warrants a waiver as a matter of discretion.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The applicant has the burden of demonstrating that she is not inadmissible, and if inadmissible, the burden of demonstrating eligibility for a waiver of inadmissibility. See Section 291 of the Act, 8 U.S.C. § 1361; see also 8 C.F.R. § 103.2(b). An application for admission is a “continuing” application, and we will determine waiver eligibility on the basis of the facts and law in effect on the date of this decision. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Section 212(h) of the Act reads:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section 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 if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 the alien has been rehabilitated; or

(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 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 Written Judgment dated October 20, 1995, from the Hiroshima District Court, Criminal Division 1, indicates that the applicant was convicted of violation of Section 2-1 of Article 24 of the Cannabis Control Law of Japan (1977), and Article 60 of the Penal Code of Japan (Act No. 45 of 1907). The Court sentenced the applicant to one year's imprisonment, and imposed a three-year suspension of execution of the sentence. Pursuant to Article 25-2 of the Japanese Penal Code, the applicant was placed on probation for three years.

According to the official English-language translation, section (1) of Article 24-2 provided: "A person who comes under any of the following items shall be liable to penal servitude not exceeding 5 years . . . . [a] person who, in contravention of the provision of paragraph 1 of article 3, has possessed, purchased, transferred or used cannabis."<sup>1</sup> Article 60 of the Penal Code of Japan provided: "Two or more persons who commit a crime in joint action are all principals." The Indictment and Written Judgment indicate that the factual basis of the conviction is that the applicant, along with two other defendants, "bought approximately 36 grams of cannabis with 175,000 yen from [REDACTED] and others . . . around 10 pm on June 21, 1995," in violation of the Cannabis Control Law.

As discussed below, counsel's arguments contain errors and contradictions. First, counsel errs in asserting that the government has the burden of demonstrating that the applicant's conviction involved marijuana in an amount greater than 30 grams to show that she is ineligible for a waiver of inadmissibility. As previously stated, the applicant has the burden of proving eligibility for the benefit of a waiver of inadmissibility. See Section 291 of the Act, 8 U.S.C. § 1361; see also 8 C.F.R. 103.2(b). The Board, moreover, has held that the applicant has the burden of showing that his or her marijuana conviction is within the scope of the Act's ameliorative provisions for cases involving 30 grams or less. *Matter of Grijalva*, 19 I&N Dec. 713, 718 n. 7 (BIA 1988).

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<sup>1</sup> We note that in the more current version of this provision in the record, the law applies to any person "who unlawfully possesses, receives, or transfers cannabis." As we have been unable to ascertain the date on which this statutory language was amended to its current form or locate other prior official versions of the statute, and as we find that the language of the Indictment and Written Judgment suggests that the phrase "possessed, purchased, transferred or used" may have been in place at the time of the applicant's conviction, we use the official 1984 translation of the statute for purposes of this appeal. We note, however, that the outcome would not be altered by considering the applicant's conviction under the current statutory language.

Second, counsel argues for a strict categorical inquiry precluding even consideration of the judgment by the court, but also indicates that the AAO should consider the weight of evidence concerning the amount of marijuana the applicant intended to purchase, a reference to applicant's testimony. Counsel cites a Third Circuit decision, *Jeune v. Atty. Gen. of U.S.*, *supra*, as general authority for this categorical approach, but has not explained how this decision is controlling. That case does not specifically address inadmissibility or waiver eligibility based on a marijuana-related conviction, as do the cases cited below. Also, the applicant's conviction occurred abroad, and the applicant's spouse resides in California, outside the jurisdiction of the Third Circuit. Furthermore, counsel's argument in this regard may actually do his client more harm than good, as a strict categorical/modified categorical approach precludes consideration of evidence outside the record of conviction, such as the applicant's testimony, and a determination that the record of conviction is inconclusive could prevent the applicant from establishing eligibility for the waiver. *See, e.g., Young v. Holder*, 697 F.3d 976, 979-983 (9th Cir. 2012) (when the burden rests on the alien to show eligibility for cancellation of removal, an inconclusive record of conviction is insufficient to satisfy the alien's burden of proof).

Third, counsel states that the indictment has not been produced, though it is one of the documents the applicant submitted into the record. Counsel cites authority, *Chanmouny v. Ashcroft*, *supra*, for the proposition that an indictment is not the same as a court record, but also notes that an "indictment" is part of the record of conviction. Fourth, counsel discusses newspaper articles and police reports concerning the applicant's conviction, without producing such documents. Finally, the AAO finds that the nature of the applicant's conviction may not have been properly characterized, as the record reflects that the applicant may have been convicted of colluding in the purchase, rather than possession, of marijuana. It is only in reassessing the conviction, and applying relevant controlling law not cited by counsel, that we reach an outcome favorable to the applicant.

The AAO has no authority to "re-litigate" the applicant's criminal case, nor entertain an argument that the applicant was not actually guilty of the charged offense. *See Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974). Her guilt under the Article 24-2(1) of the Cannabis Control Law of Japan is clearly established by the court record.

Nor can the applicant challenge the essential elements of the offense for which she was charged and convicted, as stated in the court's record and the underlying statute. If the criminal record were to show possession of a particular amount of marijuana as an essential element of the offense for which she was convicted, she would be completely foreclosed from claiming that her offense involved a smaller amount. *See Matter of Grijalva*, 19 I&N Dec. at 718 (evidence outside conviction record and underlying statute allowed to show the amount of marijuana involved, only if the record and statute did not resolve the issue). It seems, however, that the actual *amount* of marijuana was not an essential element of the offense. By its terms, the crime is basically the same, regardless of the amount of cannabis involved. For this reason, the recital in the Indictment and Written Judgment concerning the amount involved does not appear to be an essential element of the statutory offense.

Where the conviction record does not clearly specify that the crime is possession of marijuana, and that possession in an amount exceeding 30 grams is an essential element of the offense, the Board has held that an adjudicator must engage in a "circumstance-specific" inquiry:

We conclude that section 212(h) employs the term “offense” . . . to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime. Our main reason for drawing this conclusion is that the “offense” in question is defined so narrowly, by reference to a specific type of conduct (simple possession) committed on a specific number of occasions (a “single” offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

*Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 124 (BIA 2009) (citing *Nijhawan v. Holder*, 557 U.S. 28, 33-34, 129 S.Ct. 2294, 2298-2299 (2009)); see *Matter of Grijalva*, 19 I&N at 718 (“[W]here the amount of marijuana that an alien has been convicted of possessing cannot be readily determined from the conviction record, the alien who seeks section 241(f)(2) relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved “30 grams or less of marihuana”); cf. *Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a “circumstance-specific” inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a “single” offense of possession). Therefore, we are not limited by categorical considerations, but may inquire into the specific acts underlying the applicant’s conviction.

Further, the Board notes that the waiver is available not just to those whose offense is a single offense of possession of 30 grams or less of marijuana, but also to those whose violation “relates to” such an offense:

[S]ection 212(h) requires only that an applicant’s inadmissibility “relate[] to” its object of reference, namely, “a single offense of simple possession of 30 grams or less of marijuana.” Given the narrow specificity of that object, 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. Had Congress wished to make waivers available only to aliens who had committed simple marijuana possession, using a broad expression like “relates to” would have been an unlikely choice of words. Thus, we conclude that Congress envisioned something broader, specifically, 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.

*Martinez-Espinoza*, 25 I&N Dec. at 124-25.

This distinction is significant to the present case, as we conclude from our review of the record that the applicant possibly was not convicted of colluding in the *possession* of marijuana, but rather of colluding in the *purchase* of marijuana. As stated, the applicant was convicted under Section 2-1 of Article 24 of the Cannabis Control Law of Japan, which provided that it was “unlawful to possess, purchase, transfer, or use cannabis.” That the applicant’s conviction was for colluding in the

purchase, and not the possession of marijuana, is supported by the Indictment, Written Judgment and the applicant's testimony. In describing the crime committed, the Indictment references a transaction rather than the possession of marijuana by the applicant's co-defendant, stating that the applicant and the co-defendant "colluding with" a third person "bought approximately 36 grams of cannabis with 175,000 yen [around \$1,380] . . . around 10 p.m. on June 21, 1995." In describing the crime, the applicant stated in the attachment to the Applicant for Immigrant Visa and Alien Registration (Form DS-230):

In June of 1995, in Hiroshima, Japan, I was offered an opportunity to buy 5 grams of marijuana/cannabis. I agreed to do so and in fact paid for the 5 grams. Although I never physically received the drugs to possess . . . and I was arrested, and charged with a crime.

Although the dealer who was selling the 36 grams to my friend Mario from which I was to pay for and receive 5 grams, said he paid for 36 grams, received a bundle, which he later complained was actually much less than 36 grams. After confronting the dealer about the shortage, a tussle ensued, and the police were called. The police began an investigation and searched the separate home of each party involved from which the stash was confiscated before any, let alone 5 grams, had been distributed to me.

In another statement submitted with that application, the applicant indicated that she "fully explained to the Court that although [she] had agreed to purchase for use only 5 grams, along with two other people (one purchasing 5, and one purchasing the balance) [she] paid only the amount due for 5 grams." In a declaration dated January 28, 2008, the applicant stated: "Although my 1995 conviction cited me, along with my two co-defendants, with possession of 36 grams, more or less, of . . . cannabis, . . . my involvement was limited to paying for approximately 5 grams, as I told the Court, under oath."

Accordingly, we observe that while inclusion of the approximate amount of marijuana in the Indictment possibly refers to the quantity of the drug actually seized by the police, as referenced in the Written Judgment, it could also refer to the terms of the deal and not to an actual physical amount. Indeed, the applicant's testimony is that the 36 grams was the quantity "bought," but the actual amount of marijuana delivered was believed, at least by her co-defendant, to have been materially less, though by how much the record is silent. There is no indication that the marijuana seized was ever quantified, and there apparently is no further official documentation available. Even if we were to find that the applicant's conviction was for colluding to possess marijuana, given the statutory elements of the crime, it appears she needed collude only in possession generally, not in possession of any particular amount. We will not rule out the possibility that the court may have attributed possession of only five grams of the total to the applicant, in accordance with her testimony, and still have found her guilty of collusion generally. In sum, the record does not reveal, and the applicant does not know with any certainty, the total quantity of marijuana actually involved. Given that the statute does not on its face require proof of quantity, as well as the unavailability of additional court and police records, we find that the record of conviction is inconclusive as to the total amount.

Therefore, we engage in further factual inquiry to determine whether, and how, her conviction may relate to the simple possession of marijuana, and to what amount. Again, the Board's decision in *Martinez-Espinoza*, wherein the Board addressed the crime of possession of drug paraphernalia, is instructive:

[W]aivers are only available for offenses that merit the same lenient treatment as simple possession. An offense does not "relate[]" to a single offense of simple possession of 30 grams or less of marijuana" if it contains elements that make it substantially more serious than "simple possession." . . .

As we understand it, "simple possession" denotes the exercise of dominion or control over marijuana with an eye to its use by the possessor. . . . This close relationship between "simple possession" and "personal use" of marijuana is also reflected in section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i) (2006), which contains an exception to deportability for any alien convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana." (Emphasis added.) Section 237(a)(2)(B)(i), with its explicit reference to "possession for one's own use," informs the meaning of the very similar language appearing in section 212(h). Thus, when a person possesses drug paraphernalia for the sole purpose of introducing 30 grams or less of marijuana into his body, his conduct "relates to" the offense described in section 212(h).

*Martinez-Espinoza*, 25 I&N Dec. at 125.

In the present case, we see no reason to believe that the applicant colluded in purchasing marijuana with other than the intent to use it personally. Thus, we find that her crime relates to *simple* possession, not a more serious controlled substance offense. Given that 36 grams of marijuana can be divided into much smaller amounts, and that one individual's personal consumption of the drug generally precludes use by another, the AAO accepts the applicant's testimony that, in fact, she paid for and was to receive five grams of marijuana for personal use. We note that had the applicant and her co-defendants chosen to purchase marijuana individually in separate transactions, or had the applicant been arrested for possession after the marijuana had been divided and her portion delivered to her, there would be no question as to the applicant's eligibility for a waiver. In *Matter of Davey*, the Board observed that it could "conceive of no reason why Congress would except an alien from deportability for actually possessing a small amount of marijuana for personal use, yet deny such leniency simply because, for example, the marijuana was found in a baggie." 26 I&N Dec. at 40. Likewise, we see no reason to deny leniency to the applicant, to subject her to permanent inadmissibility, merely because she pooled her money with others to obtain for herself marijuana in an amount less than 30 grams. Given the unique circumstances of this case, we find that the applicant's offense bears "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." *Martinez-Espinoza, supra*.

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. An application for admission or adjustment is a "continuing" application, and the AAO determines waiver eligibility as of the date of our adjudication. *See Matter of Alarcon, supra*. Since the activities for which the alien is inadmissible occurred in October 1995, more than 15 years ago, they are waivable under section 212(h)(1)(A) of the Act.

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 a declaration from the applicant, her attachment to the immigrant visa application, a declaration from the applicant's husband, a document confirming graduation of the applicant from a two-year degree program, and a certificate of the applicant's graduation from the International Air Academy. In the declaration dated November 20, 2012, the applicant acknowledges her wrongdoing, and she states that she has become a better person since. The record reflects that since her conviction, the applicant has come to the United States as a student and has married her U.S. citizen spouse. The record reflects her emotional bond and continuing commitment to her spouse, though they have been unable to reside together since their marriage nearly a decade ago. There is no evidence that the applicant is an abuser of a controlled substance, and given the passage of more than 15 years with no further criminal record, we find that the applicant has been rehabilitated and her admission to the United States is not contrary to the national welfare, safety, or security of the United States.

In *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996), the Board stated that once waiver eligibility 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. The AAO must "[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. The favorable factors include the applicant's rehabilitation, her marriage to a U.S. citizen and his hardship in being separated from her, the declarations by the applicant's spouse attesting to their commitment to one another and her good character, no further criminal record since the conviction, and the passage of 17 years since the conviction. Although we do not condone the applicant's drug offense, the AAO finds that the crime of which the applicant committed is relatively minor in nature. When taken together, we find the favorable factors in the present case outweigh the adverse factor, such that a favorable exercise of discretion is warranted. Accordingly, the appeal is sustained, and the waiver application is approved.

**ORDER:** The appeal is sustained. The waiver application is approved.