

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



U.S. Citizenship  
and Immigration  
Services

H2

[REDACTED]

Date: OCT 26 2012

Office: MIAMI, FLORIDA

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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 waiver application was denied by the District Director, Miami, Florida, and is before the Administrative Appeals Office (AAO) on appeal. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted, but the appeal will be dismissed and the application will remain denied.

The applicant is a native and citizen of Kenya and the husband of a citizen of the United States. The applicant was found to be inadmissible to the United States 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 a crime involving a controlled substance. 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 wife.

On appeal, the AAO agreed with the district director's determination that a waiver of inadmissibility was not available to the applicant because he had two convictions related to a controlled substance.

On motion, counsel argues that the applicant has a pending motion, which will be heard on December 9, 2009, to vacate for constitutional reasons the conviction for possession of drug paraphernalia. Counsel contends that once vacated, the applicant's only remaining conviction will be for simple possession of marijuana, an offense waivable under section 212(h) of the Act. Counsel asserts that the AAO's determination that the applicant is not eligible for a section 212(h) waiver is inconsistent with *Matter of Espinoza*, 25 I&N Dec. 118, 126 (BIA 2009), as the Board held that conviction for possession or use of drug paraphernalia is waivable under section 212(h) of the Act. Counsel cites *Matter of Espinoza* as stating that section 212(h) may encompass a drug paraphernalia offense when the paraphernalia was used for the sole purpose of introducing 30 grams or less of marijuana into a person's body. 25 I&N Dec. at 123. Counsel contends that contrary to the AAO's decision, drug paraphernalia offenses are in consequence waivable under section 212(h) because possession of drug paraphernalia can sometimes be a mere adjunct to the simple possession of a small amount of marijuana for personal use. *Id.* Counsel argues that the applicant's case should be reopened and remanded for a determination of whether the conduct making the applicant inadmissible was for a single offense of simple possession of 30 grams or less of marijuana or for an act that related to such an offense.

The AAO will grant the motion to reopen, but for the reasons set forth in this decision, will affirm the decision dismissing the appeal.

The AAO will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

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 . . . .

Counsel does not dispute that the applicant's two controlled substance convictions, possession of 20 grams or less of cannabis, and possession drug paraphernalia (cigarette papers), make the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Counsel argues that the AAO erred in concluding the applicant was not eligible for a section 212(h) waiver because in *Matter of Espinoza* the Board held that conviction for possession or use of drug paraphernalia is waivable under section 212(h) of the Act. *Id.* at 120.

At issue in *Matter of Martinez* was whether an alien can file a 212(h) waiver in a case involving a controlled substance conviction for possession or use of drug paraphernalia. The Board concluded

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.” *Id.* at 120 (citation omitted).

However, in the instant case, the applicant has two controlled substance convictions because the applicant has not shown that the applicant’s motion to vacate the plea and sentence for the possession of drug paraphernalia conviction has been granted and on what basis. The waiver under section 212(h) of the Act applies only to controlled substance cases that involve a single offense of possession of 30 grams or less of marijuana. As the applicant has two controlled substance offenses, for possession of 20 grams or less of cannabis and for possession of drug paraphernalia, he is not eligible for the section 212(h) waiver.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval 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 motion will be dismissed.

**ORDER:** The motion is dismissed. The waiver application is denied.