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



H2



DATE: **SEP 11 2012** OFFICE: VERMONT SERVICE CENTER 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.

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 with the field office or service center that originally decided your case by filing a 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 Center Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Canada who 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 crimes involving a controlled substance. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse.

The Center Director concluded that the applicant is statutorily ineligible for a waiver of inadmissibility and denied the application accordingly. See *Decision of the Center Director*, dated September 14, 2010.

On appeal, counsel for the applicant contends that because the applicant's convictions were conditionally discharged under Canadian law, he has no convictions that may give rise to inadmissibility. See *Counsel's Letter in Support of Appeal*, dated October 13, 2010. In the alternative, counsel contends that the applicant is subject to only one controlled substance violation because one offense should be considered under the United States First Offender Act, and because both controlled substance violations were for less than one gram of cannabis, the applicant is not statutorily ineligible for a section 212(h) waiver. *Id.*

The record contains, but is not limited to: Form I-290B and counsel's letter in support of appeal; various immigration applications and petitions; a hardship letter; multiple character reference letters; statements by the applicant; a letter from a Canadian attorney regarding absolute and conditional discharges in Canadian law; a copy of portions of the Canadian criminal code; records pertaining to the applicant's criminal offenses and proceedings; and copies of the decisions in *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980) and *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001). The entire record was reviewed and considered in rendering this decision on the appeal.

The AAO notes at the outset that while counsel cites decisions of the U.S. Court of Appeals for the Ninth Circuit, the present matter arises in Canada, outside the United States and the jurisdiction of the Ninth Circuit. Counsel notes that if the applicant's waiver is granted, he will reside in California with his U.S. citizen spouse, in the jurisdiction of the Ninth Circuit. While the reasoning of the Ninth Circuit is generally instructive, it is not binding on the present case, regardless of where the applicant spouse resides or where he himself hopes to reside in the future.

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 – :

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
- {II} a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States,⁷ 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)(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

Section 101(a) of the Act provides, in pertinent part:

As used in this Act-

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

The record reflects that on October 18, 1978 the applicant was convicted in British Columbia, Canada for theft of a single package of meat under \$200 for which he received a conditional discharge and was bound by a probation order for a period of six months. On November 21, 1980

the applicant was convicted in British Columbia, Canada for unlawful possession of a narcotic, cannabis resin, less than one gram, for which he received a conditional discharge and was bound by a probation order for a period of twelve months. On January 29, 1986 the applicant was convicted in British Columbia, Canada for unlawful possession of a narcotic, cannabis less than one gram, for which he received a conditional discharge and was ordered to report to the Probation Office for 25 hours of community work service.

Under Section 732.2(3)(b) of the Canadian Criminal Code, a conditional discharge involves a specified term of probation not to exceed three years, and the conditional discharge takes effect upon conclusion of the probation term. Section 733.1(1) allows for revocation of the conditional discharge in the event the individual breaches his or her probation, and if convicted thereof the Court may impose any sentence imposable for the original violation in lieu of conditional discharge. See §733.1(1).

On appeal counsel contends that based on application of Canadian law, the applicant has never been "convicted" because each of his offenses were conditionally discharged. Counsel submits a supporting letter from [REDACTED] who indicates that he has been practicing criminal law in Canada for 35 years. Mr. [REDACTED] states that while an absolute discharge is effective immediately upon the passing of sentence, a conditional discharge takes effect once the term of probation specified by the court has expired. He then concludes: "Essentially, the granting of a discharge means that the accused person is not convicted of any offence," and is "...deemed not to have been convicted of the offense by the Court." The applicant's court documents show that for his 1980 controlled substance violation, the punishment ordered by the judge included a 12-month period of probation. For the applicant's 1985 controlled substance violation, the punishment ordered by the judge included that he "keep the peace and be of good behavior and appear before the Court when required to do so by the Court, and, in addition ... Report FORTHWITH in person, to [REDACTED] and complete 25 hours of Community Work Service as directed by Probation Officer or Community Work Service Officer within 3 months." As a result of his guilt or admission of sufficient facts warranting a finding of guilt, the court imposed upon the applicant periods of probation, community work service, and adherence to a specified code of conduct which included the requirement that he appear before the court whenever requested, all conditions to be completed before the granting of a discharge. Probation, adherence to a specified code of conduct, and community work service are all forms of punishment, penalty or restraint on the applicant's liberty imposed upon him by the court. As such, the AAO concludes that the applicant was convicted, as outlined in section 101(a)(48)(A) of the Act, for controlled substances violations on two separate occasions, based on his conduct in 1980 and 1985.

Counsel contends that the applicant is subject to only one controlled substance violation because one offense "would be eligible for the *Matter of Seda* and *Dillingham* exception consistent with the U.S. First Offender Act." The AAO reiterates that Ninth Circuit Court of Appeals decisions, such as that in *Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001), are not binding on the present case which arises outside the United States in Canada. Counsel cites *Matter of Seda*, 17 I. & N. Dec. 550 (BIA 1980) for the contention that "a person sentenced under a first offender statute, which provides for withholding of adjudication of guilt by the court and discharge without conviction upon successful completion of probation, shall not be considered to be 'convicted' for

immigration purposes.” Counsel fails to note that *Seda* was subsequently overruled in part by the BIA in *Matter of Ozok*, 19 I. & N. Dec. 546 (BIA 1988), holding: “[U]nder the approach we have taken in the past, form has been placed over substance, and aliens who are clearly guilty of criminal behavior and whom Congress intended to be considered ‘convicted’ have been permitted to escape the immigration consequences normally attendant upon a conviction We are aware that this standard represents a significant departure from many of our previous decisions. For this reason it is necessary to overrule the following cases to the extent they relied on our former test for conviction and are inconsistent with the standard enunciated by the Board today: *Matter of [redacted]*” The standard delineated by the BIA in [redacted] is identical to that codified in section 101(a)(48)(A) of the Act. As a general rule, where adjudication of guilt has been withheld, “a conviction will be found for immigration purposes where all of the following elements are present: (1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty; (2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and (3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.” *Ozok* at 552. Counsel again cites *Seda*, maintaining that any admission related to the applicant's Canadian discharges should not be used against him for immigration purposes under INA 212(a)(2)(A). For the reasons stated above, counsel's assertion is unpersuasive.

In the present matter there is ample evidence to show that the applicant was found guilty by a judge, on two separate occasions, for possession of marijuana in violation of the Narcotic Control Act of Canada. The record of proceeding in both cases contains documentation to show that the applicant was tried in a court of law and found guilty by a judge. See section 101(a)(48)(A)(i) of the Act. It is noted that the applicant was sentenced to periods of probation, community work service, and adherence to a specified code of conduct. Thus, section 101(a)(48)(A)(ii) of the Act is satisfied.

Based on the foregoing, the applicant's convictions for drug offenses in 1980 (unlawful possession of a narcotic, cannabis resin, less than one gram), and in 1986 (unlawful possession of a narcotic, cannabis less than one gram), meet the definition of conviction found in section 101(a)(48)(A) of the Act. As the applicant has multiple convictions in Canada relating to controlled substances, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. He does not meet the waiver provision found in section 212(h) of the Act due to the fact that he has more than one conviction relating to a controlled substance. As correctly determined by the Center Director, there is no provision under the Act that allows for a waiver of inadmissibility when an applicant has been convicted of more than one crime relating to a controlled substance.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he has demonstrated rehabilitation, whether he has established extreme hardship to a

qualifying relative, or whether he merits a waiver as a matter of discretion.

In proceedings for an 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met his burden.

ORDER: The appeal is dismissed.