

(b)(6)

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



U.S. Citizenship  
and Immigration  
Services

DATE:

APR 09 2013

Office: CHICAGO, IL

FILE:

IN RE:

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 cursive script, appearing to read "Michael Shumway".

for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Chicago, Illinois, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted, but the underlying application will remain denied.

The applicant is a native and citizen of Poland 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 committed violations related to a controlled substance. The applicant's stepmother and father are lawful permanent residents. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish extreme hardship to his father and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated August 21, 2007. The AAO subsequently determined that the applicant had been convicted of two controlled substance violations and was, therefore, not eligible for waiver consideration under section 212(h) of the Act. The appeal was dismissed. *Decision of the AAO Chief*, dated December 20, 2010.

On motion, counsel asserts that the applicant's March 3, 2006 conviction has been vacated based on a procedural defect and that the inadmissibility resulting from his remaining controlled substance conviction may be waived under section 212(h) of the Act. *Counsel's Brief in support of the Motion*. Counsel submits new documentary evidence.

The record includes, but is not limited to, counsel's brief on motion; statements from the applicant and his father; tax returns and W-2 Wage and Tax Statements; a letter of employment and earnings statements for the applicant's father; a DUI Risk Education Certificate of Completion and an Alcohol and Drug Evaluation Report Update relating to the applicant; and the applicant's criminal record, which has been supplemented with additional documentation. The entire record was reviewed and considered in arriving at a decision on the appeal.

Filing requirements for motions to reopen are found in the regulation at 8 C.F.R. § 103.5(a)(2), which states:

(2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

The AAO's prior finding that the applicant was ineligible for waiver consideration under section 212(h) of the Act was based on our determination that he had twice been convicted of controlled substance violations: on May 24, 2006, for operating a vehicle with a controlled substance (marijuana) in the body under Indiana Code (IC) 9-30-5-1(c), and on March 3, 2006 for possession of cannabis (more than 2.5 grams and less than 10 grams) under 720 Illinois Compiled Statutes (ILCS) 550/4(b). Although the record established that the applicant's March 3, 2006 conviction had been vacated in a June 6, 2010 hearing in the

the AAO found that the applicant remained convicted of this offense for immigration purposes as the record did not establish that his conviction had been vacated on the basis of a procedural or substantive defect. In reaching this decision, we relied on Board of Immigration Appeals (BIA) holdings in *Matter of Adamiak*, 23 I&N Dec. 878, 879 (BIA 2006); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); and *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

On motion, counsel submits documentary evidence that, he states, establishes that the applicant's March 3, 2006 conviction was vacated for a procedural or substantive defect. This documentary evidence includes the motion filed by the applicant with the [REDACTED] in which he asserts that, at the time he pled guilty to possession of cannabis (more than 2.5 grams and less than 10 grams) under 720 ILCS 550/4(b), he did not have adequate counsel and was not informed of the immigration consequences of the charge against him. Counsel also provides certified transcripts of the applicant's March 3, 2006 hearing in which he pled guilty to the violation of 720 ILCS 550/4(b) and the June 6, 2010 hearing in which the court vacated his conviction.

We now turn to a consideration of the newly submitted evidence and the extent to which it establishes the vacatur of the applicant's guilty plea for immigration purposes.

The applicant's plea was vacated under 735 ILCS 5/2-1401, which at that time stated:

(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984 . . . there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

The purpose of a petition for the vacatur of a judgment by a trial court more than 30 days after the entry of that judgment is to bring before the court facts that did not appear in the record and which, had they been known to the court and petitioner when judgment was entered, would have prevented its entry. *People v. Bramlett*, 347 Ill.App.3d 468, 806 N.E.2d 1251, 282 Ill.Dec. 663. While a civil remedy, relief under 735 ILCS 5/2-1401 also extends to criminal cases. *People v. DeLeon*, 387 Ill.App.3d 1035, 1038, 901 N.E.2d 997, 327 Ill.Dec. 264 (referencing holdings in *People v. Vincent*, 226 Ill.2d 1,7, 871 N.E.2d 17, 312 Ill.Dec. 617, and *People v. Mathis*, 357 Ill.App.3d 45, 49, 827 N.E.2d 932, 293 Ill.Dec. 51. Such relief requires the petitioner, by a preponderance of evidence, to establish that the defense or claim presented would have precluded entry of the judgment in the original action, as well as diligence in discovering the defense or claim and in presenting the petition. *Id.* at 1039; *see also Vincent* at 7-8.

In the present matter, the applicant has submitted the motion he filed with the [REDACTED] pursuant to 736 ILCS 5/2-1401, which states that at the time of his March 3, 2006 guilty plea, he had not been informed of the immigration consequences of pleading guilty to a controlled substance violation. He has also provided the transcript of his March 3, 2006 hearing, which establishes that he was not advised of any immigration consequences resulting from his guilty plea during the course of the hearing, as well as the transcript of the June 6, 2010 hearing at which the [REDACTED] granted his motion to vacate his guilty plea and the court's Agreed Order, entered on June 13, 2010.<sup>1</sup>

In that the [REDACTED] vacated the applicant's March 3, 2006 controlled substance conviction pursuant to 735 ILCS 5/2-1401, which was enacted to rectify defects in prior legal proceedings, the AAO finds that this conviction is no longer valid for immigration purposes. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(holding that a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). Accordingly, the applicant has been convicted of only one offense involving a controlled substance, that of operating a vehicle with a controlled substance (marijuana) in the body under IC 9-30-5-1(c).

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (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 –

.....

(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 . . . .

In *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009), the BIA held that “an alien who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act may apply for a section 212(h) waiver if he demonstrates by a preponderance of the evidence that the conduct that made him inadmissible was either ‘a single offense of simple possession of 30 grams or less of marijuana’ or an act that ‘relate[d] to’ such an offense,” such as the possession or use of drug paraphernalia. The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorical inquiry of the offense would obviously be insufficient. *Id.* at 124 (“It is

<sup>1</sup> Although the AAO notes that the applicant’s motion was not filed within the two-year period required by 735 ILCS 5/2-1401(c), we have no authority to consider whether the court acted in accordance with the requirements of Illinois law in granting the applicant’s motion.

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.”). The BIA determined that it was the intent of Congress to have “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.” *Id.* at 124-25. *See also Escobar Barraza v. Mukasey*, 519 F.3d 388, 391-93 (7<sup>th</sup> Cir. 2008) (finding section 212(h) of the Act to encompass violations beyond simple possession of less than 30 grams of marijuana where a factual nexus could be established between the violation and simple possession).

However, in concluding that section 212(h) applied to controlled substance offenses beyond that of simple possession, the BIA also indicated that no relationship to simple possession could be established where a violation contained elements that made it substantially more serious than simple possession, referencing its decision in *Matter of Moncada-Servellon*, 24 I&N Dec. 62 (BIA 2007). In *Moncada-Servellon*, the BIA found that a conviction for possessing no more than 28.5 grams of marijuana in a prison or correctional setting did not fall within the scope of the personal use exception of section 237(a)(2)(B)(i) of the Act. *Id.* at 65-67. The BIA noted that the offense was significantly more serious than simple possession because of “the inherent potential for violence and the threat of disorder that attends the presence of drugs in a correctional setting” and that it was designated as a felony under California law. *Id.* at 65. Further evidence of the BIA’s reasoning in this regard is reflected in *Popescu-Mateffy v. Holder*, 678 F.3d 612 (8<sup>th</sup> Cir. 2012), in which the U.S. Court of Appeals for the Eighth Circuit considered a BIA decision in which the Board had applied its reasoning in *Martinez Espinosa* to a conviction for possession of drug paraphernalia in a motor vehicle under South Dakota Codified Laws §§ 22-42A-3 and 32-12. The Eighth Circuit noted that the BIA had found the penalty enhancement for possessing drug paraphernalia in a vehicle to be sufficient to demonstrate conduct that was more serious than simple possession, observing that the government had found that possession of drug paraphernalia in a motor vehicle carried an “inherent danger to the driver, passengers and others on the road.” *Id.* at 617.

In the present case, the applicant has been convicted of operating a vehicle with a controlled substance in the body, IC 9-30-5-1(c). Documentation in the record relating to this offense includes: a March 18, 2006 [REDACTED]; an Affidavit for Probable Cause, dated March 18, 2006; a Criminal Information, dated March 18, 2006 and the Plea Agreement, dated May 24, 2006. To the extent necessary, the AAO may rely on evidence outside the record of conviction to determine the facts of the applicant’s controlled substance violation. *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).

A reading of the affidavit for probable cause finds that the car being driven by the applicant was stopped at a “sobriety checkpoint” at which time the arresting officer observed that the applicant’s speech was slow and his eyes bloodshot. The affidavit further indicates that there was an odor of marijuana and marijuana inside the vehicle, and that the applicant admitted to smoking marijuana prior to and while operating the vehicle. It also indicates that a drug test was performed on the applicant, the results of which were pending. The incident report filed by this same officer states that he confiscated a marijuana “bong” from the applicant’s car and that he observed plant-like material and liquid in the bong. The officer reports that the applicant was tested for “horizontal gaze nystagmus and that he displayed a “lack of smooth pursuit and nystagmus at maximum deviation [sic],” but that he passed two other field sobriety tests.

Applying the reasoning in *Martinez Espinoza* to the present case, we do not find the applicant’s conviction to relate to simple possession of 30 grams or less of marijuana. Although operating a motor vehicle with a controlled substance in the body is not punished more severely than simple possession of marijuana under Indiana law, this offense, like that considered in *Moncada-Servellon*, potentially endangers the violator and the public, risks that are not inherent to an offense involving simple possession. As a result, we find the applicant’s offense to be substantially more serious than that of simple possession and, pursuant to *Martinez Espinoza*, must find that it does not relate to the simple possession of 30 grams or less of marijuana. Therefore, the applicant is not eligible to apply for a waiver under section 212(h) of the Act. An application that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility 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 application remains denied.

**ORDER:** The waiver application remains denied.