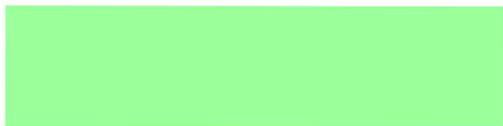


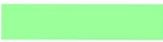
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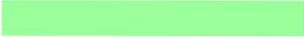
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



DATE: **AUG 26 2013**

OFFICE: MIAMI

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,




Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Field Office Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of South Africa 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 on two occasions of violating a law relating to 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 father.

The field office director concluded that the applicant's two convictions rendered him ineligible for a waiver of inadmissibility, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), accordingly. *Decision of the Field Office Director*, dated December 12, 2012.

On appeal, counsel first asserts that that the review of the police report does not mention anything about drug paraphernalia and there seems to be no basis for conviction. Counsel further contends that there are no equivalents for the applicant's conviction under Federal Law nor under the State of Florida. Counsel thus concludes that the applicant has only one conviction for possession of marijuana and is thus eligible for a waiver under section 212(h) of the Act. *See Form I-290B, Notice of Appeal*, dated December 19, 2012.

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

The record reflects that in January 2002, the applicant pled *nolo contendere* in absentia to Possession of Drug Paraphernalia¹ in the State of Florida. The applicant was placed on probation for a period of six months, was ordered to pay costs or complete 20 hours of community service, and make restitution. See *Judgment and Sentence and Order of Probation*, dated January 29, 2002. In addition, in June 2002, adjudication was withheld with fine and cost for Marijuana Possession under 20 grams in the State of Florida.

On appeal, counsel first asserts that the police report does not mention anything about drug paraphernalia and there seems to be no basis for such a conviction. The Board held in *In Re Max Alejandro Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996), that collateral attacks on a conviction do not operate to negate the finality of the conviction unless and until the conviction is overturned. (citations omitted). A collateral attack on a judgment of conviction cannot be entertained “unless the judgment is void on its face,” and “it is improper to go behind the judicial record to determine the guilt or innocence of an alien.” *Id.* 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

¹ At the time of the applicant’s conviction for *possession of drug paraphernalia*, 893.145 and 893.147 of the Florida Statutes provided, in pertinent parts:

893.145. “Drug paraphernalia” defined

The term “drug paraphernalia” means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter or s. 877.111.

893.147. Use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia.

(1) Use or possession of drug paraphernalia.—It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter....

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). The record clearly establishes that the applicant was convicted of Possession of Drug Paraphernalia.

Counsel further asserts that in order for a person to be inadmissible or removable under the State laws there must be a statutory equivalent in the Federal statutes. Counsel contends that there are no equivalents of the applicant's conviction under the Federal law. *Supra*. In the recent precedent decision, *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the BIA addressed the issue of 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 respondent in *Martinez Espinoza* asserted that drug paraphernalia is not prohibited under Federal law. 25 I. & N. Dec. at 118, 122. The BIA noted that this argument is without merit since "section 212(a)(2)(A)(i)(II) of the Act does not require that a State offense be punishable under Federal law in order to support a charge of inadmissibility." *Id.* The BIA stated that although section 212(a)(2)(A)(i)(II) contains the phrase "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)," the phrase "modifies only its immediate antecedent (i.e., 'controlled substance'), not the whole text of the section." The BIA viewed the phrase "relating to a controlled substance" under section 212(a)(2)(A)(i)(II) of the Act and concluded that "a law prohibiting the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance necessarily pertains to a controlled substance." *Id.* at 120. The BIA held 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." 25 I&N Dec. at 120 (citation omitted).

Section 893-147 of the Florida Statutes provides in pertinent part: It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia: (a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or (b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. This offense relates to a controlled substance because it prohibits "the possession of an item intentionally used for manufacturing, using, testing, or enhancing the effect of a controlled substance." *See Matter of Martinez Espinoza* 25 I. & N. Dec. at 120. Therefore, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a violation of a law relating to a controlled substance.

A section 212(h) waiver of the bar to admission, resulting from the violation of section 212(a)(2)(A)(i)(II) of the Act, is only available for a single offense of simple possession of 30 grams or less of marijuana. In *Martinez Espinoza*, 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. 25 I&N Dec. at 125. The record clearly establishes that the applicant was convicted of Possession of Drug Paraphernalia, based on a November 2001 arrest, and Marijuana Possession of less than 20 grams, based on a June 2002 arrest. The AAO concurs with the field office director that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on two separate controlled substance violations. The applicant is thus statutorily ineligible for a waiver under section 212(h) of the Act.

(b)(6)

NON-PRECEDENT DECISION

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In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.