

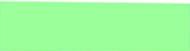
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Office of Administrative Appeals  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **DEC 30 2013** OFFICE: LOS ANGELES FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

for Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Administrative Appeals Office (AAO) previously dismissed the applicant's appeal in a decision dated October 26, 2012. The matter is now before the AAO on motion. The motion will be granted, and our findings regarding hardship withdrawn, but the previous decision of the AAO dismissing the appeal will be affirmed on other grounds.

The applicant is a native and citizen of Mexico who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. He seeks a waiver of inadmissibility (Form I-601) 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.

In a decision dated July 23, 2010, the field office director noted that on November 11, 1988, the applicant was convicted of possession of a firearm at a public school and inflicting corporal injury on his spouse. The field office director also noted that the applicant had been arrested on May 5, 1989 for possession of drugs and drug paraphernalia. The field office director concluded that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude. Additionally, the field office director found that the applicant must establish that extraordinary circumstances warranted the approval of a waiver because he has been convicted of a violent crime. The field office director found that favorable factors in the applicant's case included the serious health conditions of his U.S. citizen spouse and the fact that the applicant had become a confidential informant for the U.S. Drug Enforcement Administration (DEA). However, the field office director concluded that the applicant's convictions for violent and dangerous crimes, his lack of family ties in the United States, the lack of evidence of rehabilitation, and "insufficient humanitarian factors" outweighed the positive factors in his case. Accordingly, the field office director denied the applicant's waiver application in the exercise of discretion.

In our decision on appeal, we did not disturb the director's finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. We also determined that the applicant had failed to demonstrate extreme hardship to his qualifying spouse despite finding that she would face extreme hardship on separation from the applicant because there was no evidence that she would suffer extreme hardship if she relocated to Mexico with him. Additionally, we concurred with the field office director that the applicant's convictions for sexual battery and willful infliction of corporal injury upon his spouse were violent crimes, requiring the applicant to demonstrate extraordinary circumstances, such as exceptional and extremely unusual hardship, pursuant to 8 C.F.R. § 212.7(d). We also noted in our decision that the record lacked evidence to demonstrate whether the applicant's drug possession and paraphernalia convictions constituted controlled substance offenses which would render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act and ineligible for a waiver. However, due to the lack of evidence and the fact that there were other grounds for dismissal, we determined it was unnecessary to address inadmissibility under section 212(a)(2)(A)(i)(II) of the Act at that time.

In response to our decision on appeal, the applicant filed a motion accompanied by evidence that his qualifying spouse would face extreme hardship if she were to relocate to Mexico. In a Notice

of Intent to Dismiss (NOID) dated November 7, 2013, we found that the applicant has demonstrated that his qualifying spouse would suffer extreme hardship (both as a consequence of separation and relocation) should the waiver application remain denied. However, we indicated our intent to dismiss the applicant's motion on the basis of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a controlled substance offense. Additionally, we noted that the applicant has not demonstrated that he warrants a favorable exercise of discretion under 8 C.F.R. § 212.7(d), as the gravity of the applicant's convictions is unclear and he has not shown genuine rehabilitation.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the motion.

As discussed in our NOID, the applicant submitted with his motion evidence of the hardship his qualifying spouse would experience if she were to relocate to Mexico. We find that he has met the requirements of a motion to reopen as pertaining to the question of extreme hardship. However, as discussed below, the applicant has not established that he is eligible for a waiver of inadmissibility as a consequence of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and failure to demonstrate that he warrants a waiver as a matter of discretion. Therefore, we will affirm our prior decision dismissing his appeal.

The record indicates that the applicant has been convicted of a controlled substance offense which renders him both inadmissible under section 212(a)(2)(A)(i)(II) of the Act and statutorily ineligible for a waiver of inadmissibility. The applicant bears the burden of demonstrating that he has not been convicted of a controlled substance offense and he has failed to make such a showing. Additionally, the applicant has failed to demonstrate that he warrants a favorable exercise of discretion under 8 C.F.R. § 212.7(d), as the gravity of the applicant's convictions is unclear.

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 —

...

- (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.

The record reflects that on May 8, 1989, the applicant was convicted of possession of a drug without a prescription in violation of Cal. Business & Professions Code § 4230. On May 23, 1989, he was convicted of possession of controlled substance paraphernalia in violation of Cal. Health & Safety Code § 11364. On May 25, 1989, he was convicted of using or being under the influence of a controlled substance in violation of Cal. Health & Safety Code § 11550. On December 14, 2005, the Superior Court of California for the County of [REDACTED] granted the applicant's request to set aside his convictions under Cal. Business & Professions Code § 4230 and Cal. Health & Safety Code § 11364 based on the fact that the applicant had fulfilled all conditions of his probation.

The record of conviction does not identify the controlled substance(s) involved in the applicant's convictions, and a March 4, 2002 letter from the Judicial Services Supervisor of the Superior Court of the State of California and County of [REDACTED] indicates that the records of the convictions have been destroyed.

In his response to the NOID, the applicant asserts that he cannot be found to have been convicted of a controlled substance offense because the conviction records do not specify the substance or substances involved in his convictions. He cites *Ruiz-Vidal v. Gonzalez*, 473 F.3d 1072 (9th Cir. 2007), in support of his contention that where conviction records fail to identify the substance at issue, "one is left to speculate as to the controlled substance at issue" and the evidence is "insufficient to establish whether an alien was convicted of a controlled substance offense." However, the respondent in *Ruiz-Vidal* was in removal proceedings where the government bore the burden of proving removability. 473 F.3d at 1079. The Ninth Circuit held that the government could not meet its burden through an inconclusive record of conviction. *Id.* By contrast, the applicant in this case bears the burden of proving that he is eligible for the benefit he seeks. Section 291 of the Act, 8 U.S.C. § 1361. The applicant must demonstrate that he is not inadmissible under section 212(a)(2)(A)(i)(II), or if he is inadmissible, that he is eligible for a waiver of inadmissibility. *Cf. Young v. Holder*, 697 F.3d 976, 989 (9<sup>th</sup> Cir. 2012).

The applicant also contends that pursuant to *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012), his convictions cannot categorically qualify as controlled substance offenses because the statutes under which he was convicted are broader than the Controlled Substances Act. However, the Ninth Circuit in *Leal-Vega* did find that the respondent's conviction qualified as a drug trafficking offense through the modified categorical approach. *Id.* at 1169. The applicant further asserts that in *Descamps v. United States*, 133 S.Ct. 2276 (2013), the Supreme Court "held that courts cannot apply the modified categorical approach in determining whether a conviction satisfies the elements of a disqualifying offense." However, the Court's holding in *Descamps* was not so

broad. Instead, the Court held that where a statute of conviction is not divisible, a criminal sentencing court may not apply the modified categorical approach in determining sentence enhancements under the Armed Career Criminal Act (ACCA) because doing so would constitute an impermissible factual inquiry. 133 S.Ct. at 2281-82. The holding in *Descamps* did not completely bar the use of the modified categorical approach, nor did it address the use of such an approach in determining whether an alien has been convicted of a controlled substance offense. By contrast, in interpreting inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for violation of a law related to a controlled substance, the Board of Immigration Appeals has explicitly held that the inquiry is not subject to categorical/modified categorical limitations, but is a “circumstance-specific” inquiry concerning the nature and amount of the controlled substance. *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124-25 (BIA 2009).

Additionally, as stated in our NOID, the applicant must demonstrate that he merits a waiver in the exercise of discretion. Because he has been convicted of violent crimes, he is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d). We find that denial of the applicant’s waiver application would result in exceptional and extremely unusual hardship to his qualifying spouse. Additionally, we acknowledge the applicant’s employment history, his recent negative drug tests, the years that have passed since his convictions, and his role as a confidential informant for the DEA. However, even where an applicant has demonstrated such extraordinary circumstances, 8 C.F.R. § 212.7(d) allows for a discretionary denial of a claim where the gravity of the criminal offense outweighs the extraordinary circumstances. And generally, the applicant must demonstrate that positive factors outweigh any negative factors for a favorable exercise of discretion. In this case, we cannot determine the gravity of the applicant’s offenses because the records of conviction are incomplete and the applicant has failed to provide further specifics concerning his offenses. Without specific evidence regarding the nature and circumstances of the applicant’s convictions, including the substance or substances involved in his convictions for drug and drug paraphernalia possession, the applicant cannot meet his burden of proof of showing that he warrants a favorable exercise of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, although the motion has been granted, and our prior findings regarding hardship withdrawn, we affirm our prior decision to dismiss the applicant’s appeal on other grounds.

**ORDER:** The motion is granted, and the prior findings of hardship withdrawn, but the prior decision to dismiss the appeal is affirmed on the other grounds.