



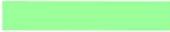
U.S. Citizenship  
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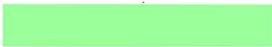


Date: JAN 04 2013

Office: SPOKANE

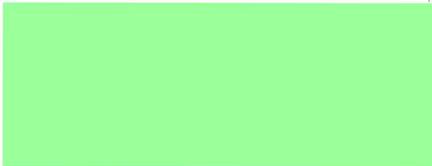
FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h) and (i)

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 our 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-190B, 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 a 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Taiwan 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 admitted to committing acts that constitute the essential elements of a violation of law relating to a controlled substance. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission to the United States through fraud or willful misrepresentation of a material fact. The applicant is the husband of a U.S. citizen. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. § 1182(h) and (i), in order to remain in the United States with his U.S. citizen spouse.

On June 11, 2010, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based upon his approved immigrant petition. On November 17, 2010, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601).

In a decision dated October 5, 2011, the field office director found the applicant inadmissible for having admitted in a sworn statement to committing acts that constitute the essential elements of possession of cannabis and cocaine. The field office director also found that the applicant misrepresented a material fact on his nonimmigrant visa application, Form DS-156. The director denied the Form I-601 waiver application stating that a waiver was not available for inadmissibility related to possession of cocaine under section 212(a)(2)(A)(i)(II) of the Act.

On appeal, counsel for the applicant contends that the field office director's determination that the applicant admitted to conduct constituting the essential elements of a controlled substance offense subjected the applicant to double jeopardy, as the immigration judge had already granted the applicant voluntary departure after adjudicating this issue in a removal proceeding convened in 2004. Counsel for the applicant further contends that the field office director erred in finding that the applicant admitted to possession of a controlled substance in violation of Washington State law, for he alleges that all of the elements required for an admission were not present. Counsel also asserts that the field office director erred in not adjudicating the applicant's Form I-601 waiver application.

The record includes, but is not limited to: counsel's brief; a statement from the applicant's U.S. citizen wife; statements from the applicant's wife's family members; pay stubs and tax records; utility bills; school documentation; a psychological report concerning the applicant's wife; country conditions documentation; documentation regarding the applicant's 2004 removal proceeding; documentation regarding the applicant's 2003 detention by Canadian immigration officers and officers from Customs and Border Protection (CBP); and a sworn statement from the applicant admitting under oath to possession of cocaine and cannabis.

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 has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

(i) [A]ny 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, 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 AAO notes that the field office director has found the applicant to be inadmissible to the United States based on his admission in a sworn statement to having possessed marijuana and cocaine while in the United States. The Board of Immigration Appeals (Board) held in *Matter of K-*, 7 I&N Dec. 594 (BIA 1957) that, in order for an admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to making the admission; and 3) the admission must have been voluntary.

The record reflects that on August 2, 2011, the applicant signed a document titled "Record of Sworn Statement" (statement) in which he described the circumstances concerning his September 15, 2003, detention at the Canadian border at the Pacific Highway Port of Entry in Washington State. Immigration Officer [REDACTED] informed the applicant of her intent to take a sworn statement regarding the applicant's September 15, 2003 possession of controlled substances. The statement details that Officer [REDACTED] explained to the applicant that in Washington State it is unlawful to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid medical prescription. The statement also details that the applicant was informed "that the essential elements of the crime of possession of a controlled substance in Washington are: (1) that the person possessed a controlled substance; and (2) that the act occurred in the state of Washington." The applicant further details that he was refused entry into Canada because he had narcotics on his person. Upon officer [REDACTED] question of what type of controlled substances were found, he specified marijuana and cocaine. He acknowledged in the statement that he had purchased small quantities of these controlled substances in Seattle, Washington, that he intended them for his use, and that he had purchased them without a valid prescription for either one. The AAO notes that the statement explicitly mentions that the applicant's admissions were free, voluntary, and truthful; that he was willing to make such a statement; that he did not feel that the officer forced him to provide the information in any way; and that it was made after being duly sworn. Additionally, the AAO notes that the applicant initialed each page of the statement, and that

he signed the statement's certification form after acknowledging that his answers were true and correct. Counsel for the applicant also signed the statement as witness to the document.

The possession of controlled substances in Washington State is a violation of section 69.50.4013 of the Revised Code of Washington. This section provides, in pertinent part, that: "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice." To interpret this crime, the Jury Instructions set by the Washington State Courts provide that the essential elements of the crime of possession of a controlled substance are that "the defendant possessed a controlled substance" and that "this act occurred in the State of Washington." See 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.02 (2010).

Counsel for the applicant contends that the applicant's sworn statement is insufficient for a finding of inadmissibility, and claims that all the elements required for an admission were not present. Here, however, the applicant admitted in his statement that he purchased small quantities of marijuana and cocaine, without a valid prescription, in Seattle, Washington. The applicant also admitted to possessing these controlled substances when he was stopped as he attempted to enter Canada by bus at the border in Washington State. The applicant's statement acknowledges that marijuana and cocaine are controlled substances, that he possessed these controlled substances in the state of Washington, that he did not have a valid prescription for them, that he was provided the essential elements and the definition of the crime of "possession of a controlled substance" as codified in section 69.50.4013 of the Washington Revised Code prior to making his admission, and that his admission was voluntary. As such, the AAO finds that the applicant's voluntary statement and admission of acts meet the requirements set forth in *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), as they detail the essential elements of a crime in Washington State that serves as a basis for inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

To further bolster the conclusion that his admissions were voluntary, the record reflects that the applicant was accompanied by counsel during the August 2, 2011, interview with Officer [REDACTED]. In a memorandum dated August 4, 2011, Officer [REDACTED] mentions that she explained to the applicant the voluntary nature of the interview, indicating that participation was voluntary and that the applicant was free to leave at any time. Officer [REDACTED] further indicates in her memorandum that she explained to the applicant that his statement would be used in the determination of his inadmissibility to the United States, and that the applicant acknowledged his understanding of the officer's explanation. In addition, the statement mentions that Officer [REDACTED] informed the applicant of her intent to take a sworn statement specific to the September 2003 incident in which the applicant was refused entry to Canada for possessing controlled substances. After consulting with counsel for approximately four minutes, the applicant indicated to Officer [REDACTED] that he was willing to make a statement regarding his stop at the border. As such, the record includes sufficient indicia of reliability concerning the voluntariness of the applicant's admissions.

Counsel for the applicant contends on appeal that the applicant was subjected to double jeopardy as the issue of the applicant's possession of controlled substance was considered by an immigration judge during the applicant's 2004 removal proceedings. The AAO notes that counsel's assertions regarding the immigration judge's granting of voluntary departure in lieu of the initial charging

grounds are incorrect. Here, Immigration Judge [REDACTED] entered an order granting voluntary departure in lieu of a removal order, not a dismissal of the charged grounds of removal. It is noted that a grant of voluntary departure, as well as an order of removal entered pursuant to section 237 of the Act, must be predicated on the Department of Homeland Security proving by clear and convincing evidence that an alien is removable from the United States. See section 240(c)(3)(A) of the Act. The voluntary departure grant is therefore a form of relief from removal the applicant requested only after the issue of his removability from the United States was resolved.

Furthermore, it is well established that the Double Jeopardy Clause is inapplicable to administrative immigration proceedings. See *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, (1975) (concluding that the Double Jeopardy Clause is inapplicable to deportation proceedings); *United States v. Bodre*, 948 F.2d 28, 33 (1st Cir.1991) (stating "[t]he ex post facto clause has been unswervingly held as inapplicable to matters of deportation").

Accordingly, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act based on his voluntary sworn statement concerning his possession of marijuana and cocaine in Washington State.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record shows that in May 2006, the applicant applied for a nonimmigrant visa by misrepresenting the reason for his removal proceeding and subsequent grant of voluntary departure to consular officers at the U.S. Embassy in Taipei, Taiwan. The misrepresentation is referenced in the Consular Consolidated Database. Moreover, the record reflects that the applicant conceded to an Immigration Officer during his adjustment of status interview that he misrepresented a material fact related to his nonimmigrant visa application in order to procure a nonimmigrant visa. Based upon this misrepresentation, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant does not dispute this finding on appeal.

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

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien ...

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. If

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extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). Here, the record reflects that the applicant is the spouse of a U.S. citizen who has an approved Form I-130, Petition for Alien Relative, which was filed on the applicant's behalf. The applicant's U.S. citizen wife therefore meets the definition of a qualifying relative. As such, it appears that the applicant would be eligible to apply for a section 212(i) waiver of inadmissibility.

Nevertheless, the AAO notes that the only waiver available for a controlled substance offense is under section 212(h) of the Act for simple possession of 30 grams or less of marijuana. In this case, the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) for having admitted the essential elements of possession of marijuana and cocaine. However, there is no waiver available under section 212(h) of the Act for simple possession of cocaine. As such, the applicant is statutorily ineligible for a waiver of inadmissibility, and there is no purpose in addressing waiver eligibility under section 212(i).

Section 291 of the Act provides that the burden of proof is on the applicant to establish statutory eligibility for the benefit sought. Here, the applicant has not met that burden. The appeal will be dismissed and the Form I-601 will be denied.

**ORDER:** The appeal is dismissed.