



**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

DATE: **MAR 07 2013**

Office: HOUSTON, TX

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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:

SELF-REPRESENTED

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,

*Michael Shumway*  
for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Field Office Director, Houston, Texas who subsequently reaffirmed his denial in response to a motion filed by the applicant. The applicant's appeal of the Field Office Director's decision was dismissed by the Administrative Appeals Office (AAO) and he has now filed a Motion to Reconsider that decision. The motion will be dismissed. The underlying application remains denied.

The applicant is a native and citizen of Pakistan 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 of cocaine possession in Germany. The applicant is the spouse and father of U.S. citizens. He 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.

The Field Office Director found that the applicant was not eligible for waiver consideration and denied the Form I-601, Application for Waiver of Ground of Excludability, accordingly. *Decision of the Field Office Director*, dated May 11, 2010. In response to the applicant's motion, the Field Office Director concluded that the additional evidence submitted by the applicant did not establish an incorrect application of immigration law or policy and affirmed his prior decision. *Decision of the Field Office Director*, dated September 14, 2010. The AAO also found the applicant ineligible for waiver consideration under section 212(h) of the Act. *Decision of the AAO Chief*, dated June 20, 2011.

On motion, counsel asserts that the AAO erred in finding the applicant's FBI record to be proof of his conviction for cocaine possession. He contends that establishing a conviction for immigration purposes requires an alien's record of conviction and that an FBI record is not part of the record of conviction. Counsel also maintains that the AAO exceeded our authority in reaching a decision on the applicant's appeal as we did not limit our review to the issues and evidence on which the Field Office Director made his decision and failed to consider whether the new evidence submitted by the applicant warranted reconsideration by the Field Office Director. Counsel also asserts that United States Citizenship and Immigration Services (USCIS) is statutorily precluded from analyzing and interpreting German law to deny the applicant a benefit. In support of his assertions, counsel references precedent decisions issued by the Board of Immigration Appeals (BIA), the U.S. Supreme Court and U.S. Courts of Appeal.<sup>1</sup>

The requirements for a motion to reconsider are found in the regulation at 8 C.F.R. § 103.5(a)(3):

(3) *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when

<sup>1</sup> The AAO notes that the applicant's counsel, [REDACTED] has been suspended from the practice of law by the District Court for Harris County, Texas, 129<sup>th</sup> Judicial District, for four years. [REDACTED] has been actively suspended from the practice of law for a period of two years that began on October 19, 2012 and will end on October 18, 2014, followed by probated suspension. [REDACTED] has also been suspended from practicing before the Board of Immigration Appeals (BIA), the Immigration Courts and the Department of Homeland Security (DHS) as of October 23, 2012, pending the final disposition of disciplinary proceedings initiated by DHS and the Executive Office for Immigration Review. Accordingly, the applicant will be considered self-represented, although [REDACTED] submissions and statements will be fully considered.

filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Having reviewed counsel's brief and submitted evidence, the AAO grants the applicant's motion and will reconsider our June 20, 2011 decision.

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 . . . .

(1)(A) [I]t is established to the satisfaction of the Attorney General [Secretary of Homeland Security] that-

- (i) [T]he activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
- (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
- (iii) the alien has been rehabilitated; or

(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 evidence of record in this matter includes, but is not limited to, the following evidence: counsel's briefs and statements; statements from the applicant and his spouse; medical documentation relating to the applicant's spouse and daughter; a psychological evaluation of the applicant's spouse; country conditions information on Pakistan; documentation relating to the applicant's and his spouse's financial obligations; court records concerning the applicant's U.S. convictions; German certificates of good conduct; letters issued by the Monchengladbach (Germany) Prosecutor's Office; and the applicant's letter to the Federal Bureau of Investigation (FBI) requesting the correction of its records. The entire record was reviewed and all relevant evidence was considered in reaching a decision on the motion.

In our June 20, 2011 decision, the AAO found the record to reflect that, on October 18, 1995, the applicant had been arrested by the Monchengladbach (Germany) police on a cocaine possession charge and that he had been convicted of this offense on July 19, 1996. We based our finding on an FBI record reporting the applicant's conviction, letters written by the applicant to the Pakistani embassy and consulate that acknowledge his conviction and an Amended Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, dated June 4, 2007, filed by the applicant's prior counsel in the United States District Court for the Eastern District of Texas, Lufkin Division. In the amended petition, the applicant's former counsel indicated that his client had served a 20 month sentence on drug charges in Germany. Although, on appeal, the applicant submitted two German Certificates of Good Conduct, dated June 15, 2010 and September 30, 2010, that reported he had no criminal record in Germany we noted that pursuant to Article 33 of the German Federal Central Criminal Register Act (BZRG), convictions are no longer reported in certificates of good conduct after the expiration of certain periods of time: three years after convictions punished with a suspended sentence of less than one year and five years for most other convictions, with the exception of convictions for sexual offenses punished by more than one year of imprisonment, which require the elapse of ten years. The period starts as of the date of conviction and is extended by the length of the prison sentence.<sup>2</sup>

As the applicant's conviction had preceded his 2010 requests for a Certificate of Good Conduct by approximately 14 years, we concluded that the "No Record" reported by the certificates did not establish that he had not been convicted of cocaine possession in 1996.

On motion, counsel continues to assert that the applicant was not convicted of possession of cocaine in Germany in 1996 and contends that, pursuant to *Wilkerson v. Utah*, 99 U.S. 130 (1979) and *Trop v. Dulles*, 356 U.S. 86 (1958), USCIS is statutorily precluded from analyzing and interpreting German law to deny the applicant's waiver application. He further maintains that the AAO erred in failing to accept the Certificates of Good Conduct submitted by the applicant as the reporting of serious crimes such as the possession of a controlled substance is not subject to the above noted time limits. As a result, counsel contends, the Certificates of Good Conduct are proof that the applicant has not been convicted of cocaine possession in Germany. In support of his assertions, he points to the November 20, 2010 statement from [REDACTED] a former German prosecutor, who reviewed the certificates obtained by the applicant and concluded:

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<sup>2</sup> This reading of the limitations imposed by German law on the reporting of crimes finds support in the article by Christine Morgenstern, Ernst Moritz Arndt Universitat Greifswald, "Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions," *European Journal of Probation*, Vol. 3, No. 1, 2011, pp. 20-35.

The Certificates of Conduct provided to me by [REDACTED] as a scan show no conviction on record for [REDACTED] and would list any reportable convictions if any would have been found.

As further proof that the applicant has no criminal record in Germany, counsel now submits letters, dated October 5, 2011 and October 18, 2011, from the Prosecutor's Office in Monchengladbach, which were sent to [REDACTED] and which indicate that there are "no known proceedings" against the applicant. Counsel also provides an October 26, 2011 letter written to the applicant by [REDACTED] in which he reports the text of the questions he asked of the Prosecutor's Office in Monchengladbach and the responses he received, concluding that the information given to the FBI concerning the applicant's conviction for cocaine possession is "somehow faulty." An October 31, 2011 statement from counsel, submitted as a supplement to the applicant's motion, states that the FBI record of the applicant's conviction for cocaine possession is based on a report from the Police/Court of Monchengladbach.

Counsel states that it is well settled law that establishing a conviction for immigration purposes requires an alien's record of conviction. Accordingly, he asserts, the FBI record reflecting the applicant's German conviction is not legally binding and that the AAO erred in considering it as proof of the applicant's conviction. Counsel notes that the regulation at 8 C.F.R. § 1003.41 establishes the kinds of evidence that may be used to prove a criminal conviction in immigration proceedings and that 8 C.F.R. § 1003.41(a), which lists a series of documents that are admissible as evidence in proving a criminal conviction, does not include FBI records, referencing the Board of Immigration Appeals' (BIA) decision in *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996). Counsel further asserts that USCIS has not certified the FBI record on which the applicant has been found inadmissible and references the holdings in *Iran v. INS*, 656 F.2d 469, 472 (9<sup>th</sup> Cir. 1981)(citing *Chung Young Chew v. (Boyd) INS*, 309 F.2d 857, 866-67 (9<sup>th</sup> Cir. 1962); *In Re: Ines Rafael Gonzalez-Guzman A.K.A. Ines Gonzalez-Guzman*, A90 527 694, May 28, 2010. Counsel also points to the holding in *Small v. United States*, 544 U.S. 385, 125 S. Ct. 1752, 1755-56, 161 L.Ed.2d 651(2006), in which, he asserts, the U.S. Supreme Court found that it is dangerous to rely on FBI records because of the dangers of incorrect and incomplete information, a ruling that counsel states is applicable to the applicant's case.

Counsel further states that the applicant's letters to the Pakistani embassy and consulate, and the FBI record do not qualify as "other evidence" under 8 C.F.R. § 1003.41(d), as other evidence must be in the form of court records and that these records are also subject to the authentication requirements of 8 C.F.R. § 1003.41(b) and (c) pursuant to *In Re: Ines Rafael Gonzalez Guzman; Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988); and *Baswell Francis v. Alberto Gonzalez*, 442 F.3d 131 (2<sup>nd</sup> Cir. 2006). He contends that the absence of any admissible proof of the applicant's drug conviction is also established by the failure of the Department of Homeland Security (DHS) to remove him from the United States under section 237(a)(2)(B)(i) of the Act.

As a further rationale for reconsidering the AAO's June 20, 2011 decision, counsel states that the FBI record does not establish a conviction pursuant to *Matter of Ozkok* and that the definition and standard for conviction introduced by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) are not applicable here. Counsel also asserts that the AAO has not established that the applicant has not appealed or waived his rights of appeal in connection with his German conviction and that finality does not occur unless and until direct appellate review of the conviction has been

exhausted or waived, referencing *Marino v. INS*, United States Department of Justice, 537 F.2d 686 (2<sup>nd</sup> Cir. 1976) and *Kabongo v. INS*, 488 U.S. 982, 109 S.Ct. 533, 102 L.Ed.2d 564 (1988). Moreover, counsel states, the AAO is prevented from finding the applicant to be inadmissible as he was not determined to be inadmissible at the time of his first entry to the United States following his 1996 conviction for possession of cocaine, as established by *Francis v. Gonzales*, 442 F.3d 131, 139-141 (2<sup>nd</sup> Cir. 2006).

The AAO now turns to a consideration of counsel's arguments, beginning with his contention that USCIS is statutorily precluded from analyzing and interpreting German law to deny the applicant in the present case a benefit. As support for his position, counsel points to the decisions in *Wilkerson v. Utah*, 99 U.S. 130, 1878 WL 18292 (U.S. Utah) and *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). However, although counsel asserts that the holdings in these decisions establish that the "use or interpretation of foreign law in deciding U.S. judicial decisions disturbs an individual's Eight[h] Amendment Rights," we find neither decision to constrain USCIS' authority to review foreign convictions in determining admissibility under section 212(a)(2)(A)(i)(II) of the Act. In *Wilkerson*, the Supreme Court confirmed the legislative authority of the Utah Territory to establish punishments for criminal offenses so long as such punishments did not violate the Eighth Amendment's stricture against cruel and unusual punishment. In *Troy*, it concluded that the Eighth Amendment precluded Congress from using denaturalization to punish criminal acts. Therefore, the AAO does not find counsel to have demonstrated that USCIS is precluded from reviewing a foreign drug statute in determining whether an alien's violation of that statute bars admission to the United States.

We also note counsel's objections to our use of the applicant's FBI record and his letters to Pakistani authorities to establish his inadmissibility pursuant to section 212(a)(2)(A)(i)(II) of the Act. He asserts that proof of the applicant's conviction can only be established by his record of conviction and that an FBI record is not part of the record of conviction.<sup>3</sup> He also contends that the fact that the Department of Homeland Security has not previously removed the applicant on the basis of his drug conviction reflects the absence of any admissible proof of that conviction. Counsel's concerns, however, reflect a misperception that inadmissibility determinations are subject to the same evidentiary requirements as those involving removal.

In removal proceedings, it is the government's burden to prove by clear and convincing evidence that an alien is removable as charged. In such cases, removing an alien on the basis of a criminal offense requires the individual's record of conviction, i.e., the indictment, plea, verdict and sentence. Removal further imposes the requirements counsel has noted regarding the authentication of records and the establishment of the finality of a conviction. Here, however, the applicant is seeking admission to the United States and the burden of proof is not the government's, but his. See section 291 of the Act, 8 U.S.C. § 1361; see also *Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2000). As a result, the AAO is not precluded from relying on the applicant's FBI record, his multiple statements

<sup>3</sup> As previously indicated, counsel also asserts that an FBI record does not establish a conviction pursuant to *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988) and that the definition and standard of conviction established by IIRIRA are not applicable in the applicant's case. Although we do not find it necessary to address this issue in the present case, we do note that the BIA in *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) held that a request for a waiver is a request for prospective relief and as such its restrictions may be applied to conduct that predates passage of the current statute. As the applicant is seeking admission to the United States, his 1996 conviction for a controlled substance violation is appropriately considered under the definition of conviction set forth in section 101(a)(48) of the Act.

admitting his conviction for cocaine possession, and his 2007 amended habeas petition as evidence demonstrating his inadmissibility to the United States.

Counsel's reliance on *Francis v. Gonzales* to establish his contention that we are currently precluded from finding the applicant to be inadmissible to the United States because he was not found inadmissible at the time of his 1997 admission also confuses removal and inadmissibility proceedings. Although we note as a matter of clarification that the applicant returned to the United States in 1997 under the Attorney General's parole authority and was, therefore, not admitted, the reasoning in *Francis* would not apply to the applicant's case even if he had returned as a nonimmigrant in 1997. In *Francis*, the Second Circuit considered the removal of a lawful permanent resident under section 237(a)(1)(A) of the Act, 8 U.S.C. § 1227(a)(1)(A), which requires that an alien's inadmissibility be established as of the date of entry or adjustment. As the Court found insufficient evidence to establish the respondent's inadmissibility at the time of his adjustment, it remanded the case to the BIA for further consideration. Accordingly, *Francis v. Gonzales* is not relevant to the present case.

The AAO now turns to the November 20, 2010 statement of [REDACTED] regarding the Certificates of Good Conduct issued to the applicant. We need not question [REDACTED] statement, as we also do not find it to establish that the submitted certificates are proof that the applicant does not have a controlled substance conviction in Germany. [REDACTED] asserts only that the certificates indicate the applicant has no "reportable" convictions, which is in keeping with our understanding of the time limits imposed on the reporting of criminal convictions by German law. Although counsel has asserted that crimes such as the possession of a controlled substance are not subject to the time limitations set forth in Article 33 of the BZRG, he has submitted no documentation in support of this claim, including a statement to that effect from [REDACTED]. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also contends that in concluding on appeal that the applicant's 1996 conviction would no longer be reported in a 2010 Certificate of Good Conduct, the AAO found that his conviction had been expunged. As a result, he states, the applicant's conviction should no longer be held against him as had he been prosecuted in the United States, his case would have been considered under the Federal First Offenders Act. In support of his claim, counsel points to the holding in *Dillingham v. INS*, 267 F.3d 996 (9<sup>th</sup> Cir. 2001). However, on appeal, we did not find the Certificates of Good Conduct provided to the applicant to indicate anything but that a check of the Federal Central Criminal Register had found the applicant to have no reportable convictions in Germany. The record contains no affirmative evidence to indicate that the applicant's unreported conviction has been expunged, nor any that demonstrates that his offense would be subject to federal first offender treatment in the United States. We acknowledge the possibility that the recent documents presented by the applicant could be indicative of some form of expungement, but there is insufficient basis to conclude that such an outcome renders the applicant's conviction, which the applicant has conceded to exist, no longer a conviction for immigration purposes. There is also no basis for applying the now overruled *Dillingham* decision outside the Ninth Circuit. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> Cir. 2011).

As further proof that the applicant does not have a criminal record in Germany, counsel has submitted the October 5 and October 18, 2011 responses provided to [REDACTED] by the Prosecutor's Office in Monchengladbach, which in response to his queries of August 3 and October 12, 2011, indicate "no known proceedings" against the applicant. Counsel also asserts in an October 31, 2011 statement that the FBI record of the applicant's conviction for cocaine is based on a report from the Police/Court of Monchengladbach. However, while we take note of the responses from Monchengladbach, as well as counsel's statement, we do not find this additional evidence to establish that the applicant was not convicted of a controlled substance violation in Germany in 1996.

Contrary to counsel's assertions regarding the source of the FBI record, it does not appear to rely on a Monchengladbach police record, but to be based on an Interpol case record in which the applicant is reported to have been arrested by Monchengladbach police on October 18, 1995 [REDACTED]. Further, no documentary evidence has been submitted to establish that the reporting of local prosecution records is not subject to the same time limitations as those imposed on the Federal Central Criminal Register or that the prosecution records available for search by the Monchengladbach Prosecutor's Office included records dating back to 1995 and 1996. It is also unclear whether the brief reply of "no known proceedings" responds to the first of [REDACTED] requests in which he asked for a copy of any judgment or order against the applicant or to the second in which he asked for information concerning any other proceedings that had been pending or were pending with the Prosecutor's Office.

Based on the preceding analysis, we continue to find the evidence of record to establish that the applicant was convicted of cocaine possession in Germany in 1996, as indicated by his FBI record; his letters to the Pakistani embassy and consulate in 2004, 2005 and 2006; and his counsel's statement in his 2007 amended habeas petition. Although we acknowledge the applicant's October 27, 2011 letter to the FBI in which he asks for the correction of its record concerning his 1996 conviction, this request does not prove the record to be in error. Therefore, we again conclude that the applicant's admission to the United States is barred pursuant to section 212(a)(2)(A)(i)(II) of the Act based on his 1996 conviction for possession of cocaine and that no waiver is available to him.

On motion, counsel has also asserted that the AAO erred in assessing hardship to the applicant's spouse and daughter under section 212(h)(1)(B) of the Act as the waiver application should have been considered under section 212(h)(1)(A) of the Act, which does not require a favorable exercise of discretion. Contrary to counsel's assertion, the AAO did not consider the applicant's waiver application under section 212(h)(1)(A) or (B) of the Act, having found his admission to be barred by an inadmissibility for which no waiver is available. We indicated, however, that even if the applicant had been found eligible for waiver consideration under section 212(h) of the Act, his 1998 conviction for Aggravated Robbery, Serious Bodily Injury<sup>4</sup> would have precluded a favorable exercise of the Attorney General's (now Secretary of Homeland Security's) discretion in his case. Whether an alien seeks a waiver under section 212(h)(1)(A) or (B) of the Act, that individual must demonstrate that the positive factors in his or her case outweigh the negative, such that a favorable exercise of discretion is warranted under section 212(h)(2) of the Act.

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<sup>4</sup> Counsel has not contested that the applicant was convicted on August 3, 1998 of two counts of Aggravated Robbery, Serious Bodily Injury, Texas Penal Code § 22.02.

Counsel has also stated that the AAO exceeded our authority on appeal as we did not limit our review only to the issues and evidence on which the Field Office Director had made his decision, failing to consider whether the new evidence submitted by the applicant warranted reconsideration by the Field Office Director. We note, however, that the AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). Under this authority, we conduct the final administrative review and enter the ultimate decision for USCIS on all immigration matters that fall within our jurisdiction. This review is conducted on a *de novo* basis as to issues that may result in the denial of an application or petition that fails to comply with the technical requirements of the law, even when the original decision did not identify all of the grounds for denial. 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 (3<sup>d</sup> Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Therefore, our June 20, 2011 review of the applicant's case did not exceed our authority.

Having considered the applicant's motion to reconsider, we do not find it to establish that our decision of June 20, 2011 was based on an incorrect application of law or USCIS policy. Neither does it establish that our decision was incorrect based on the evidence of record. Accordingly, the motion will be dismissed and the underlying application will remain denied.

In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden.

**ORDER:** The motion is dismissed.