



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 03 2013**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: [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 (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 Service Center Director, Nebraska, denied the waiver application and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Ukraine who was found to be inadmissible under 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 violated a law relating to a controlled substance. The applicant is applying for a waiver 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.

On May 17, 2013, the Field Office Director denied the Form I-601 application for a waiver, concluding that the applicant is statutorily ineligible for a waiver of inadmissibility as a result of his controlled substance conviction.

On appeal, the applicant provides an explanation of the circumstances surrounding his conviction and states that he was released from punishment of his conviction under the Law of Ukraine on Amnesty and that he is deemed to be a person with no criminal record.

In support of the waiver application, the record includes, but is not limited to: documentation and translations concerning the applicant's criminal conviction in the Ukraine; biographical information for the applicant and his fiancée; a statement from the applicant; and statements from the applicant's fiancée.

The applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance.

Section 212(a)(2)(A) 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.

The applicant's criminal record from the Ukraine indicates that on July 26, 2000, he was convicted of illegally purchasing and keeping a narcotic substance (acetylated opium) in violation of Article 2296, Part 1, of the Criminal Code of Ukraine. The record indicates that the applicant admitted his guilt and was sentenced to 1 year imprisonment, but was released from serving his sentence pursuant to Article 1 of the Law of Ukraine On Amnesty, as he had an underage child. The record further reflects that applicant's criminal record was cancelled pursuant to Article 5 of the Law of Ukraine on Applying of Amnesty in Ukraine and Article 89, Party 7; Article 90, Part 3 of the

Criminal Code of Ukraine. On appeal, the applicant states that he should be admissible to the United States as a result of the cancelation of his criminal conviction.

Generally, under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to an action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). The record indicates that the laws under which the applicant's conviction was cancelled was rehabilitative in nature, and, as a result, the applicant's conviction remains valid for immigration purposes even where he has been deemed to be a person with no criminal record in the Ukraine.

As result of the applicant's conviction, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense involving possession of a controlled substance.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of 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 if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the 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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The applicant may only be considered for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act if he was convicted of a single offense relating to simple possession of 30 grams or less of marijuana. As the applicant has been convicted of purchase and possession of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802) other than marijuana, he is not eligible to apply for a waiver under section 212(h) of the Act and remains inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The AAO acknowledges the documentation in the record regarding the hardship to the applicant's fiancée; however, there is no discretionary basis to approve the applicant's Form I-601 application. The applicant is statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(II) of the Act. Thus, no purpose is served in adjudicating his waiver application.

In application proceedings, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.