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



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

Date: **SEP 12 2013**

Office: NEWARK

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:

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,

[Handwritten signature]

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to 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 a crime involving moral turpitude. The applicant was also found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law of a foreign country relating to a controlled substance. Finally, the field office director found the applicant inadmissible under 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), for controlled substance trafficking. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The field office director concluded that the applicant was statutorily ineligible for a waiver as she had been convicted of importation of a controlled drug. Furthermore, the field office director noted that the applicant had failed to provide any evidence that the conviction was based on a single offense relating to the applicant's personal use. The Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *Decision of the Field Office Director*, January 29, 2013.

On appeal, the applicant contends that the amount involved in the case was only 3.7 grams of marijuana and the facts of the case would probably not warrant a conviction. Further, the applicant contends that the conviction no longer exists for any purpose in the jurisdiction where it occurred.¹ Moreover, the applicant asserts that since the matter took place in 1984, more than 15 years ago, this matter should be considered as analogous to a simple offense possession due the small amount involved. The applicant concludes by stating that evidence in support of her rehabilitation and that her admission would not be contrary to the national welfare, safety or security of the United States will be submitted within 30 days. *See Form I-290B, Notice of Appeal*, dated February 27, 2013. As

¹ Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state 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 state 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. In *Matter of Pickering*, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). Assuming *arguendo* that the applicant's conviction from 1984 has in fact been expunged based on the passage of time, there is nothing in the record to show that said action was based on a defect in the conviction or in the proceedings underlying the conviction. Thus, the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act.

of today, no additional evidence has been received by the AAO. As such, the record is considered complete.

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

- (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-
 - (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 a 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.
 - (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
 - (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).
- (C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.

The record establishes that the applicant was convicted, in 1984, of “FOREIGN LEG/IMPORTING CONTROLLED DRUGS”, a violation of Guernsey Criminal Law. *See Report from National Identification Service, London*, dated September 12, 2007. To the extent necessary, the AAO may rely on evidence outside the record of conviction to determine the facts of the applicant’s controlled substance violation. *See Matter of Grijalva*, 19 I&N 713 , 718 (BIA 1988)(“[W]here the amount of marijuana that an alien has been convicted of possessing cannot be readily determined from the conviction record, the alien who seeks section 241(f)(2) relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved “30 grams or less of marihuana”); *cf. Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a “circumstance-specific” inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a “single” offense of possession). Pursuant to documentation provided on appeal by the applicant, the applicant violated the law by importing 3.67 grams of Cannabis Resin. She was fined and alternatively, were she to default in payment of such fine she would be imprisoned for a period of 30 days. As noted in the documentation provided, the information regarding the applicant’s conviction was obtained from a Custom’s ledger of 1984 seizures which also contained a copy of the Court sheet detailing the outcome. *See Email from Lynn M De Carteret, Cross Border Crime, A Division of the Guernsey Border Agency*, dated February 19, 2013.

The AAO notes that there is no waiver available for inadmissibility under section 212(a)(2)(C)(i) of the Act, controlled substances traffickers. Nevertheless, even if the applicant is not inadmissible under this section, the applicant remains inadmissible pursuant to section 212(a)(2)(A)(i)(I) and 212(a)(2)(A)(i)(II) of the Act. The only waiver available to the applicant for such grounds of inadmissibility is outlined in section 212(h)(1)(A) of the Act.

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

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) 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 . . .
- (2) The Attorney General (Secretary), in his discretion . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

To begin, the AAO notes that the applicant, despite her assertion to the contrary, was not convicted of a violation with respect to marijuana. She was convicted of importing Cannabis Resin, as noted by the letter from the Guernsey Border Agency. The drug equivalency of 1 gram of Cannabis Resin is 5 grams of marijuana. *See United States Sentencing Commission Supplement to the 2000 Guidelines Manual*, dated May 1, 2001, Drug Equivalency Table. The amount the applicant imported is thus equivalent to 18.835 grams of marijuana, not 3.7 grams as noted on appeal.

The applicant goes on to assert that her conviction was analogous to simple possession. However, 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 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 establishes that the applicant was convicted of Importing Controlled Drugs, and as such, the applicant is not eligible for a waiver under section 212(h) of the Act.

The field office director found that the applicant was inadmissible under section 212(a)(2)(C)(i) of the Act, as a controlled substance trafficker. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act. Assuming *arguendo* that such provision of the Act is not applicable to the applicant, the AAO concurs with the Field Office Director that the applicant remains inadmissible under section 212(a)(2)(A)(i) of the Act based on her conviction for importation and as outlined above, is statutorily ineligible for a waiver under section 212(h) of the Act.

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.