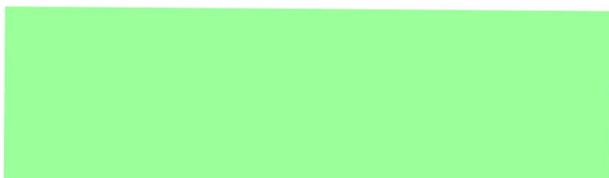




U.S. Citizenship
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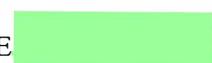
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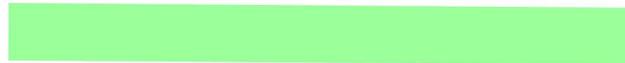
Office: NEBRASKA SERVICE CENTER

FILE



IN RE:

Applicant:



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:



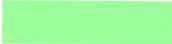
INSTRUCTIONS:

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,

Ron Rosenberg
Chief, Administrative Appeals Office



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

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States 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 been convicted of a crime relating to a controlled substance. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and seeks a waiver of inadmissibility to reside in the United States.

The director found that the applicant is ineligible for a waiver and the Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied accordingly. *See Decision of the Director* dated March 7, 2014.

On appeal counsel for the applicant contends in the Notice of Appeal (Form I-290B) that the substance related to the applicant's conviction is not located on the Federal Schedules at 21 CFR 21 1308.11-15. Counsel further asserts that the director then overlooked the hardship to the applicant's U.S. citizen spouse and disabled child if he is unable to reunite with them, and that the director's decision is based on an incorrect application of the law. With the appeal counsel submits a brief and school records for the applicant's son. The record also contains evidence in support of the I-601 waiver application. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

- (i) [A]ny 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, that:

The [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. . . .

A review of the record also supports that the applicant is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C) for being a controlled substance trafficker. Section 212(a)(2)(C) states, in pertinent part:

- (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 reflects that the applicant entered the United States without inspection in February 1990. On April 20, 2001, the applicant was convicted in U.S. District Court for the Eastern District of New York of Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids in violation of 21 U.S.C 846 and 841 (b)(1)(D). The applicant was sentenced to three years of probation. The applicant was removed from the United States on May 9, 2003. Based on the applicant's conviction the director determined that he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime relating to a controlled substance.

On appeal counsel asserts that the applicant's conviction does not involve a controlled substance as indicated by section 212(a)(2)(A)(i)(II) of the Act. Counsel observes that in the transcript of sentence for the applicant the judge ruled that Clemeprol is not a controlled substance. Counsel asserts that the director's decision references the federal schedule of controlled substances at 21 CFR Section 1308.13, but Clemeprol is not on the schedule and the director then failed to produce evidence identifying the actual substance at issue.

In support of this assertion, counsel cites *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), in which the BIA found that where the record of conviction is silent as to the narcotic involved, an alien's conviction did not render him deportable under section 241(a)(11) of Immigration and Nationality Act since the conviction could have involved a substance which though a narcotic under California law is not a narcotic drug within the meaning of the immigration laws. Counsel further asserts that if the record of conviction of a state drug offense does not identify the particular substance that conviction cannot constitute a controlled substance conviction because immigration authorities cannot prove unambiguously that the offense was a federally listed offense.

The issue is whether the record supports a finding that the applicant was convicted of an offense relating to a controlled substance that renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. The applicant was convicted in United States District Court of Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids, a violation of 21 U.S.C §§ 846 and 841 (b)(1)(D), rather than under state law. We note that under 21 CFR §1308.13 Schedule III anabolic steroids are listed as a controlled substance and 21 CFR § 1308.14 (f) states:

Anabolic Steroids. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation containing any quantity of the following substances, including its salts, esters and ethers:

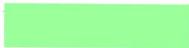
- (1) Anabolic steroids (see § 1300.01 of this chapter)—4000

Counsel refers to the transcript of sentence for the applicant where the judge ruled that Clemepril is not a controlled substance. However, according to the transcript, the reference to the substance Clemepril is in a probation report that is not on the record and appears to refer to an additional substance in the applicant's possession, and not the Schedule III controlled substance that is the subject of the guilty plea. The applicant was convicted of Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids, which is clearly indicated as a controlled substance on Schedule III. The record also shows that the applicant was removed from the United States in 2003 because of his conviction relating to a controlled substance violation, and nothing in the record shows that the finding was contested.

Counsel asserts that the director incorrectly applied law and case law and cites cases including, *Ruiz v. Vidal v. Gonzales*, 473 F.3d 1072, 1078-79 (9th Cir. 2007). Counsel contends that USCIS bears the burden to show that the applicant was convicted of a controlled substance identified in section 102 of the Controlled Substances Act. However, in *Ruiz-Vidal* the Ninth Circuit was reviewing whether an individual was removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). In such an instance, “[t]he government must prove by ‘clear, unequivocal, and convincing evidence that the facts alleged as grounds of [removability] are true.’” *Id.* (citing *Gameros-Hernandez v. INS*, 883 F.2d 839, 841 (9th Cir. 1989)). No such burden adheres when USCIS is assessing inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Section 291 of the Act, 8 U.S.C. § 1361, provides that, in the present proceeding, the burden of proof is upon the applicant to establish he is eligible for the benefit sought.

In the present matter, the applicant has not established that he was convicted for a controlled substance not included in section 102 of the Controlled Substances Act or as contemplated by section 212(a)(2)(A)(i)(II) of the Act. The applicant is therefore inadmissible under section 212(a)(2)(A)(i)(II) of the Act. As the applicant's conviction is for an offense that does not relate to possession of 30 grams or less of marijuana his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act cannot be waived under section 212(h) of the Act.

The record also supports that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act as he has been an illicit trafficker in a controlled substance. In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer “knows or has reason to believe” that the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In the present matter the applicant has been convicted of Conspiracy to Distribute and Possess with Intent to Distribute Anabolic Steroids, which is a controlled substance. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.



Accordingly, the applicant has not met his burden to show that he was erroneously deemed inadmissible under section 212(a)(2)(A)(i)(II) of the Act or that he is not inadmissible under section 212(a)(2)(C)(i) of the Act. Given that the applicant is statutorily ineligible for a waiver, no purpose is served in adjudicating such a waiver application.

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.