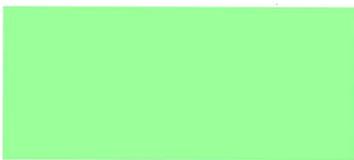


(b)(6)

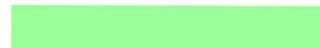


U.S. Citizenship
and Immigration
Services

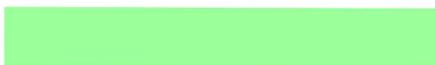


DATE: **FEB 11 2014**

OFFICE: ATHENS, GREECE



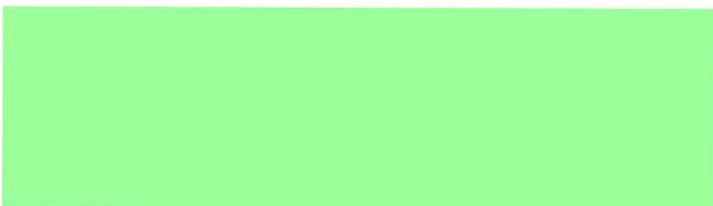
IN RE:



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:



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,


for Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Athens, Greece, and a subsequent appeal was dismissed by Administrative Appeals Office (AAO). The matter came again before the AAO on motion to reopen and reconsider and we affirmed our prior decision. The matter is now before the AAO a third time, on a motion to reopen. The motion will be granted, but the prior AAO decisions will be affirmed.

The applicant is a native of Morocco and a citizen of Israel who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. He was also found inadmissible under section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), for having been convicted of a crime involving a controlled substance and for having been convicted of crimes involving moral turpitude. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (Form I-130). He seeks a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) and 8 U.S.C. § 1182(h), in order to reside in the United States.

The Officer in Charge concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Officer in Charge*, dated May 27, 2008.

In our prior decisions, the AAO has found the applicant to be statutorily ineligible for a waiver based on his conviction for possession of an unspecified controlled substance, concluding that the applicant failed to meet his burden of proof in establishing that his conviction relates to a single offense of simple possession of 30 grams or less of marijuana. *See Decisions of the AAO*, dated July 6, 2011 and dated March 7, 2013. In response, counsel for the applicant filed the present motion to reopen.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Counsel asserts on motion that the applicant's drug conviction has since "been cleared and he no longer has any convictions under Israeli law." *See Counsel's Brief in Support of Motion*, received June 3, 2013. Counsel avers: "It appears that due to the significant time that has passed since the applicant had been previously convicted under Israeli law such convictions have now been eliminated." *Id.* In support of this contention, he submits a document from the Ashdod, Israel Police Station, dated April 11, 2013, indicating that if the applicant does not "see record in one of the aforementioned subjects" – i.e., criminal record or police record – "it's meaning that there is no information about you in the Police record."

The record reflects that on November 27, 1979, the applicant was convicted in the District Court, [REDACTED], of violating section 7(a) of the Dangerous Drug Ordinance of 1973 after admitting to the "holding of a dangerous drug" contrary to this section. We found previously that although the statute punishes cannabis possession of up to only 15 grams, it also punishes

possession of opium, LSD, cocaine, heroin, morphine, methadone, pethidine, morphetamine, and dexamphetamine or methamphetamine. Accordingly, as no evidence had been submitted concerning the particular substance for which the applicant was convicted, we found that the applicant had failed to demonstrate that his controlled substance violation involved only simple possession of 30 grams or less of marijuana. Counsel now contends that the absence of the applicant's 1979 conviction from recent police station records indicates that he "no longer has any convictions under Israeli law."

Section 101(a)(48) of the Act provides that:

- (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
 - (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

The November 27, 1979 verdict issued by [REDACTED] shows that the applicant was convicted after admitting to the "holding of a dangerous drug contrary to section 7(a) of Dangerous Drug Ordinance 1973." The applicant has, therefore, been convicted as set forth in section 101(a)(48)(A) of the Act.

Under the current statutory definition of conviction provided at section 108(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state or foreign action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns such 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 Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). In counsel's memo dated August 10, 2006, he writes: "A foreign pardon will not be effective as no pardon is effective as to a drug conviction." Counsel references *Matter of Pickering*, stating that it is "a similar case arising in Canada where a Canadian drug conviction was overturned exclusively for U.S. immigration purposes and was not honored by the U.S. Immigration Service."

In the present matter, counsel does not assert the operation of any rehabilitative statute in the applicant's drug conviction, only that the conviction appears to have been "eliminated" and "cleared" due to the passage of time such that the applicant "no longer has any convictions under Israeli law." The record contains no documentation that the applicant's conviction was vacated or overturned on the merits or for a violation of constitutional or statutory rights in the underlying

criminal proceedings. The fact that current records from the [REDACTED] station do not contain a reference to the conviction does not demonstrate that the applicant's conviction has been expunged on basis that can be recognized as eliminating it for immigration purposes. Accordingly, the applicant remains "convicted" within the meaning of section 101(a)(48)(A) of the Act based on his November 27, 1979 conviction for holding a dangerous drug contrary to section 7(a) of Israel's Dangerous Drug Ordinance of 1973.

Section 212(a)(2) of the Act states in pertinent part:

Criminal and related grounds. —

(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 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 Attorney General 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

Based on the foregoing, the AAO finds that the applicant's November 27, 1979 conviction for holding a dangerous drug contrary to section 7(a) of Israel's Dangerous Drug Ordinance of 1973 constitutes a crime related to a controlled substance, rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. In interpreting inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and the corresponding waiver of inadmissibility under section 212(h), the BIA has held that a purely categorical inquiry concerning the nature and amount of the controlled substance is clearly insufficient, and Congress intended to permit a broader factual inquiry in order to resolve these issues. *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124-25 (BIA 2009). Where the

record of conviction is inconclusive, and the burden of proof is on the applicant (as it is here), the applicant must present evidence to show that the controlled substance conviction relates to simple possession of 30 grams or less of marijuana. *Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988). Because the applicant has failed to demonstrate that his conviction relates to a single offense of simple possession of 30 grams or less of marijuana, he does not qualify for the waiver found in section 212(h) of the Act.

Because the applicant is statutorily ineligible for a waiver due to his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, no purpose would be served in discussing whether he has demonstrated rehabilitation, whether he has established extreme hardship to a qualifying relative for purposes of waiving his other grounds of inadmissibility, or whether he merits a waiver as a matter of discretion.

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. Therefore, the motion is granted but the prior AAO decisions are affirmed.

ORDER: The prior AAO decisions are affirmed.