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U.S. Citizenship
and Immigration
Services

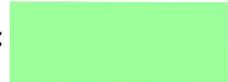


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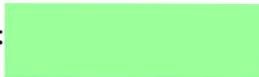
OFFICE: NEBRASKA SERVICE CENTER

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:

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 Nebraska Service Center Director 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 India 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 a crime involving a controlled substance and section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. He is the son of a U.S. citizen mother and the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States.

The director concluded that because the applicant is statutorily inadmissible as a result of his conviction for a crime relating to a controlled substance, no purpose would be served in adjudicating his application for a waiver of a crime involving moral turpitude. *See Decision of the Service Center Director*, dated August 30, 2013. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Id.*

On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act and the waiver should be decided on the merits. *See Counsel's Appeal Brief*, received September 17, 2013.

The record contains, but is not limited to: Form I-290B and counsel's appeal brief; prior counsel's brief in support of a waiver; various immigration applications and petitions; documents related to the applicant's criminal convictions, removal proceedings, and departure from the United States; a hardship declaration from the applicant's mother; a letter from the applicant's sister; numerous letters of character reference and support; medical records; financial and property records; and documents related to the applicant's father's incarceration. The entire record was reviewed and considered in rendering this decision on the appeal.

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.

(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 was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the 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).

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

The record shows that the applicant was convicted on or about February 4, 2000 of Petty Theft, in violation of California Penal Code (CPC) section 490.1. He was sentenced to pay a fine. The applicant was convicted on or about June 25, 2002 of Petty Theft, in violation of CPC §§ 484/488. He was sentenced to six days incarceration and the payment of a fine. Based on the foregoing, the director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

The record shows that the applicant was convicted on or about June 5, 1997 of Use/Under the Influence of a Controlled Substance, in violation of California Health and Safety Code (H&S) section 11550. The applicant was sentenced to 90 days incarceration (suspended sentence) and two years of probation. As noted by the director and conceded by counsel, while the applicant's conviction was subsequently expunged in 2007, expungement of a state court conviction for a first time controlled

substance offense remains a conviction for immigration purposes. *See Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011). While the BIA held the decision in *Nunez-Reyes* operates only prospectively, it additionally held that expungements for “under the influence” convictions have no force or effect even if prior to 2010. Thus, under *Nunez-Reyes*, the applicant’s state court conviction for use/under the influence of a controlled substance remains a conviction for immigration purposes even though the conviction was subsequently expunged.

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 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). 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. Accordingly, the applicant remains “convicted” within the meaning of section 101(a)(48)(A) of the Act based on his June 1997 conviction for use/under the influence of a controlled substance.

Based upon the foregoing, the director determined that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act and does not qualify for the waiver provision in section 212(h) of the Act because the applicant has not established that his controlled substance conviction relates to a single offense of simple possession of 30 grams or less of marijuana. Rather, the director noted that the record of conviction shows that the applicant’s offense involved stimulants, which is a controlled substance. *See* 21 U.S.C. § 802; 21 C.F.R. § 1308.

Citing *Ruiz-Vidal v. Gonzalez*, 437 F.3d. 1072 (9th Cir. 2007), counsel contends that the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) because the government must prove that the specific controlled substance for which he was convicted appears on the federal schedules of the Controlled Substances Act (CSA), 21 U.S.C. § 802; 21 C.F.R. § 1308. Counsel further cites *Cheuk Fung v. Holder*, 578 F.3d. 1169 (9th Cir. 2009), in support of his contention. The AAO finds that the present matter is distinguishable from *Ruiz-Vidal* and *Cheuk Fung*, as those decisions address the government’s burden in terms of deportability/removability, not in terms of inadmissibility. In application proceedings for a visa, admission, or other immigration benefit, the burden is entirely on the applicant to establish admissibility and eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. *See also Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the BIA noted that it has long drawn a distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general. Thus, the requirement

of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), for cases involving the possession of particular substances, has never been extended to other contexts by the BIA. *Martinez Espinoza* at 121. For example, in *Matter of Martinez-Gomez*, 14 I&N Dec. 104, 105 (BIA 1972), the BIA held that an alien's California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs under former section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11) (1970), even though the California statute required no showing that only Federal narcotic drugs were sold or used in the place maintained. Further, the Ninth Circuit held that an alien was deportable based on his Arizona conviction for possessing drug paraphernalia, even though Arizona's definition of a "drug" did not "map perfectly" with the Federal controlled substance definition, because the Arizona statute was "plainly intended to criminalize behavior involving the production or use of drugs—at least some of which are also covered by the federal schedules of controlled substances." *Luu-Le v. INS*, 224 F.3d at 915.

In the present matter, the record of conviction shows that the applicant was convicted in a California state court of use/under the influence of a controlled substance, stimulants. The applicant has failed to establish by a preponderance of the evidence that he is not inadmissible for having been convicted of a violation of a state law relating to a controlled substance, or that his conviction relates to a single offense of simple possession of 30 grams or less of marijuana. Moreover, California H&S § 11550(a) criminalizes the use or being under the influence of a list of enumerated controlled substances in certain subsections of H&S §§ 11054 and 11055 and all controlled substances in H&S §§ 11056 through 11058. H&S §11550(a) provides, in pertinent part: "No person shall use, or be under the influence of any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), (21), (22), or (23) of subdivision (d) of Section 11054...". Marijuana is specified at H&S §11054(d)(13), and is thus not one of the specified controlled substances in H&S §11550(a). Therefore, one cannot be convicted under that section of law for the use or being under the influence of marijuana. By terms of the statute, a conviction is necessarily for the use or being under the influence of some controlled substance other than marijuana. As such, the applicant is ineligible to seek a waiver under section 212(h) of the Act since the waiver is available only for convictions relating to a single offense of simple possession of 30 grams or less of marijuana. Accordingly, the applicant has not established eligibility for the benefit sought.

The AAO finds, therefore, that the applicant's June 1997 conviction for use/under the influence of a controlled substance constitutes a crime related to a controlled substance, rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Because the applicant has not shown 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 under section 212(h) of the Act, the AAO will not analyze whether his convictions for petty theft constitute a crime involving moral turpitude rendering him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Because the applicant is statutorily ineligible for relief 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, 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.

ORDER: The appeal is dismissed.