



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 03 2014** Office: NEBRASKA SERVICE CENTER

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,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Norway 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 committed violations related to a controlled substance. The applicant is the child of lawful permanent residents and is also a lawful permanent resident. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to reside in the United States with his parents.

The Service Center Director concluded that the applicant had failed to establish he belonged to one of the categories of aliens who could apply for a waiver, or that he had contacted the U.S. Department of State in his country of residence as instructed. *Decision of the Service Center Director*, dated May 8, 2014. The application was accordingly denied. *Id.*

On appeal, counsel contends that Board of Immigration Appeals (BIA) case-law, section 212(h) of the Act, and regulations allow the applicant, who is now in Norway, to file a stand-alone waiver for his 2010 conviction for possession of marijuana.

The record includes, but is not limited to: briefs in support; documentation of criminal and removal proceedings; copies of passports; evidence of birth, residence, and citizenship; affidavits; employment and federal income tax records; educational transcripts; letters of support; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

We will first address the applicant's admissibility and eligibility for a waiver. 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 record reflects that on January [REDACTED] the applicant was charged with one count of possession of marijuana, less than 2 ounces, in violation of Texas Health and Safety Code §481.121(b)(1). Before a county court judge, the applicant pled nolo contendere on September 7, 2010, and the adjudication of the criminal case was deferred. The applicant was ordered to serve 6 months in probation, 24 hours of community service, and pay \$492 in fees. The case was dismissed on April 8, 2011.

Inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is not contested on appeal. Therefore, the Service Center Director's finding of inadmissibility for possession of a controlled substance, marijuana, is affirmed.

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.

In order to be eligible for consideration for a waiver under section 212(h) of the Act, the applicant must establish that his conviction relates to simple possession of 30 grams or less of marijuana. The record of conviction reflects that the applicant was convicted for possession of 7.7 grams of marijuana. We find, therefore, that the applicant's conviction was for simple possession of less than 30 grams of marijuana.

However, the applicant has not demonstrated that he is otherwise presently eligible to apply for a waiver. The record reflects the applicant was last admitted to the United States in November 2008, in E-2 nonimmigrant status. He subsequently adjusted status to that of a permanent resident on June 30, 2009. As noted above, in 2010 the applicant was convicted for possession of 7.7 grams of marijuana. In 2012, the applicant departed the United States, and on or about December 23, 2012, he attempted to procure admission into the United States as a returning lawful permanent resident. He was issued a Notice to Appear, Form I-862, on the same day, charging him as an arriving alien who was inadmissible under section 212(a)(2)(A)(i)(II) of the Act. On January 22, 2013, an immigration judge granted the applicant's motion to withdraw his application for admission into the United States, and allowed him to depart the United States no later than January 29, 2013. It appears that the applicant departed the United States in compliance with those instructions, and has filed a stand-alone I-601 waiver application while residing in Norway.

In order to obtain a waiver under section 212(h) of the Act, an applicant must be "applying or reapplying for a visa, for admission to the United States, or adjustment of status." Section 212(h)(2) of the Act. In this case, the applicant is not applying for adjustment of status, as the applicant's lawful permanent resident status was not terminated by the immigration judge, and he is currently still a lawful permanent resident who has no need to apply for adjustment of status. The record also does not reflect that the applicant is applying or reapplying for an immigrant or non-immigrant visa which, again, he would not require as he is a lawful permanent resident. Therefore, to obtain a waiver, the applicant must be requesting admission into the United States.

Counsel contends that the applicant, a lawful permanent resident residing in another country, is eligible to apply for a *nunc pro tunc* 212(h) waiver, which would dispose of the charges against him. Counsel additionally claims that the applicant may file a waiver application, standing alone, to overcome a ground of inadmissibility which would otherwise preclude his admission. In support, counsel cites to *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976), and *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1973). These cases, however, do not support a conclusion that the applicant, who is not presently requesting admission at a port of entry or in removal proceedings, is eligible to apply for a waiver.

In *Matter of Abosi*, the respondent had become a lawful permanent resident, and when he returned from a trip outside the United States, he was found with marijuana. *Matter of Abosi*, 14 I&N at 204. The respondent was charged with a petty misdemeanor, he was admitted to the United States, and he was later convicted of possession of marijuana under Minnesota law. *Id.*

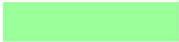
After a subsequent trip overseas, the respondent was not able to procure admission into the United States in light of his controlled substance conviction. He was placed in removal proceedings as an arriving alien, and charged with inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. *Id.* at 204-05. An immigration judge held that the respondent could not independently pursue a 212(h) waiver without an application for adjustment of status, and consequently found him ineligible for the waiver. On appeal, the BIA reversed the immigration judge's decision, finding that section 212(h) of the Act did not "bar arriving aliens from seeking such relief. Nor does the language of the statute require the filing of a concurrent application for adjustment of status." *Matter of Abosi*, 14 I&N at 205.

Pursuant to the BIA's decision in *Matter of Abosi*, the applicant could have requested a stand-alone section 212(h) waiver while he was in removal proceedings, as he was then an arriving alien. Currently, however, the applicant is no longer an arriving alien. *See* 8 C.F.R. §1.2 ("Arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry..."). Although the applicant was charged as an arriving alien on the December 23, 2012, Notice to Appear, he was allowed to withdraw his application for admission into the United States, and he subsequently departed the country.

Neither is the applicant presently requesting admission into the United States. When he was in removal proceedings, the applicant was in the position of a lawful permanent resident requesting admission into the United States, as he had committed an offense described in section 212(a)(2) of the Act. *See* section 101(a)(13)(C)(v) of the Act ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking admission into the United States for purposes of the immigration laws unless the alien... (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a)..."). At that point, the applicant was eligible to request a waiver of inadmissibility as an applicant for admission. *See* section 212(h)(2) of the Act.

The applicant has not provided sufficient legal support for his contention that he is presently requesting admission into the United States.¹ Under section 101(a)(13)(A) of the Act, "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." Admission encompasses adjustment of status, as well as entry at the border with an immigrant or a nonimmigrant visa. *In re Shanu*, 23 I&N Dec. 754 (BIA 2005), *Matter of Alyazji*, 25 I&N Dec.

¹ The cases cited on appeal, *Matter of Ducret* and *Matter of Vrettakos*, are distinguishable from the applicant's situation because in those matters the BIA discussed an immigration judge's power to grant nunc pro tunc applications for permission to reapply for admission, and not USCIS's power to grant a stand-alone waiver of inadmissibility under section 212(h) of the Act.



397 (BIA 2011). Here, the applicant has not demonstrated that he is presently requesting admission by attempting to enter at a port of entry or applying for adjustment of status. Consequently, the applicant has not established that he is eligible to apply for a waiver of inadmissibility under section 212(h) of the Act. As the applicant has not demonstrated this, no purpose would be served in evaluating whether he has shown that his qualifying relatives would experience extreme hardship given his inadmissibility.

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.