



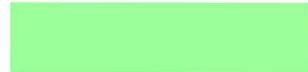
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **SEP 08 2014**

OFFICE: NEWARK, NJ



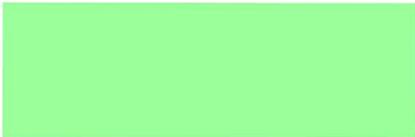
ed therein)

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:



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 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 Argentina who was found 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 committed a crime involving moral turpitude. The applicant also was found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for his convictions relating to possession of a controlled substance. The applicant requests a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. §1182(h), in order to remain in the United States with his U.S. citizen spouse.

The Field Office Director determined that the applicant was statutorily ineligible for a waiver because he was convicted of two controlled substance violations and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director*, dated October 3, 2013.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) erred in finding the applicant was ineligible for relief. Counsel indicates that the applicant was found guilty of a controlled substance violation only once, because the other conviction was dismissed, and therefore he is eligible for a waiver.

The evidence of record includes, but is not limited to: a Form I-290B, Notice of Appeal or Motion; a letter from the applicant's attorney; medical and psychological documentation regarding the qualifying spouse; an affidavit from the qualifying spouse; documentation regarding the applicant's criminal history; identification documentation for the applicant and qualifying spouse; financial documentation; three Forms I-485, Applications to Register Permanent Residence or Adjust Status; an approved Form I-130, Petition for Alien Relative (Form I-130), with supporting documents; and a withdrawn Form I-130. 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 part:

(i) [A]ny 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 . . . is inadmissible.
- (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.

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

- (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 record reflects that the applicant was twice arrested for controlled substance violations, first in 1995 and then in 1998. On August 28, 1995, the applicant was arrested for possession of marijuana and for possession of drug paraphernalia in violation of sections 2C:35-10a(4) and 2C:36-2 of the New Jersey Statutes (N.J.S.A.). A complaint inquiry certified by the [REDACTED] Township Municipal Court indicates no plea was made on the adjourned date. The record also contains two additional certified complaint inquiries. With respect to the applicant’s charge for possession of marijuana, one certified complaint inquiry indicates that the applicant made no plea and the court finding was conditional discharge. Another disposition certified by the Municipal Court of [REDACTED] Township on May 4, 2011, concerning the applicant’s second charge for possession of drug paraphernalia indicates that the court found him guilty and that his drug paraphernalia charge was merged with his possession charge.¹ The [REDACTED] Township Municipal Court subsequently permitted the applicant to participate in the New Jersey conditional discharge program under N.J.S.A. 2C:36-1, and he was placed on probation for one year with penalties. After completing his probation, on July 8, 1997, the case against him was dismissed.

The version of N.J.S.A. 2C:36A-1 in effect at the time of the applicant’s conditional discharge states, in pertinent part:

Conditional discharge for certain first offenses; expunging of records

a. Whenever any person who has not previously been convicted . . . under any law of the United States, this State or any other state relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, is charged with or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title, the court upon notice to the prosecutor and subject to subsection c. of this section, may on motion of the defendant or the court:

- (1) Suspend further proceedings and with the consent of the person after reference to the State Bureau of Identification criminal history record

¹ A “finding” code of “4” appears in the record concerning these charges. The evidence describing the court’s finding codes indicates that “4” means “guilty-merged.”

information files, place him under supervisory treatment upon such reasonable terms and conditions as it may require; or

(2) After plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person after proper reference to the State Bureau of Identification criminal history record information files, place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.

...

b. . . . Upon fulfillment of the terms and conditions of supervisory treatment the court shall terminate the supervisory treatment and dismiss the proceedings against him. Termination of supervisory treatment and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense but shall be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. Termination of supervisory treatment and dismissal under this section may occur only once with respect to any person. Imposition of supervisory treatment under this section shall not be deemed a conviction for the purposes of determining whether a second or subsequent offense has occurred under section 29 of P.L.1970, c. 226 (C. 24:21-29), chapter 35 or 36 of this title or any law of this State.

Counsel asserts that the applicant is eligible for relief because he was found guilty of only one controlled substance violation, since there was no finding of guilt or admission of guilt with respect to his first arrest for possession of marijuana and possession of drug paraphernalia. She appears to assert that the applicant was not convicted, as conviction is defined in section 101(a)(48)(A) of the Act, on charges brought after his 1995 arrest.

Evidence in the record, however, reflects different dispositions- no plea and guilty- to at least one of the 1995 controlled substance charges brought against the applicant. The record contains documentation, namely the certified inquiry disposition evidence the applicant submitted, showing that the applicant was found guilty. The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361 (“Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document”). Furthermore, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The applicant has not explained or reconciled the differences between the two disposition documents or provided competent, objective evidence to establish the truth. As the record reflects that the court made a finding regarding his guilt, the first prong of the Act’s definition of conviction

has been met.

With regard to the second prong of the definition of conviction under section 101(a)(48)(A) of the Act, we find that the applicant's 12-month probation is a restraint on his liberty that satisfies this prong. As the applicant's controlled substance offense falls within the definition of conviction within section 101(a)(48)(A) of the Act, we find that the applicant is inadmissible under 212(a)(2)(A)(i)(II) of the Act.

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

The Attorney General [now Secretary of 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 [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 [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 [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.

The applicant's second controlled substance offense occurred on or around July 28, 1998, when he was convicted of possession of marijuana under fifty grams. The record shows that he possessed 9.35 grams of the controlled substance and that he was sentenced to one year of probation, six months' revocation of his driver's license and fines. As such, the applicant was convicted of a second controlled substance violation rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Section 212(h) of the Act provides a waiver for a 212(a)(2)(A)(i)(II) inadmissibility only where an applicant has been convicted of a single offense of simple possession of 30 grams or less of marijuana. The applicant has not established that he was convicted of a single offense, as the record shows he has two convictions for controlled substance violations. Accordingly, we find he is ineligible for waiver consideration under section 212(h) of the Act.² Having determined the applicant to be ineligible for a 212(h) waiver, we find no purpose would be served in determining whether the record establishes that his spouse would suffer extreme hardship as a result of his inadmissibility and whether he merits a waiver as a favorable exercise 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.

² The applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act. On [REDACTED] 1987, he was convicted in the Superior Court of the [REDACTED] California of burglary, grand theft, forgery and fraud in violation of California Penal Code §§ 459, 487.1, 470 and 475. He was ordered to serve 127 days in jail and was placed on probation for 36 months. The applicant indicates that he was not guilty of the aforementioned offenses to which he pled guilty, but he does not claim that these offenses are not crimes involving moral turpitude. Because the applicant has two controlled substance convictions and is ineligible for a waiver under 212(h) of the Act, we will not address his crimes involving moral turpitude in this decision.