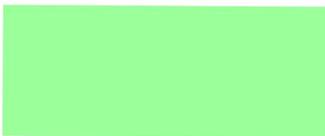




U.S. Citizenship
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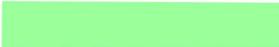


Date: **MAR 02 2015**

Office: NEW YORK

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,


for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York, New York, 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 the Dominican Republic 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 (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a controlled substance violation. The applicant seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. Citizen spouse, children, and step-children.

The District Director concluded that the applicant's 2006 conviction for possession of marijuana rendered him inadmissible, with no waiver available, and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the District Director*, dated July 2, 2013.

On appeal, filed on August 1, 2013 and received by the AAO on October 7, 2014, the applicant contends that he is eligible for a waiver under section 212(h) the Act as he was only convicted of a single offense of simple possession of 30 grams or less of marijuana.

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 –

....

(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)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if- ... in the case of an immigrant who is 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 that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully permanent resident spouse, parent, son, or daughter of such alien.

The record indicates that on [REDACTED] 2006, the applicant was arrested and charged with criminal possession of marijuana in the fifth degree, under New York Penal Law §221.10, for

possession of approximately 31 grams of marijuana. On [REDACTED] 2007, the applicant pleaded guilty to the lesser charge of unlawful possession of marijuana under New York Penal law §221.05.¹

At the time of the applicant's conviction, New York Penal Law §221.10 provided, in pertinent part:

A person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses:

1. marihuana in a public place, as defined in section 240.00 of this chapter, and such marihuana is burning or open to public view; or
2. one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than twenty-five grams.

Criminal possession of marihuana in the fifth degree is a class B misdemeanor.

New York Penal Law §221.05 provided, in pertinent part,

A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana.

Unlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars. However, where the defendant has previously been convicted of an offense defined in this article or article 220 of this chapter, committed within the three years immediately preceding such violation, it shall be punishable (a) only by a fine of not more than two hundred dollars, if the defendant was previously convicted of one such offense committed during such period, and (b) by a fine of not more than two hundred fifty dollars or a term of imprisonment not in excess of fifteen days or both, if the defendant was previously convicted of two such offenses committed during such period.

On appeal, the applicant asserts he pled guilty unlawful possession of marijuana under New York Penal Law §221.05, which is a violation and not a crime, and does not specify any amount of marijuana. He further asserts that the higher charge of criminal possession of marijuana in the fifth degree under New York Penal Law §221.10 specifies possession of 25 grams or more of marijuana, and because he pled guilty to the lesser charge, his offense involved less than 30 grams of marijuana.

For purposes of a section 212(h) waiver of section 212(a)(2)(A)(i)(II) inadmissibility, the Board of Immigration Appeals (Board) has held that an adjudicator must engage in a "circumstance-specific"

¹ The record further indicates that in 2003, the applicant was arrested under New York Agricultural and Markets Law §351, prohibition of animal fighting, and New York Penal Law §225.05, promoting gambling in the second degree. The record indicates that the applicant was convicted on a plea of guilty, and sentenced probation for a term of three years. As the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, we find it is unnecessary to examine whether the applicant is further inadmissible under section 212(a)(2)(A)(i)(I) of the Act for committing a crime involving moral turpitude.

inquiry where the conviction record does not clearly specify that the crime is possession of 30 grams or less of marijuana:

We conclude that section 212(h) employs the term “offense” . . . to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime. Our main reason for drawing this conclusion is that the “offense” in question is defined so narrowly, by reference to a specific type of conduct (simple possession) committed on a specific number of occasions (a “single” offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

Matter of Martinez-Espinoza, 25 I&N Dec. 118, 124 (BIA 2009) (citing *Nijhawan v. Holder*, 557 U.S. 28, 33-34, 129 S.Ct. 2294, 2298-2299 (2009)); cf. *Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a “circumstance-specific” inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a “single” offense of possession).

Additionally, it has long been held by the Board that where the amount and type of a controlled substance that an alien has been convicted of possessing cannot be readily determined from the conviction record, “the alien who seeks relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved “30 grams or less or marihuana.” *Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988). Otherwise, the alien will remain inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a conviction relating to a controlled substance without the possibility of applying for a section 212(h) waiver. *See id.* at 724. Therefore, we are not limited by categorical considerations, but may inquire into the specific acts underlying the applicant’s conviction.

The record contains a copy of an Information/Complaint filed in the [REDACTED] New York on [REDACTED] 2006. The Information alleges that on the same date, the applicant “was found to possess approximately 31 grams of marijuana” and states that the allegations are based on a positive field test for marijuana.

The applicant asserts that because he was not convicted under the higher charge of criminal possession of marijuana in the fifth degree under New York Penal Law § 221.10, which prohibits possession of 25 grams or more of marijuana, but rather under section 221.05, a lesser charge, his offense involved less than 25 grams of marijuana. We note that New York Penal Law § 221.05 does not specify a maximum amount, and the applicant has cited no authority to support his claim that a conviction is only possible for possession of less than 25 grams of marijuana. Further, documentation on the record indicates that his offense involved more than 30 grams of marijuana, and the applicant has submitted no evidence in support of his claim that the offense involved possession of less than 30 grams. It is incumbent upon the applicant to squarely establish his eligibility for the relief sought. *See Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988) (where the amount of a controlled substance cannot be readily determined from the conviction record, the alien must present credible and convincing evidence independent of his conviction record to meet his burden of showing that his conviction involved 30 grams or less of marijuana).

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NON-PRECEDENT DECISION

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Based on the foregoing, the applicant has not shown that he was convicted for a single offense relating to simple possession of 30 grams or less of marijuana. Accordingly, he is statutorily ineligible for consideration for a waiver of his inadmissibility under section 212(h) of the Act.

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.