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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

Date: JUN 20 2014 Office: NEBRASKA SERVICE CENTER FILE:

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) and section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Italy who was found to be 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 been convicted of a crime involving a controlled substance. The applicant was also found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or willful misrepresentation of a material fact. The applicant is married to a U.S. citizen and has a U.S. citizen child. She seeks a waiver of inadmissibility pursuant to section 212(h) and section 212(i) of the Act in order to reside in the United States.

In a decision, dated October 12, 2013, the director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of possessing a hypodermic needle. The director also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for not disclosing her conviction when entering the United States on the visa waiver program. Finally, the director found that the applicant was not eligible for a waiver as a result of her conviction for possessing a hypodermic needle and as a result her waiver under section 212(i) of the Act was denied as a matter of discretion. The waiver application was denied accordingly.

In a brief, dated December 10, 2013, counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because she made a timely retraction of her misrepresentation. Counsel also states that the applicant's conviction is not related to a controlled substance, that it did not involve drug paraphernalia relating to a controlled substance, and if found to the contrary, she is eligible for a waiver for her conviction because it is related to 30 grams or less of marijuana. Counsel then asserts further that the applicant is eligible for a waiver under section 212(i) of the Act based on the extreme hardship her spouse will suffer as a result of separation.

We will first address the finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2) 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 indicates that on April 27, 1999 the applicant was arrested and charged with violating California Health and Safety Code Section 11550(A), Being Under the Influence of a Controlled Substance. On June 8, 1999, a charge under Section 4140 of the California Business and Professional Code was added to the Complaint as count two and the applicant pled nolo contendere to this charge. She was sentenced to 90 days in jail and two years probation. Count one of the complaint was dismissed.

At the time of the applicant's conviction, Section 4140 of the California Business and Professional Code provided, in pertinent part:

> No person shall possess or have under his or her control any hypodermic needle or syringe except when acquired in accordance with this article.

The record establishes that counsel's assertions regarding the applicant's conviction not being related to a controlled substance are persuasive. Although courts have construed the "relating to" language of section 212(a)(2)(A)(i)(I) broadly, they have also limited their interpretation where the conviction itself had nothing to do with controlled substances, even when the underlying conduct clearly did. See *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000); *Matter of Carrillo*, 16 I&N Dec. 625, 626 (BIA 1978); *Castaneda de Esper v. INS,* 557 F.2d 79, 84 (6th Cir.1977); *Matter of Batista-Hernandez,* 21 I&N Dec. 955, 960, 1997 WL 398681 (BIA 1997); and *Lara-Chacon v. Ashcroft*, 345 F.3d 1148, 1154-55 (9th Cir. 2003). Furthermore, in *Coronado-Durazo v. INS* the Ninth Circuit held that a law relates to a controlled substance if it is "specifically aimed at the regulation or prohibition of controlled substances." *Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997). In the applicant's case, her conviction was under the Pharmacy Law of California, which is included in the Business and Professional Code and not the Controlled Substances Act, which is included in California's Health and Safety Code. Because it cannot be said that the section under California's Business and Professional Code relating to pharmacies was intended to be a vehicle to redress controlled substance violations, the applicant's conviction does not qualify as one "relating to" controlled substance. Accordingly, the record establishes that the applicant has not been convicted of an offense related to a controlled substance and is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

It then follows that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act because her misrepresentation was not material.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

As previously stated, the director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for failing to disclose her arrest and conviction when she entered the United States under the visa waiver program. To be found inadmissible under section 212(a)(6)(C)(i) of the Act the applicant's misrepresentation must be material. According to the Department of State's Foreign Affairs Manual, a misrepresentation is material if either: (1) The alien is excludable on the true

facts; or (2) The misrepresentation tends to shut off a line of inquiry that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*. In the applicant's case, if she had disclosed her conviction, which is not an offense related to a controlled substance, would not have resulted in her inadmissibility. Therefore, her conviction is not material and the applicant's omission is not a material misrepresentation. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 US 759 (1988); see also *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409(BIA 1962; AG 1964) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961).

Accordingly, the record establishes that the applicant is not inadmissible.

In these proceedings, the burden of establishing admissibility rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden and the appeal will be sustained.

ORDER: The appeal is sustained.