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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals
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Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

H2

[redacted]

Date: AUG 06 2012 Office: NEWARK, NEW JERSEY 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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Michael Shumway

for Perry Rhew
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 The previous decision of the Field Office Director will be withdrawn and the waiver applicant declared unnecessary. The appeal will be dismissed. The matter will be returned to the Field Office Director for continued processing.

The applicant is a native and citizen of the Philippines who was found to be inadmissible under 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. The applicant sought a waiver of inadmissibility. The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that a waiver is not available for inadmissibility under section 212(a)(2)(C) of the Act.

On appeal, counsel disputes the finding of inadmissibility. Counsel states that the decision of the U.S. Citizenship and Immigration Service (USCIS) misinterpreted the holding of the military "court" and failed to state facts and circumstances sufficient to find inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. Counsel states that USCIS records reflect that the Department of the Navy conducted a random urinalysis that resulted in a positive response for controlled substances in the applicant's urine, and that the applicant denied having any knowledge of the drugs. Counsel observes that the applicant was found to have violated Article 112A of the Uniform Code of Military Justice (UCMJ), wrongful use, possession of controlled substances. Counsel states that the applicant was issued an Article 15, known as a "non-judicial punishment," under the UCMJ, and ordered to appear before an Administrative Separation Board of the Department of the Navy (Separation Board) with a commanding officer serving in the capacity as a judge. Counsel states that the Separation Board's recommendation was administrative separation for having committed misconduct, and that the applicant was discharged in absentia from the Navy under "other than honorable" conditions. Counsel contends that the applicant did not have an opportunity to refute the charges and the appointed attorney did not adequately defend the applicant's rights and did not inform the applicant of any immigration consequences.

Counsel argues, therefore, that the director erred in concluding that the commanding officer's finding, that the applicant committed misconduct, rendered the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violation of a law or regulation of the United States relating to a controlled substance. Counsel asserts that the decision of the Separation Board and the commanding officer, who found that the applicant committed misconduct, does not constitute a "conviction" as that term is defined in section 212(a)(2)(A)(i)(II) of the Act. Counsel asserts that the Separation Board is an internal administrative body which, in the applicant's case, was convened solely for the purpose of determining whether or not to retain the applicant as an employee; and that it is of no consequence that the employer is the Department of the Navy. Counsel argues that, assuming *in arguendo*, hearings conducted by military officers may result in convictions for purposes of the Act, in the instant case, the only charge the applicant was found guilty of committing was misconduct, which is not a violation relating to a controlled substance. Counsel contends that even if the commanding officer found the applicant had taken illicit drugs, such a finding was ancillary to the charge of misconduct, which had nothing to do with a drug-related offense.

Counsel argues further that the applicant's violation of the Navy's employment regulation is not encompassed within the phrase "a violation of . . . any law *or regulation* of a State, the United States, or a foreign country relating to a controlled substance," as stated in section 212(a)(2)(A)(i)(II) of the Act, because violation of the Navy's employment regulation is comparable to an individual's violating the employment conditions an employer. Counsel contends, for instance, that if the applicant was fired from a job by an employer for failure to pass a drug test, USCIS would not deny the applicant admission on that basis. Counsel argues that employment regulations are for purposes of internal governance, not for criminal prosecution. Counsel contends that the commanding officer's finding that the applicant committed misconduct was not for the purpose of criminal prosecution, but was in connection with the applicant's eligibility to continue serving as an officer of the Navy.

Counsel, citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1888), *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), as well as *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903), argues that the hearing, which took place in front of a single commander conducted by the Separation Board did not comply with the Due Process Clause of the Fifth Amendment. Counsel asserts that the Separation Board of the Department of the Navy is an internal administrative body which, in the applicant's case, was convened for the purpose of determining whether or not to retain the applicant as an employee.

Counsel contends that the applicant did not admit to having violated any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, or to having committed acts which constitute the essential elements of a controlled substance crime. Counsel asserts that the applicant's contention has always been that the applicant did not voluntarily take or participate in the taking of a controlled substance. Counsel contends that the commanding officer stated that the applicant contended that the applicant's intake of drugs was accidental.

The record reflects that the director found that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

Section 212(a) of the Act states in pertinent part:

> (2) 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.

. . . .

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.

USCIS records show that the commanding officer and Separation Board found that the applicant violated Article 112a of the UCMJ. That article provided:

> (a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports form the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances refereed to in subsection (a) are the following:
>
> (1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, penecyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.
>
> (2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.
>
> (3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Use of contraband will not be deemed wrongful if done without knowledge of the contraband nature of the substance. *U.S. v. Attucks*, 64 M.J. 518, 520 (A.F. Crim. App. 2006). However, "[k]nowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge." 64 M.J. 518 at 520.

The commanding officer and the Separation Board determined that the applicant engaged in misconduct due to wrongful use of amphetamines and methamphetamines. The Separation Board recommended the applicant's separation from service by reason of misconduct due to drug abuse under an "other than honorable" discharge. The record shows that the applicant was discharged in absentia from the Navy on May 27, 1994 under "other than honorable" conditions.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> 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.

In the instant case, the record reflects that the applicant was accused of misconduct for engaging in drug abuse in violation of Article 112a of the UCMJ. On February 22, 1994, an Article 15, Non-Judicial Punishment, or mast proceeding, was held before a commanding officer, and the applicant was found guilty of the accusation. Article 15 of the Uniform Code of Military Justice (UCMJ) permits military commanders to resolve allegations that a service member committed a minor offense or other misconduct without having to go through the more formal process of preferring court-martial charges. Article 15 is also referred to as non-judicial punishment (NJP) because it is not a considered a judicial proceeding, unlike a court-martial. *See* Article 15, UCMJ (Section 815 of Title 10, United States Code), which is governed by Part V of the Manual for Courts-Martial and by service regulations.

The document to the Commanding Officer, Strike Fighter Squadron 97 dated April 21, 1994 reflects that on April 19, 1994, a Separation Board was convened by an order of the commanding officer for the purpose of considering the pertinent facts relating to the case of the applicant, who was being processed for administrative separation by reason of misconduct due to drug abuse. The Separation Board was to make findings of fact and a recommendation with respect to the final action as to the applicant's employment with the Navy. The Separation Board stated that its proceeding was administrative in nature, and that the Board may consider information which might not be admissible at a court-martial, and that the Separation Board's decision will be based upon a preponderance of the evidence submitted. The Board, by a vote of 3 to 0, found the applicant committed misconduct due to drug abuse.

A judgment of guilt entered by a general court-martial qualifies as a "conviction" for immigration purposes. *See Matter of Rivera-Valencia*, 24 I&N Dec. 484 (BIA 2008). However, a violation of state law does not constitute a "conviction" for purposes of 8 U.S.C. § 1101(a)(48) if an alien is found guilty of a crime "by a preponderance of the evidence" rather than "beyond a reasonable doubt" in a proceeding that was not criminal in nature. *See Matter of Eslamizar*, 23 I&N Dec. 684, 688 (BIA 2004). In *Matter of Roberto Cuellar-Gomez*, 25 I&N Dec. 850, 852 (BIA 2012), the

Board stated that a formal judgment of guilt entered by a court qualifies as a conviction under section 101(a)(48)(A) of the Act so long as it was entered in a "genuine criminal proceeding" under the governing laws of the prosecuting jurisdiction. (citing *Matter of Rivera-Valencia*, 24 I&N Dec. 484, 486-87 (BIA 2008) (quoting *Matter of Eslamizar*, 23 I&N Dec. 684. 688 (BIA 2004)). In *Matter of Roberto Cuellar-Gomez*, 25 I&N Dec. 850, 852 (BIA 2012), the Board concluded that the judgment of guilt entered against the respondent in 2008 by the Wichita municipal court was a conviction for immigration purposes because the judgment was entered in a "genuine criminal proceeding," that was "criminal in nature under the governing laws of the prosecuting jurisdiction." 25 I&N Dec. 850 at 852. The Board acknowledged that in Kansas, municipal court judges have authority to enter judgments of guilt in drug possession cases and to impose fines or order incarceration of defendants found guilty. *See* Kan. Stat. Ann. §§ 12-4104(a)(5), 12-4106. *Id.* at 853. The Board observed that for criminal cases in municipal court prosecution has the burden to prove the charge beyond a reasonable doubt, and that a judgment of guilt entered by a municipal court is considered a valid conviction for purposes of calculating the defendant's criminal history. *See* Kan. Stat. Ann. § 21-4710, 21-4711. *Id.* Under the aforementioned circumstances, the Board found that the respondent's Wichita judgment was entered in a "genuine criminal proceeding" under the laws of the State of Kansas. *Id.*

As to the instant case, the Separation Board found the applicant guilty of misconduct by a preponderance of the evidence in a proceeding that was not criminal in nature. The finding of misconduct due to drug abuse does not qualify as criminal conviction for immigration purposes.

Section 212(a)(2)(A)(i)(II) of the Act also provides that an alien is inadmissible if the alien "admits having committed . . . [or] admits committing acts which constitute the essential elements of . . . a violation of . . . any law or regulation of . . . a foreign country relating to a controlled substance. . . ." In *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), the Board of Immigration Appeals (BIA) established the standard for determining the "validity" of an admission for purposes of inadmissibility under section 212(a)(2)(A)(i) of the Act (formerly section 212(a)(9)). The BIA held that a "valid admission of a crime for immigration purposes requires that the alien be given an adequate definition of the crime, including all essential elements, and that it be explained in understandable terms," a rule intended to insure "that the alien would receive fair play and to preclude any possible later claim by him that he had been unwittingly entrapped into admitting the commission of a crime involving moral turpitude." *Id.* at 597. We see no evidence here that establishes that the applicant has admitted, after having being given an adequate definition of the elements of the offense, violating a law or regulation relating to a controlled substance.

As to the charge of misconduct due to drug abuse, the applicant stated in an undated document addressed to the State of New Jersey the following:

> In 1993, I attended a party off base with friends and was given a drink that must have contained something that I did not know. I am not an addict and never taken drugs so frankly, I don't know how it came about. Subsequently, I was given a routine urinalysis which showed methamphetamine in my system. As a result of the test, I was discharged from the Navy and was given Other Than Honorable and not Dishonorable. . . .

The applicant also stated in an undated document that he had been invited to a drinking party by some civilians that he met through playing basketball. He stated that the party, which lasted overnight, had a big crowd, and that Tequila was served. The applicant stated that: "I passed out and woke up the next day with a severe head-ache. I asked someone to drive me back to base and on our way he gave me a hint that the drinks might have been spike although he is not really sure. . . . I know in my heart that I did not do anything. I never took anything. I never did in the past, during those times and never will." The commanding officer stated in correspondence dated April 22, 1994 that "[the applicant] contends his intake of drugs was accidental." The evidence in the record reflects that the applicant has always asserted that he did not knowingly use illegal drugs. In the absence of any evidence to the contrary, the record does not support a finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act.

Thus, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to the Act need not be addressed. Accordingly, the decision of the Field Office Director is withdrawn.

ORDER: As the applicant is not inadmissible, the waiver application is unnecessary. The appeal will be dismissed and the matter returned to the Field Office Director for further processing.