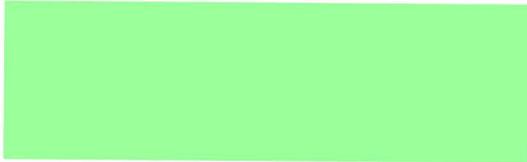


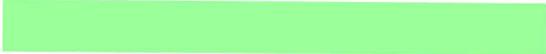
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U.S. Citizenship
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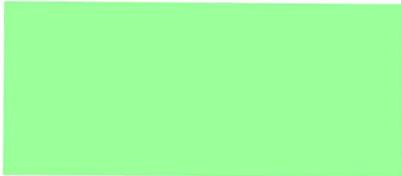


DATE: DEC 04 2013 OFFICE: ROME (LONDON) FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to Section 212(h) of the 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.

Thank you,

A handwritten signature in cursive script that reads "Michael Shumway".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Rome. A Motion to Reopen/Reconsider was denied by the Field Office Director, London, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native of the United Kingdom and a citizen of the U.K. and Nigeria 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 violated a law relating to a controlled substance. He was also found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or material misrepresentation. The applicant seeks a waiver of inadmissibility (Form I-601) 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 son.

On June 19, 2012, the District Director found that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act and did not qualify for a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), as he does not have a qualifying relative under that section. On July 23, 2012, the applicant filed a motion to reopen and motion to reconsider the District Director's decision and the motions were denied by the Field Office Director on November 26, 2012. The applicant, through counsel, appealed the decision of the Field Office Director on December 20, 2012. On August 21, 2013, the AAO sent a Notice of its Intent to Dismiss (NOID) the applicant's appeal. The applicant was granted thirty (30) days from the date of the notice to respond. Counsel for the applicant timely submitted a brief and additional evidence in response to the NOID.

On appeal, counsel for the applicant states that the applicant is not inadmissible under either section 212(a)(2)(A)(i)(II) or section 212(a)(6)(C)(i) of the Act.

In support of the waiver application, the record includes, but is not limited to: legal arguments and statements by counsel for the applicant; statements by the applicant; a statement from the applicant's son; letters of support concerning the applicant; and documentation concerning the applicant's criminal and immigration history in the United States.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal.

The AAO will first address the question of whether the applicant is admissible to the United States.

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 the applicant was arrested on December 29, 1977 and charged with Possession of Marijuana. The applicant submitted a document from the [REDACTED] Georgia Police Department dated June 28, 2005 stating that the only records available to the police department concerning the applicant's arrest indicate that the applicant's arrest resulted in a bond forfeiture in the amount of \$50. The Police Department states that no additional records were available possibly due to a flood that occurred in the early 1990s. The record also contains a "final disposition" from the [REDACTED] Municipal Court, which indicates a court date of January 7, 1978, and under the heading "Disposition," lists "BOND FORFEITED," and under the heading Fine, lists "50.00." The District Director's conclusion regarding the applicant's conviction appears to have been based primarily on a record from the FBI Criminal Justice Information Services Division that indicates that the applicant was found guilty (convicted/adjudicated) of possession of "marijuana possession less than 1 ounce" on January 7, 1978. The record indicates that the applicant was fined \$50. The FBI record does not indicate the specific court where the applicant was convicted.¹

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 response to the NOID, counsel for the applicant states that the applicant denies that he was convicted of the offense in question, and even if he was convicted, the conviction occurred *in absentia*. In regards to the conviction record, counsel calls into question the reliability of the FBI

¹ The Field Office Director's decision incorrectly notes that the conviction occurred at the [REDACTED] Georgia Crime Information Center; however, this Center is not a court but rather a records clearinghouse. See Georgia Bureau of Investigation, Georgia Crime Information Center, available at <http://gbi.georgia.gov/georgia-crime-information-center>.

record by pointing out various problems with the report, including an inaccurate listing of the applicant's birth place and citizenship. Those inaccuracies, however, do not necessarily cast doubt on the fact of the conviction itself, particularly because of the other records on file and because the applicant has admitted to facts underlying the conviction in his statements. He does not claim that the record refers to a different individual. In response to the NOID, counsel argues that what occurred, as indicated on the records from the Powder Springs Police Department, was merely a bond forfeiture and not a criminal conviction.

Generally, the applicant has the burden of proof with regards to the admissibility determination. Section 291 of the Act, 8 U.S.C. § 1361. Beyond the applicant's recollection of events from 1977-78, there is no objective evidence showing that the applicant's conviction was, in fact, *in absentia*. The record supports a finding that there was a conviction in the form of a final disposition reached by a court resulting in a fine. Counsel argues that under Georgia law, a court could only reach a disposition of bond forfeiture if the applicant failed to appear in court, which demonstrates that the applicant's conviction must have been *in absentia*. Counsel cites current sections 17-6-70 and 17-6-72 of the Georgia Code in support. However, these statutory provisions were enacted subsequent to 1978, and thus do not necessarily reflect the law and procedures in force at the time of the applicant's conviction. We acknowledge that Georgia law currently contains provisions allowing for an *in absentia* conviction based on a "citation" wherein a bond forfeiture is deemed to constitute imposition of a fine. *See, e.g.*, Ga. Code §§ 15-10-63.1 and 15-10-263. But counsel has not presented the law as it existed at the time of the applicant's conviction. While the criminal record supports the finding that the bond forfeiture became a fine upon disposition of the case in court, the assertion that the court proceedings were *in absentia* is based not on evidence contemporaneous to those proceedings but on the applicant's more recent statements and supposition as to the laws and procedures in force at that time. Because we find other more certain grounds that justify sustaining the applicant's appeal, we will not, for purposes of this decision, disturb the prior determination that the applicant is inadmissible under Section 212(a)(2)(A)(i)(II) of the Act as a result of his January 7, 1978 Georgia conviction for possession of less than one ounce of marijuana.

The District Director also found the applicant to be inadmissible under section 212(a)(6)(C) of the Act, which 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.

A misrepresentation is generally material only if by making it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 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). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, which is, having a natural tendency to affect, the official decision in order to be considered material.

Kungys at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, 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 which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

The District Director's determination that the applicant is inadmissible under section 212(a)(6)(C) of the Act is based on the applicant's failure to disclose on Form I-94W that he had been arrested or convicted of a crime involving a controlled substance. On appeal, counsel for the applicant states that the applicant did not willfully misrepresent a material fact as a result of the complicated nature of the I-94W question, the amount of time that had elapsed since the incident in question, and the applicant's own understanding as to what had occurred in regards to that incident. We must turn to whether the record demonstrates, considering the specific facts of this case, that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act based on his completion of Form I-94W, where he answered "no" to the question on the I-94W which asks, in pertinent part, "have you ever been arrested or convicted of an offense or crime involving moral turpitude or a violation related to a controlled substance?"

U.S. Citizenship and Immigration Services interprets the term "willfully" as knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the factual claims are true. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately misrepresented material facts. *See generally Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). To be willful, a misrepresentation must be made with knowledge of its falsity. 7 I&N Dec. at 164. To determine whether a misrepresentation was willful, we examine the circumstances as they existed at the time of the misrepresentation, and we "closely scrutinize the factual basis" of a finding of inadmissibility for fraud or misrepresentation because such a finding "perpetually bars an alien from admission." *Matter of Y-G-*, 20 I&N Dec. 794, 796-97 (BIA 1994) (citing *Matter of Shirdel*, 19 I&N Dec. 33, 34-35 (BIA 1984)); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28-29 (BIA 1979). With relevance to the present matter, we acknowledge that the length of time since the applicant's arrest and the nature of the records that exist concerning that arrest support the applicant's statement that his failure to disclose his arrest was unintentional. Nevertheless, as the burden is on the applicant to establish that he or she is not inadmissible, the applicant has the burden of showing that any misrepresentation was, in fact, not willful. *See* section 291 of the Act, 8 U.S.C. § 1361.

In our NOID, we indicated that the applicant's misrepresentation was willful even if he was unaware of his conviction because he was at least aware that he had been arrested for a controlled substance offense. However, we now acknowledge the applicant's specific testimony that he

believed, based on the arresting officer's statements and other circumstances, that he was arrested for a traffic infraction, and was released not after formal hearing, or after being told that he was paying a bond and required to appear in court, but by simply paying the officer money as requested. The incident occurred 24 years before the applicant completed the I-94W. We find it plausible that the applicant lacked knowledge that the 1977 incident did constitute an arrest and conviction specifically of a controlled substance violation. Under the unique facts of this case, including the length of time since the conviction and the applicant's plausible explanation for his misunderstanding of the nature of his arrest, and his lack of knowledge of any conviction, the AAO finds that the applicant did not "willfully" misrepresent a material fact to procure admission to the United States. As such, the AAO finds that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act.

We will consider the applicant's only inadmissibility to be inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, which requires a waiver under section 212(h).

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) . . . 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; or

...

Section 212(h)(1)(A) of the Act provides that the Secretary may, in her discretion, waive the application of subparagraph (A)(i)(I) of subsection (a)(2) if 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. An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992).

Since the activities that are the basis for the applicant's criminal conviction occurred more than 15 years ago, on December 29, 1977, he is eligible for a waiver under section 212(h)(1)(A) of the Act. Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States

not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(ii) and (iii) of the Act consists of a statement from the applicant, a statement from the applicant's U.S. citizen son, letters of support from other individuals with knowledge of the applicant's character, and the applicant's resume. The record does not indicate any arrests or convictions for the applicant since January 7, 1978.

In view of the record, which shows that the applicant has not been arrested or convicted of any crimes since 1978 and has worked hard to support his family and contribute to his community, the AAO finds that the applicant has provided sufficient evidence to demonstrate that his admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act.

Demonstrating that his that admission to the United States is not contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated, as required by section 212(h)(1)(A)(ii) and (iii) of the Act, is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Id.* For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957). The AAO must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted).

The adverse factor in the present case is the applicant's conviction for possession of marijuana in January 1978. The applicant has no other known criminal convictions. The favorable factors in the present case are the applicant's family ties to the United States, the applicant's long-term employment, and the numerous letters of recommendations that he received from community members. The AAO finds that the applicant has established that the favorable factors in his application outweigh the unfavorable factors.

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 been met. The appeal is sustained.

ORDER: The appeal is sustained.