U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JAN 11 2013 Office: PROVIDENCE 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.

If you believe the AAO inappropriately applied the law in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Rosenberg

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Providence, Rhode Island, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). An appeal of the denial was dismissed by the Administrative Appeals Office (AAO) on December 2, 2011. The matter is now before the AAO on motion to reconsider. The motion will be dismissed, and the underlying application will remain denied.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1182(a)(2)(A)(i), for having been convicted of crimes involving moral turpitude and controlled substance violations. The applicant seeks a waiver of inadmissibility under 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 wife.

In a decision dated July 13, 2009, the field office director found that the applicant failed to demonstrate that his U.S. citizen spouse, a qualifying relative for purposes of a section 212(h) waiver, would experience extreme hardship as a consequence of his inadmissibility. The field office director denied the waiver application accordingly.

In a decision dated December 2, 2011, the AAO found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having three convictions for possession of a controlled substance, based upon the applicant's guilty plea to three charges under the United Kingdom's Misuse of Drugs Act 1971 in Scotland. The AAO further found that the record did not indicate the type or amount of drug possessed by the applicant, and that the applicant failed to disclose this information to establish his eligibility for a section 212(h) waiver of inadmissibility. The AAO noted that a section 212(h) waiver of section 212(a)(2)(A)(i)(II) inadmissibility is only available for a single offense relating to simple possession of 30 grams or less of marijuana. Since the applicant failed to show that his convictions involved less than 30 grams of marijuana, and based upon the record evidence indicating that the applicant was convicted of three separate charges of drug possession, the AAO dismissed the applicant's appeal.

On motion to reconsider, counsel for the applicant contends that the AAO incorrectly applied the law relating to section 101(a)(48) "convictions" under the Act in its decision. Specifically, counsel asserts that the applicant pled guilty to three counts of a violation of section 5(2) of the Misuse of Drugs Act 1971. Counsel states that the final disposition for these offenses was that that the sentencing court in Scotland imposed a fine for one of the offenses and admonished the applicant for the other two offenses. Counsel states that the imposition of a fine by the court satisfies the required elements for a conviction under section 101(a)(48) of the Act. However, he contends that the applicant's guilty plea and the admonishment disposition for the other two charges does not amount to a conviction for immigration purposes, as no punishment, penalty, or restraint on his liberty was imposed.

The regulation at 8 C.F.R. § 103.5(a) states, in pertinent part, that:

(a) Motions to reopen or reconsider

. . . .

(3) Requirements for motion to reconsider. A motion to reconsider must state the

> reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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.

The record reflects that the applicant was convicted of two charges of drug possession in violation of section 5(2), and one charge of "drug possession with intent to supply it to another" in violation of section 5(3), of the United Kingdom's Misuse of Drugs Act 1971. Section 291 of the Act provides that the burden of proof is on the applicant to establish that he is eligible for the benefit sought. Here, the record of conviction as submitted by the applicant does not reference the drug/controlled substance associated with his convictions nor the amount of the drug/controlled substance. Moreover, it is clear from the statutory language that a section 212(h) waiver of section 212(a)(2)(A)(i)(II) inadmissibility is only available for a single offense relating to simple possession of 30 grams or less of marijuana, without intent to distribute or supply. By the statutory language of section 212(h), there is no waiver available for an offense related to possession with intent to distribute or "supply another with" controlled substances. As noted, the record does not include evidence that the drug/controlled substance at issue was marijuana. Furthermore, the applicant's record of conviction reveals that he is statutorily ineligible for a section 212(h) waiver, as his conviction involved drug possession with intent to supply to another, not merely simple possession. Thus, even assuming, *arguendo*, that the applicant was in possession of 30 grams or less of marijuana, he would remain ineligible for a section 212(h) waiver of inadmissibility on two separate grounds: (1) the record reflects that the applicant has two convictions for drug possession and the 212(h) waiver only allows for a conviction relating to a "single offense;" and (2) the applicant was convicted of "drug possession with intent to supply it to another," for which there is no waiver available.

While counsel for the applicant suggests on motion that the applicant "was in possession of small amounts of cannabis for each of his offenses," the record does not contain documentary evidence supporting this assertion. It is well-established that the unsupported assertions of an attorney do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Thus, counsel's unsupported assertions regarding the drug/controlled substance in question have no evidentiary value. Since the applicant has not submitted documentary evidence

demonstrating that he was convicted of a "single offense relating to 30 grams or less of marijuana," he has failed to meet his burden of proof under section 291 of the Act to demonstrate eligibility for a section 212(h) waiver of section 212(a)(a)(A)(i)(II) inadmissibility.

Counsel for the applicant contends that being admonished under Scottish law does not qualify as a "punishment, penalty, or restraint on the alien's liberty" as required by section 101(a)(48) of the Act. However, counsel's argument is irrelevant because the record does not indicate that the court withheld adjudication. The applicant's convictions are convictions for immigration purposes under the first clause of section 101(a)(48)(A) – a formal judgment of guilt. Counsel asserts that "conviction" is defined under section 101(a)(48)(A) of the Act as requiring a finding of guilt *and* the imposition of a sentence or penalty, but this second clause of the statute applies only where adjudication of guilt is withheld by the court, and the evidence does not show that to have occurred here.

Even were we to accept that adjudication was withheld, we are not convinced that the court's "admonishment" of the applicant for two of the his September 4, 1995 offenses for violations of the Misuse of Drugs Act is not a punishment, penalty or restraint on liberty under section 101(a)(48) of the Act. It is noted that counsel does not cite to any legal authority, by way of statute, regulation, or case law, to support his argument. Although counsel relies on the Scottish Legal Aid Board and the National Archives of Scotland to describe the term admonishment, he offers no support that such sources are authoritative or binding in Scotland. Additionally, the AAO notes that article 246 of Scotland's Criminal Procedure Act of 1995 provides that: "a court may, if it appears to meet the justice of the case, dismiss with an admonition any person convicted by the court of any offence." It is further noted that admonitions are included in Part XI of the Criminal Procedure Act of Scotland, covering means of Sentencing, such as: imprisonment, restriction of liberty orders, fines, criminal financial penalties, community payback orders, offender supervision, compensation, restricted movement orders, probation, and admonition, among others. By the language of article 246 of the aforementioned law, an admonishment is a sentence in its own right imposed by the courts in Scotland. Additionally, various U.S Circuit Court of Appeals and BIA decisions have considered that the "punishment, penalty, or restriction on liberty" required for a conviction under section 101(a)(48) of the Act can be met with sentences comparable to those found in Part XI of Scotland's Criminal Procedure Act of 1995. *See e.g. Matter of Cabrera,* 24 I&N Dec. 459, 462 (BIA 2008) (holding that the imposition of court costs and fines in the criminal sentencing context is sufficient to constitute a conviction for purposes of section 101(a)(48) of the Act); *Matter of Ramirez,* 25 I&N Dec. 203, 205 (noting that a sentence to confinement after an order of probation is part of the penalty imposed against an alien for the offense giving rise to immigration proceedings); *Moosa v. INS,* 171 F.3d 994 (5th Cir. 1999) (treating probation after deferred adjudication as constituting a penalty for purposes of the immigration definition of conviction); *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003) (same). Furthermore, it is noted that an admonishment is considered a type of punishment in contexts outside of U.S. immigration law, including Courts-Martial proceedings pursuant to the Uniform Code of Military Justice. *See U.S. v. Payne*, 32 C.M.R. 659, 660 (ABR 1963) ("Other types of punishment included … are restriction, admonishment, reprimand, detention of pay and so on."); *U.S. v. Ragan*, 32 C.M.R. 913, 915 (AFBR 1962) (stating that an admonishment is a type of punishment).

Here, the record reflects that the applicant pled guilty to two charges of drug possession and one charge of "drug possession with intent to supply it to another." The applicant was sentenced on September 4, 1996 to a fine for one of the charges and was admonished for the rest. On motion, counsel has not demonstrated that adjudication of guilt was withheld, and the record indicates, to the contrary, that there was a formal judgment of guilt. Also, counsel has not sufficiently distinguished an admonishment from the other types of sentences that constitute a "punishment, penalty, or restriction on liberty" under section 101(a)(48)(A) of the Act. That is, counsel has not demonstrated that the applicant's admonitions do not constitute a "punishment" and as such that they do not qualify under the second prong of the "conviction" definition found in section 101(a)(48)(A) of the Act. Accordingly, the applicant has failed to establish that the AAO's December 2, 2011 decision was based on an incorrect application of law.

ORDER: The motion to reconsider is dismissed.