

(b)(6)

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



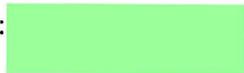
U.S. Citizenship
and Immigration
Services



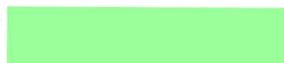
Date:

Office: NEW YORK CITY

FILE:



IN RE: **MAR 25 2013** Applicant:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (i)

ON BEHALF OF APPLICANT:



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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, New York City, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Pakistan 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 (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 was also found to be inadmissible to the United States pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for having willfully misrepresented a material fact in an attempt to enter the United States. On October 22, 2009, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The applicant seeks waivers of inadmissibility pursuant to sections 212(h) and 212(i) of the Act, 8 U.S.C. §§ 1182(h) and (i), in order to remain in the United States with his U.S. citizen spouse.

In a decision dated May 11, 2011, the district director determined that the applicant failed to establish his statutory eligibility for a waiver of inadmissibility as the applicant failed to demonstrate that his conviction for unlawful possession of marijuana involved simple possession of 30 grams or less of marijuana. The district director denied the Form I-601 waiver application accordingly.

On appeal, counsel for the applicant contends the applicant submitted all requested evidence of his criminal convictions to the District Office, including evidence of his May 29, 1995 arrest for possession of marijuana. Counsel contends that the arrest report "clearly indicated [applicant] pled guilty to simple possession of marijuana, less than 30 grams, and paid a fine of \$100.00." Counsel states that the actions of the district office amount to an abuse of discretion and that the record evidence demonstrates extreme hardship to the applicant's qualifying relative.

The record includes, but is not limited to: counsel's statement on appeal; documentation concerning the applicant's numerous arrests and convictions; copies of income tax records and pay stubs; a marriage certificate; a copy of the applicant's passport; a statement by the applicant's spouse; and documentation regarding the applicant's 1993 exclusion proceeding.

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 has been reviewed and considered in rendering a decision on the appeal.

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

- (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.

The record reflects that on November 9, 1992, the applicant applied for admission into the United States at the John F. Kennedy International Airport by presenting a photo-substituted passport in the name of one [REDACTED] containing a nonimmigrant tourist visa. The record further reflects that the applicant admitted he was not [REDACTED] and that his uncle had procured the false passport. The

applicant was then placed in exclusion proceedings and he was ordered excluded *in absentia* by an immigration judge on March 25, 1993. The record evidence reflects that the applicant failed to depart the United States after he was ordered excluded in 1993 and, in fact, has remained in the United States since his entry on November 9, 1992. In that the applicant used a photo-substituted passport in an attempt to enter the United States as a nonimmigrant, he is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. The applicant does not dispute his inadmissibility under this ground on appeal.

Section 212(i) of the Act provides, in pertinent part, that:

(1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien ...

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Here, the record reflects that the applicant is the spouse of a U.S. citizen who has an approved Form I-130, Petition for Alien Relative, which was filed on the applicant's behalf. The applicant's U.S. citizen wife therefore meets the definition of a qualifying relative.

However, the AAO notes that the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. Section 212(a)(2)(A) of the Act provides that:

- (i) [A]ny 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:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(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

The record shows that on July 19, 1995, the applicant was convicted in the New York State Court, Criminal Division, City of Beacon, of unlawful possession of marijuana in the fifth degree in violation of New York Penal Law § 221.05. The only waiver available for a controlled substance offense is under section 212(h) of the Act for a violation relating to a single offense of simple possession of 30 grams or less of marijuana.

For purposes of a section 212(h) waiver of the applications of section 212(a)(2)(A)(i)(II) of the Act, the Board of Immigration Appeals (Board) has held that an adjudicator must engage in a “circumstance-specific” 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, the AAO is not limited by categorical considerations, but may inquire into the specific acts underlying the applicant’s conviction.

At the time of the applicant's conviction, New York Penal Law § 221.05 provided, in pertinent part, that:

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.

Counsel asserts in Part 3 of Form I-290B that the applicant submitted a police report for the applicant's May 29, 1995 arrest for possession of marijuana. Counsel contends that the police report "clearly indicated petitioner pled guilty to simple possession of marijuana, less than 30 grams, and paid a fine of \$100.00." A review of the record evidence reveals that no police report for the applicant's aforementioned arrest has been submitted, and that the document that counsel refers to as a "police report" is actually the Information/Complaint filed in the Beacon City Court by [REDACTED] on May 29, 1995. The Information alleges that on the same date, the applicant did: "possess a substance believed to be marihuana with an aggregate weight of *more than 25 grams*, all contrary to the provisions of [section 221.10, subdivision 2 of the Penal law of the State of New York.]" (Emphasis added).

On appeal, counsel also submitted a letter addressed to New York State Judge [REDACTED] dated June 2, 2011, in which he asks for the Judge's help in establishing how much marijuana the applicant possessed at the time of his May 29, 1995 arrest. The AAO notes that as of the date of this decision, no additional documentation was submitted by counsel regarding this letter and its content.

Contrary to counsel's assertions on appeal, the record does not contain any document establishing that the applicant pled guilty to simple possession of less than 30 grams of marijuana. The criminal information charges the applicant with possessing an amount of more than 25 grams, but there is no indication that the applicant actually possessed less than 30 grams of the controlled substance. Consequently, the documents submitted by counsel pertaining to the applicant's conviction cannot uphold a determination that the applicant possessed less than 30 grams of marijuana. That is, the criminal information is inconclusive as to the amount the applicant possessed at the time of arrest. Though there is a theoretical possibility that the applicant possessed a quantity greater than 25 and less than 30 grams of marijuana, 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); *see also* Section 291 of the Act, 8 U.S.C. § 1361. By merely submitting the criminal information, which indicates that the applicant possessed an indeterminate amount of marijuana in excess of 25 grams, the applicant has failed to meet his burden of demonstrating that the amount for which he was convicted meets the waiver eligibility requirements of section 212(h) as they relate to controlled substance offenses.

As the applicant has failed to establish statutory eligibility for a waiver of section 212(a)(2)(A)(i)(II) inadmissibility, no purpose would be served in determining whether the applicant has established extreme hardship to a qualifying relative under section 212(i) of the Act.

(b)(6)

Page 6

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. The appeal will therefore be dismissed and the Form I-601 will be denied.

ORDER: The appeal is dismissed.