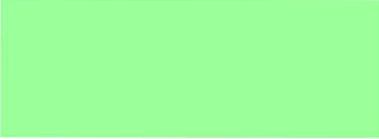


(b)(6)

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

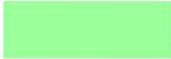


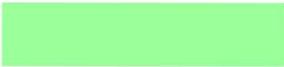
U.S. Citizenship
and Immigration
Services



Date: **MAY 29 2013**

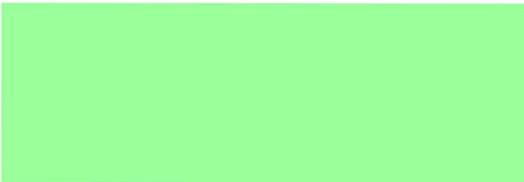
Office: PHILADELPHIA

FILE: 

IN RE: Applicant: 

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:



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 "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Philadelphia, Pennsylvania, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Administrative Appeals Office (AAO) dismissed the applicant's appeal. On September 15, 2011, the applicant filed a motion to reopen and reconsider the AAO's decision. The applicant's motion will be dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible under section 212(a)(2)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II) for being an illicit trafficker in a controlled substance. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen wife and children.

In a decision dated November 6, 2008, the field office director denied the applicant's waiver application as a matter of law after finding him inadmissible for being a controlled substance trafficker. In a decision dated August 19, 2011, the AAO found that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of crimes related to the possession of marijuana on two separate occasions. As a section 212(h) waiver can be available only insofar as it related to a *single offense* of simple possession of 30 grams or less of marijuana, the applicant was found statutorily ineligible for a waiver and his appeal was dismissed.

On motion, counsel asserts that the applicant is eligible for cancellation of removal in conjunction with his adjustment of status application. Counsel further asserts that since the applicant's 1996 charge in New York for possession of marijuana does not constitute a conviction within the meaning of the Act. Counsel contends that the applicant is eligible for the petty offense exception, and that the AAO should reopen the case as the applicant received ineffective assistance of counsel during the 2002 criminal proceeding against him.

No evidence was submitted in support of the motion to reopen and reconsider. *See* 8 C.F.R. § 103.5(a)(2) ("A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."). As such, the applicant's filing will be treated as a motion to reconsider.

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

- (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.

The AAO will dismiss the applicant's motion. In response to counsel's assertions regarding the circumstances surrounding the applicant's convictions and ineffective assistance of counsel, we note that it is a well-established principle of immigration law that immigration adjudicators cannot entertain collateral attacks on a judgment of conviction unless that judgment is void on its face, and cannot go behind the judicial record of conviction to relitigate the facts that led to the applicant's

convictions. *See Matter of Madrigal*, 21 I&N Dec. 323, 327 (BIA 1996); *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (observing that for purposes of deportability, immigration adjudicators cannot go behind the record of conviction to determine the alien's guilt or innocence). Additionally, the AAO notes that the applicant was found guilty of the charged controlled substance crimes, and the record of proceedings indicates that his convictions constitute final convictions for immigration purposes. *Matter of Ozkok*, 19 I & N Dec. 546, 551 (BIA 1988); *see also Marino v. INS*, 537 F.2d 686 (2d Cir.1976). Though counsel indicates on appeal that the applicant "was never advised how his criminal matter[s] would affect his immigration status," the record does not contain any evidence indicating that the applicant's conviction has been vacated on recognized substantive or procedural grounds.

Regarding counsel's contentions about the applicant's eligibility for cancellation of removal under section 240A(b) of the Act in connection to an adjustment of status application, that issue is not the subject of the Form I-601 application, and the AAO lacks jurisdiction to address it. The AAO exercises appellate jurisdiction over appeals from decisions on many immigration petitions and applications adjudicated by service centers and field offices of U.S. Citizenship and Immigration Services (USCIS), such matters being described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or counsel. Here, counsel contends that the applicant's adjustment of status application should be granted as he is eligible for cancellation of removal under section 240A(b) of the Act. However, the regulations clearly indicate that jurisdiction over cancellation of removal applications pursuant to section 240A of the Act is exclusive to the Executive Office for Immigration Review. *See* 8 C.F.R. § 1240.20(a) ("An application for the exercise of discretion under section 240A of the Act shall be submitted on Form EOIR-42, Application for Cancellation of Removal, to the Immigration Court having administrative control over the Record of Proceedings of the underlying removal proceeding under section 240 of the Act."). Moreover, an appeal of a Form EOIR-42, Application for Cancellation of Removal, is reviewed by the Board of Immigration Appeals (Board), not USCIS. *See* 8 C.F.R. § 1003.1(b). As such, the AAO does not have jurisdiction over a cancellation of removal application and may not consider whether the applicant meets the statutory requirements for such relief.

Counsel further contends that the applicant is eligible for the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act. However, it is noted that the petty offense exception excuses inadmissibility on account of a conviction of, or admission of committing, one crime involving moral turpitude. *See* Section 212(a)(2)(A)(ii)(II) of the Act. Per the statutory language, this exception does not apply to other criminal grounds of inadmissibility such as controlled substances offenses. As the applicant's two criminal convictions render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of crimes relating to controlled substances, he is statutorily ineligible for the petty offense exception.

Here, the AAO correctly found that the applicant is 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 crimes involving controlled substances. Section 212(a)(2)(A) of the Act provides, in pertinent part, 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.

The record evidence reflects that the applicant was convicted on July 27, 2010, in the Municipal Court of Philadelphia, Pennsylvania, of Intentionally Possessing a Controlled Substance by Person not Registered in violation of Pennsylvania Statutes Title 35 § 780-113. The criminal complaint reflects that the controlled substance was marijuana. For this offense, the applicant was sentenced to two years of supervised probation.

The record further reflects that on July 2, 1998, the applicant was convicted under the alias [REDACTED] in the New Windsor Justice Criminal Court of unlawful possession of marijuana in violation of New York Penal Code § 221.05. For this offense, the applicant was fined \$100.00 and was assessed \$45.00 in surcharges. Counsel asserts that, since the applicant received only a fine and was ordered to pay surcharges, he was not “convicted” of a crime within the meaning of the Act. However, a penalty is only necessary establish a conviction for immigration purposes under section 101(a)(48) of the Act if adjudication of guilt is withheld, not where the conviction is based on a formal judgment of guilt by the court. Furthermore, the Board has held that the imposition of surcharges in the context of a disposition is sufficient to constitute a form of “punishment” or “penalty” for purposes of establishing that an alien has suffered a “conviction” within the meaning of section 101(a)(48). *Matter of Cabrera*, 24 I&N Dec. 459, 462 (BIA 2008). The applicant’s July 2, 1998 conviction therefore renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana 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 Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a single offense related to a controlled substance which is more than simple possession of 30 grams of marijuana. That is, a waiver of inadmissibility under section 212(h) of the Act can be

granted only insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana. *See* Section 212(h) of the Act. Here, the record evidence establishes that the applicant has two convictions for possession of marijuana not arising under a single scheme of criminal misconduct. Specifically, the applicant was convicted of unlawful possession of marijuana under New York Penal Code § 221.05 on July 2, 1998, and of Intentionally Possessing a Controlled Substance by Person not Registered under Pennsylvania Statutes, Title 35 § 780-113(a)(16) on July 27, 2010. Accordingly, the applicant is statutorily ineligible for consideration for a section 212(h) waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, and the AAO correctly dismissed the applicant's appeal.

In proceedings for an application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing statutory eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has not met that burden. Accordingly, the applicant's motion to reconsider is dismissed and the underlying application remains denied.

ORDER: The motion is dismissed.