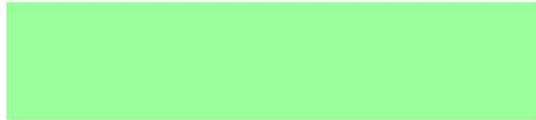


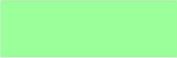
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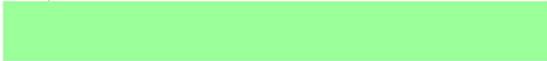


U.S. Citizenship
and Immigration
Services



DATE: **OCT 01 2013** Office: MANCHESTER

FILE: 

IN RE: 

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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Manchester, New Hampshire, denied the waiver application. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of the United Kingdom 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. The applicant was also found inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime involving moral turpitude. The applicant is applying for a waiver 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 spouse.

On August 28, 2012, the Field Office Director denied the Form I-601 application for a waiver, concluding that the applicant is statutorily ineligible for a waiver of inadmissibility as a result of multiple controlled substance convictions. The applicant appealed that decision and the AAO dismissed the applicant's appeal on June 12, 2013. The applicant, through counsel, filed a motion to reconsider that decision.

On motion, counsel for the applicant states the Board of Immigration Appeals (BIA or Board) decision in *Matter of Esqueda*, 20 I&N Dec. 850 (BIA 1994) does not apply to foreign convictions and that *Lennon v. INS*, 527 F.2d 187 (2nd Cir. 1975) should be applied in the applicant's case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Here, the applicant, through counsel, has filed a motion to reconsider submitting a brief in support of the motion.

The applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance.

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 applicant's criminal record from the United Kingdom indicates that he has been arrested on nine occasions and has been convicted on six occasions, five of which involve the possession of a controlled substance in violation of the Misuse of Drugs Act of 1971. On April 11, 2002, the applicant was found guilty of Possessing a Controlled Drug, Class B Cannabis, by the [REDACTED]. The applicant was fined ordered to pay court costs. On September 20, 2001, the applicant was found guilty of Possession of a Class B Drug, Cannabis Resin, by the [REDACTED]. He was ordered to do 12 months of community rehabilitee and pay court costs. On January 5, 2000, the applicant was found guilty of Possession of a Class B Drug, Cannabis Resin, by the [REDACTED]. He was ordered to complete 12 months of probation. On February 3, 1997, the applicant was found guilty of Possessing Controlled Drug by the [REDACTED]. He was fined and ordered to pay court costs. On March 21, 1994, the applicant was found guilty of Possessing Controlled Drug and what appears to be two counts of Supplying Controlled Drug by the [REDACTED]. He was fined and ordered to pay court costs.

Counsel states that foreign convictions "must include the requisite intent necessary for a criminal conviction" and that the AAO was incorrect in citing to the Board's decision in *Matter of Esqueda*. 20 I & N Dec. 850 (BIA 1994) (citing *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), distinguished. We are not persuaded by counsel's argument. In *Matter of Esqueda*, although the Board's decision pertained specifically to a conviction that occurred in California, the Board more broadly held that as a result of the changes in the law as a result of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, that:

...we now find it appropriate to question whether *Lennon v. INS, supra*, remains applicable to the current statute at all. In this regard we note that the immigration law reviewed by the Second Circuit in its 1975 opinion addressed violations of laws proscribing the "illicit" possession of drugs, a term which carries with it the connotation of an intentional violation. [FN8] In 1986, however, Congress eliminated the words "illicit possession" from the statute, broadening the language of the law to render deportable aliens convicted of violating "any law ... relating to a controlled substance." See sections 212(a)(23) and 241(a)(11) of the Act, 8 U.S.C. §§ 1182(a)(23), 241(a)(11) (1988).

Consequently, there no longer exists any statutory limitation on the types of drug offenses which subject an alien to exclusion or deportation. We find nothing in the legislative history of the Anti-Drug Abuse Act of 1986 to indicate that Congress meant to restrict its expansive language by allowing an exception to be made for statutes lacking a mens rea component. See *Flores-Arellano v. INS, supra*. See generally *De Osorio v. United States INS*, 10 F.3d 1034, 1043 (4th Cir. 1993) (relying on Congress' unquestionably restrictive intent to reject the argument that the principle of leniency to aliens should be applied in interpreting the statute

regarding the availability of section 212(c) waivers). In fact, by progressively enacting more stringent immigration provisions relating to drug offenders, Congress has shown that it takes the matter of drug abuse and its concomitant crime in this country very seriously and that it has a diminishing tolerance for those aliens who violate statutes aimed at drug enforcement. In view of Congress' clear shift to enlarge the scope of the statute, we believe that the rationale of the Second Circuit's *Lennon* decision, which was based largely on an interpretation of the congressional intent underlying a version of the statute that is no longer in effect, has been severely undermined.

Id. at 861 (citations omitted)

Counsel states that the decision of the U.S. Court of Appeals for the Second Circuit, which is not the court under whose jurisdiction this case lies, in *Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975), applies to this case. Counsel further states that the applicant was convicted under the same laws in the United Kingdom as the respondent in *Lennon*. The AAO notes, however, that the *Lennon* case dates back to 1975, and the law interpreted in the *Lennon* case dates to 1968, where here the applicant's convictions occurred between 1994 and 2002. Although the statute in question is from the Misuse of Drugs Act of 1971, the law has changed through regulations and judicial interpretations, none of which is acknowledged by counsel.

Counsel further argues that the applicant's convictions involving marijuana were the result of his medicinal use of the drug and that the statute under which the applicant was convicted did not consider medicinal use, or innocent knowledge. Even if this were proven, counsel has not cited to, and the AAO is unaware of, and law or precedent decision where the applicant's medicinal use of marijuana, as it pertains to his convictions that occurred between 1994 and 2002, alters the inadmissibility determination under section 212(a)(2)(A)(i)(II) of the Act. It is the applicant's burden of proof in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361.

As result of the applicant's multiple convictions for possession of marijuana, he is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense involving possession of a controlled substance. As set forth in our prior decision, the applicant may be considered for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act if he was convicted of a single offense relating to simple possession of 30 grams or less of marijuana. As the applicant has been convicted of more than one offense involving the violation of a law or regulation of a State, the United States, or a foreign country relating to a controlled substance (marijuana), he is not eligible to apply for a waiver under section 212(h) of the Act and remains inadmissible under section 212(a)(2)(A)(i)(II) of the Act. On motion counsel also argues that the applicant should not be inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude, as his conviction for theft in the United Kingdom involved a statute under which an individual may be convicted without proof of the requisite intent or *mens rea*; however, as the applicant is statutorily ineligible for a waiver of inadmissibility of section 212(a)(2)(A)(i)(II) of the Act, no purpose would be served in analyzing the applicant's inadmissibility or eligibility for a waiver in relation to section 212(a)(2)(A)(i)(I) of the Act.

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NON-PRECEDENT

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Again, the AAO acknowledges the documentation in the record regarding the hardship to the applicant's spouse and stepson as a result of his inadmissibility; however, there is no discretionary basis to approve the applicant's Form I-601 application. The applicant is statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(II) of the Act. Thus, no purpose is served in adjudicating his waiver application.

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 not been met. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed.