



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 09 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: [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 (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,


f.
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the waiver application and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the prior AAO decision will be affirmed.

The applicant is a native and citizen of the Bahamas who was found to be inadmissible to the United States pursuant to 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 relating to 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 his U.S. citizen spouse and stepchildren.

The Director concluded that the applicant is not eligible to apply for a section 212(h) waiver for his conviction of possession of cocaine and stated that the applicant's waiver application was denied as a matter of discretion. *See Decision of the Director*, dated February 17, 2012. The AAO also determined that the applicant is ineligible for a section 212(h) waiver. *See Decision of the AAO*, dated June 3, 2013.

The applicant has submitted a motion to reopen or reconsider the dismissal of his appeal. The AAO will grant the applicant's motion to reopen. On the applicant's motion, counsel for the applicant asserts that the applicant has a conviction for possession of hemp rather than cocaine. Counsel further asserts that the applicant has demonstrated his rehabilitation since his conviction.

In support of the applicant's motion to reopen and reconsider, the applicant submitted police and court documents concerning the applicant's conviction and a copy of the accompanying statute. The entire record was reviewed and considered in rendering a decision on the motion.

Section 212(a)(2)(A) of the Act states, in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(II) a violation of (or a 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 convicted in the Bahamas for possession of dangerous drugs, cocaine under section 25(5) and 25(2)(b) of the Dangerous Drugs Act. The record further indicates that the applicant was convicted on April 30, 1991 and sentenced to a fine or 14 days imprisonment.

Section 25(5) of the Dangerous Drugs Act provides:

Where any drug to which this Act applies is, without the proper authority, found in the possession of any person or store or kept in a place other than a place prescribed

for the storage or keeping of such drug, such person or the occupier or owner of such place, unless he can prove the same was deposited there without his knowledge or consent, and also the owner of, or other person responsible for the keeping of such drug shall be guilty of an offense against this 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 subparagraphs (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 –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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

(1) (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

Counsel for the applicant asserts that the applicant has not been convicted of a crime relating to cocaine because he pled guilty to a section of the Dangerous Drugs Act that encompasses both cocaine and marijuana. Counsel contends that the record is too general to determine the specific type of drug related to the applicant's conviction so that it would be incorrect to determine that he pled guilty to cocaine possession. Counsel maintains that the applicant was convicted of marijuana possession so that he is eligible for a section 212(h) waiver under the Act.

The applicant submitted court documents from [REDACTED], Bahamas, indicating charges of two counts under the Dangerous Drugs Act for actions taking place on January 28, 1987. Under count one, the applicant was charged with cocaine possession. Under count two, the applicant was charged with Indian hemp possession. Both counts were charged under the same sections of the Dangerous Drugs Act, section 25(5) and section 25(2)(b). The court documents reflect that the applicant was convicted of the offense of possession of dangerous drugs on April 30, 1991, with a

sentence of 300 dollars or 14 days imprisonment and the dismissal of count two. As the applicant was charged with two counts and on April 30, 1991, a conviction was entered against him and count two dismissed, it is clear that the applicant was convicted under count one, cocaine possession. Further, the court documents demonstrate that though the applicant was charged under the same section for both counts, count one specifically relates to cocaine and count two specifically relates to Indian hemp.

The record also contains a certificate from the [REDACTED] dated October 31, 2011, stating that the applicant has not been convicted of a criminal offense. As noted previously, under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an individual is considered convicted for immigration purposes. *Id.* The record does not contain any indication that the applicant's conviction was vacated on the merits as a result of underlying procedural or constitutional defects.

As the applicant was convicted of cocaine possession on April 30, 1991, he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act. As the applicant was not convicted of a single offense of simple possession of 30 grams or less of marijuana, he is not eligible for a section 212(h) waiver.

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.

ORDER: The motion is granted and the prior AAO decision is affirmed.