

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **SEP 10 2013** Office: OAKLAND PARK

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,

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

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility was denied by the Field Office Director, Oakland Park, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Trinidad and Tobago 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 is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) as the beneficiary of an approved VAWA Petition for Special Immigrant (Form I-360).

On February 29, 2012, the Field Office Director denied the Form I-601 application for a waiver, concluding that the applicant was statutorily ineligible for a waiver of inadmissibility as the applicant had not been convicted of “a single offense of simple possession of 30 grams or less of marijuana,” but rather possession of a controlled substance and possession of drug paraphernalia.

On appeal, counsel for the applicant states that the applicant is eligible for a waiver under section 212(h)(1)(C) as a VAWA self-petitioner who merits a waiver in the exercise of discretion. He asserts that her convictions qualify as “relating to a single offense of simple possession of 30 grams or less of marijuana.”

In support of the waiver application, the record includes, but is not limited to legal briefs by counsel; affidavits and statements from the applicant; biographical information for the applicant and her children; limited financial information for the applicant; documentation submitted in support of the applicant’s Form I-360; limited documentation regarding the applicant’s children’s education; and documentation of the applicant’s criminal and immigration history.

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 was reviewed and considered in rendering a decision on the appeal.

We will first address the applicant’s inadmissibility and eligibility for a waiver of inadmissibility. The applicant was found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of multiple crimes 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 record indicates that on May 3, 2001, before the County Court, Twentieth Judicial Circuit in and for Collier County, Florida, the applicant pled no contest to violation of Florida Statutes section 893.13(6)(b), Possession of a Controlled Substance, and Florida Statutes section 893.147(1), Use or Possession of Drug Paraphernalia. Adjudication was withheld by the court and the applicant was sentenced to serve 6 months of probation for each offense, to be served concurrently.

Section 893.13(6) of the Florida Statutes stated, in pertinent parts, at the time of the applicant's conviction that:

(6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, "cannabis" does not include the resin extracted from the plants of the genus Cannabis, or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

Section 893.147(1) of the Florida Statutes stated in pertinent part at the time of the applicant's conviction that:

Use, possession, manufacture, delivery, transportation, or advertisement of drug paraphernalia

(1) Use or possession of drug paraphernalia.—It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia:

(a) To plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance in violation of this chapter; or

(b) To inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter.

Any person who violates this subsection is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

As result of the applicant's convictions for possession of marijuana and possession of drug paraphernalia, she is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense involving a controlled substance. The applicant does not contest her inadmissibility on appeal.

Section 212(h) of the Act provides, in pertinent parts that:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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 [Secretary] that --

(i) . . . 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

(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; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

On appeal, counsel correctly points out that the applicant is a VAWA self-petitioner and, if she qualifies for a waiver, she is eligible to apply under 212(h)(1)(C), which allows for a waiver to be approved as a matter of a favorable exercise of discretion.<sup>1</sup>

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<sup>1</sup> In evaluating whether section 212(h)(1)(C) relief is warranted in the exercise of discretion, the AAO must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996) (citations omitted). The AAO notes that the applicant has submitted very little evidence regarding the exercise of discretion in her case.

In order to be eligible for consideration for a waiver under section 212(h) of the Act, however, the applicant must establish that her controlled substance convictions, which resulted in her inadmissibility under section 212(a)(2)(A)(i)(II), “relates to a single offense of simple possession of 30 grams or less of marijuana.” In determining whether an individual is eligible for a waiver of section 212(a)(2)(A)(i)(II), we employ a “circumstance specific,” rather than categorical approach. *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 120-22 (BIA 2009). The burden of proof is upon the applicant to establish eligibility in accordance with the requirements at 8 C.F.R. 103.2(b).

On appeal, counsel states that because the applicant’s two controlled substance convictions arise from a single event related to “a single offense of simple possession of 30 grams or less of marijuana,” she is qualified for a waiver under section 212(h) of the Act. The record of conviction, to the extent it has been submitted, is inconclusive, but the police arrest report indicates that the applicant’s two convictions relate to her arrest on February 21, 2001 for possessing “a plastic bag containing weighing 4.56 grams, with packaging,” and “a Ziploc bag containing thirty nine small plastic Ziploc bags, commonly used for packing marijuana and other narcotics.”

In *Martinez Espinoza*, the Board stated that “[s]ection 212(h) does not require an applicant to show that he was *convicted* of a single marijuana possession offense, or even that he *committed* such an offense; instead, it requires the applicant to show that his inadmissibility “relates to” such an offense.” As such, the Board found that section 212(h) does not categorically exclude all possession of drug paraphernalia offenses, as they “can sometimes be a mere adjunct to the simple possession of a small amount of marijuana for personal use. At the same time, “drug paraphernalia” can also denote syringes, drug scales, volatile chemicals and equipment used in methamphetamine labs, kits for extracting cocaine base, and a host of other devices that bear no relationship to simple marijuana possession.” *Id.* at 123. The Board also held that “when a person possesses drug paraphernalia for the sole purpose of introducing 30 grams or less of marijuana into his body, his conduct “relates to” the offense described in section 212(h).” *Id.* at 125-26 (holding that where the respondent was convicted of possessing a marijuana pipe, he may be able to prove by a preponderance of the evidence that the conduct that makes him inadmissible was “relate[d] to,” and no more serious than, a single offense of simple possession of 30 grams or less of marijuana). More recently, in *Matter of Davey*, the Board held that “possession of drug paraphernalia would not “involve” simple marijuana possession, however, if the paraphernalia in question was associated with the manufacture, smuggling, or distribution of marijuana or with the possession of a drug other than marijuana.” 26 I. & N. Dec. 37, 41 (BIA 2012) (holding that where the respondent’s two offenses, committed simultaneously, involved “the simple possession of less than 10 grams of marijuana” and “...the..plastic baggie in which the marijuana was contained...describe a single offense involving possession for one's own use of thirty grams or less of marijuana” under Section 237(a)(2)(B)(i) of the Act). The Board also held that “[b]ecause the term ‘drug paraphernalia’ covers a broad range of objects, many of which have no relationship to simple drug possession, the inquiry will necessarily be fact intensive.” *Id.* (stating that “an alien who possessed a marijuana pipe or rolling papers may be covered by the exception; an alien who possessed a drug scale or a hypodermic syringe would not”).

Here, as matter of primary importance, before we need reach the question of whether the applicant's two convictions may qualify as being "related to a single offense" under section 212(h) of the Act, is whether the applicant's conviction for possession of drug paraphernalia, under Florida Statutes section 893.147(1), where the record shows that paraphernalia to be 39 small plastic Ziploc bags, is related to, and is no more serious than, "a single offense of simple possession of 30 grams or less of marijuana." Section 893.147(1) of the Florida Statutes is divisible, but in pertinent part, as it would relate to Ziploc baggies, states that "[i]t is unlawful for any person to use, or to possess with intent to use, drug paraphernalia: to...pack, repack, store, contain, or conceal a controlled substance in violation of this chapter..." In order for a conviction to be sustained under this section of the Florida Statutes, it must be proven that the applicant possessed the paraphernalia with intent to use it for illegal purposes. *See e.g. T.E.D., III v. State*, 627 So.2d 118, 118 (Fla.App. 5 Dist. 1993). Counsel states that the applicant's conviction for possession of paraphernalia relates to the applicant's conviction under section 893.13(6)(b), possession of not more than 20 grams of cannabis. Although, the arrest and convictions for these offenses may have occurred at the same time, there is no indication in the record how the possession of 39 baggies with the intent to use those baggies to "pack, repack, store, contain, or conceal a controlled substance..." relates to a single offense of simple possession of 30 grams or less of marijuana. Therefore, on the question of whether the applicant's inadmissibility under section 212(a)(2)(A)(i)(II), as it pertains to her conviction under section 893.147(1) of the Florida Statutes, is waivable under section 212(h), the applicant has not met her burden of proof.

The applicant is statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(II) of the Act, as a result of her conviction under section 893.147(1) of the Florida Statutes. Thus, no purpose is served in adjudicating her waiver application. *Cf. Matter of J- F- D-*, 10 I&N Dec. 694 (Reg. Comm. 1963).

In proceedings regarding a waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.