



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

FILE: [Redacted]

Office: Buffalo

Date:

APR 19 2000

IN RE: Applicant:

[Redacted]

APPLICATION:

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

IN BEHALF OF APPLICANT:

[Redacted]

Public Comment

Identifying Case Selected to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Buffalo, New York, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States under §§ 212(a)(2)(A)(i)(II) and 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(2)(A)(i)(II) and 1182(a)(6)(C)(i), for having been convicted of a violation of a law relating to a controlled substance and for having procured admission into the United States by fraud or misrepresentation in 1998. The applicant married a United States citizen in England in September 1997 and she is the beneficiary of an approved immediate relative visa petition. The applicant seeks the above waiver in order to remain in the United States and reside with her spouse.

The district director concluded that the applicant is statutorily ineligible for the waivers sought and denied the application accordingly.

On appeal, counsel states that the applicant's convictions for other pills cannot legally be combined with the possession of 1.3 grams of marijuana to put the applicant over the threshold of 30 grams or more of marijuana. Counsel states that this was a legal error which renders the decision incorrect.

The record reflects that the applicant was convicted on September 3, 1982 of 2 charges of simple possession of dangerous drugs, namely, 19.9 grams of resinous substance containing 0.3 grams of tetrahydrocannabinol and 4 cigarettes containing 1.3 grams of cannabis. She was also convicted of 2 charges of possession of Part I Poison, namely, 5 Mogadon pills and 11 Valium Pills.

The applicant failed to indicate on her questionnaire in seeking admission under the Visa Pilot Waiver Program that she had ever been arrested or convicted of an offense involving moral turpitude or a controlled substance. Therefore, she is also inadmissible under § 212(a)(6)(C)(i) of the Act.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) CRIMINAL AND RELATED GROUNDS.-

(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 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 § 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-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.

Section 212(h) WAIVER OF SUBSECTION (a)(2)(A)(i)(I), (II), (B), (D), AND (E).-The Attorney General may, in his discretion, waive application of subparagraph (A)(i)(II) 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 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 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; and

(2) the Attorney General, 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 for adjustment of status.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 Attorney General 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.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

In certain cases, the Service has discretion to waive the inadmissibility of an alien who is subject to inadmissibility for a drug conviction, "insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana." *Id.* § 212(h), 8 U.S.C. § 1182(h); 8 C.F.R. §§ 2.1 and 212.7(a). There is a similar exception that applies to the corresponding deportation ground. *Id.* § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i). The chief distinction is that whether to grant a waiver under § 212(h) is entrusted to the Attorney General's sound discretion. *Id.* § 212(h), 8 U.S.C. § 1182(h). The deportation ground, by contrast, does not apply at all, if the alien's conviction is within the terms of the exception. *Id.* § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i). Also, the inadmissibility waiver applies to a "single offense of *simple possession*," but the deportation exception requires a finding that the conviction was for "a single offense involving *possession for one's own use*." Compare *id.* § 212(h), 8 U.S.C. § 1182(h), and *id.* § 241(a)(2)(B)(i), 8 U.S.C. § 1251(a)(2)(B)(i) (*emphasis added*).

The Federal controlled substances law defines marijuana to include "all parts of the plant *Cannabis sativa L.*, whether growing or not . . . [and] the resin extracted from any part of such plant." 21 U.S.C. § 802(16).¹ The Service may properly interpret the

¹The complete definition is:

all parts of the plant *Cannabis sativa L.*, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. 21 U.S.C. § 802(16).

expression "30 grams or less of marijuana" in § 212(h) and § 241(a)(2)(B)(i) to mean 30 grams or less of any cannabis product that is within the definition given in 21 U.S.C. § 802(16).

The meaning of a statute is to be determined from the text of the statute itself. *Mallard v. United States Dis. Ct. for South. Dist. Iowa*, 490 U.S. 296, 300 (1989); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984); *Richards v. United States*, 369 U.S. 1, 9 (1962).

Neither § 212(h) nor § 241(a)(2)(B)(i) provides any textual basis for giving the term "marijuana" one meaning for determining whether an alien is subject to inadmissibility or deportation, and a different meaning for determining whether the alien is eligible for a waiver of inadmissibility or for the exception from deportation. The term "marijuana" is a defined term, at least for purposes of the controlled substances law. If we substitute the definition of "marijuana," 21 U.S.C. § 802(16), for the term "marijuana" in § 212(h) and § 241(a)(2)(B)(i), then it is at least arguable from the texts of § 212(h) and § 241(a)(2)(B)(i) that the waiver and the exception may apply with respect any form of marijuana. It could be argued that the definition in 21 U.S.C. § 802(16) does not necessarily apply to administration of the INA, which does not itself define the term "marijuana." But the Board of Immigration Appeals has held that, in administering the INA, "marijuana" includes cannabis resin, also called hashish oil, so that conviction for possession of cannabis resin is a conviction for possession of marijuana. *Matter of Lennon*, 15 I & N Dec. 9, 25-26 (BIA 1974), *rev'd for lack of proof of mens rea, Lennon v. INS*, 527 F.2d 187 (2d Cir. 1975).² The Board based its decision on the definition of "marijuana" established in the controlled substances law. *Id.*, 15 I & N Dec. at 26.

We note that, despite their common origin, cannabis leaves and other cannabis products are distinguishable. Simple possession of some cannabis products is much more serious an offense than simple possession of cannabis leaves. The law recognizes this distinction. For sentencing, 30 grams of cannabis resin is equivalent to 150 grams of marijuana. 18 U.S.C. App. 4 § 2D1.1 (Drug Equivalency Table, Schedule I, Marijuana). Thirty grams of hashish oil is equivalent to 1500 grams of marijuana. *Id.* Thirty grams of Tetrahydrocannabinol (THC) is equivalent to 5,010 grams of marijuana. *Id.* Possession of 30 grams of cannabis resin is a Level 10 offense; possession of 30 grams of marijuana, a Level 6. *Id.* § 2D.1.1(c). A person with a criminal history score of -0-, *id.*, § 4A1.1, who was convicted of simple possession of 30 grams of cannabis resin would be subject to a presumptive sentence of imprisonment for a term from six to twelve months, *id.*, ch. 5, part A. If a person with the same criminal history score was convicted of simple possession of 30 grams of ordinary marijuana, the person

²It is no longer necessary to prove that *mens rea* was a necessary element of an offense, in order for a conviction for that offense to make an alien subject to exclusion or deportation. *Matter of Esqueda*, 20 I & N Dec. 850 (BIA 1994).

might not be imprisoned at all; if imprisoned, the person would probably be imprisoned for at most six months. *Id.*

What is clear from this history is that, while expanding the class of aliens who could benefit from the exception from the deportation ground, Congress intended that both the deportation exception and the inadmissibility waiver were to remain available only for aliens with a single, rather minor, marijuana conviction. The law is also clear that any doubt about the proper interpretation of a deportation statute must be resolved in favor of the alien. *Bonetti v. Rogers*, 356 U.S. 691 (1958); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Marino v. INS*, 537 F.2d 686, 691 (2d Cir. 1976; *Lennon v. INS*, 527 at 193. In administering § 212(h), the Service may interpret "marijuana" to include any cannabis product within the definition under 21 U.S.C. § 802(16).

The applicant in this matter was convicted of simple possession of 0.3 grams of THC. The Drug Equivalency Table reflects that 1 gram of THC equals 167 grams of marijuana. Therefore, 0.3 grams of THC equals 50.1 grams of marijuana.

No waiver is available to an alien convicted of simple possession of more than 30 grams or more of marijuana. In proceedings for application for waiver of grounds of inadmissibility under § 212(h), the burden of proving eligibility remains entirely with the applicant. Here, the applicant has not met that burden. Since the applicant is statutorily ineligible for the granting of a waiver under § 212(h) of the Act, the appeal regarding the waiver under § 212(i) of the Act must also be dismissed as the applicant is not otherwise admissible. Accordingly, the decision of the district director will be affirmed.

ORDER: The appeals are dismissed.