U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 05335325

Date: AUG. 3, 2023

Motion on Administrative Appeals Office Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, who requested an immigrant visa abroad was found inadmissible for a controlled substance violation, and for prior unlawful presence in the United States of one year or more. He seeks a waiver of those inadmissibility grounds under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(h) and 1182(a)(9)(B)(v).

The Director of the Nebraska Service Center denied the Form I-601 and a subsequent motion to reopen the proceedings, concluding that the Applicant was ineligible for a waiver under section 212(h) of the Act because the U.S. Department of State determined that his conviction for a controlled substance violation was not related to a single offense for simple possession of 30 grams or less of marijuana. On appeal, we acknowledged the Applicant's assertion that he was not convicted of a controlled substance violation or, in the alternative that it involved less than 30 grams of marijuana. Nevertheless, we dismissed the appeal, explaining that because the Applicant is residing abroad and seeking an immigrant visa, the U.S. Department of State, and not U.S. Citizenship and Immigration Services (USCIS) makes a final determination concerning his inadmissibility to the United States.

The matter is now before us on a motion to reconsider. The Applicant asserts that our decision was in error, as the U.S. Department of State found him inadmissible only for prior unlawful presence,[1] a ground for which a discretionary waiver is available.

Upon review, we will dismiss the motion.

A motion to reconsider must establish that our previous decision was based on an incorrect application of law or USCIS policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the immigration benefit sought.

[1] The Applicant states that he was also determined to be inadmissible under section 212(a)(9)(A) of the Act as a noncitizen who was previously ordered removed from the United States. Noncitizens inadmissible under section 212(a)(9)(A) of the Act may seek consent to reapply for admission by filing a separate Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. The record reflects that the Applicant's Form I-212 was denied.

As stated, in concluding that the Applicant was statutorily ineligible for a waiver under section 212(h) of the Act, we relied on the U.S. Department of State's determination that he was inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a violation (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, which was not related to a single offense of simple possession of 30 grams or less of marijuana. The Applicant does not point to any legal or policy errors in our conclusion that because he is seeking an immigrant visa, the U.S. Department of State is responsible for determining whether he is eligible for such visa, and admissible to the United States.

Instead, the Applicant submits a copy of an undated and unsigned letter from the U.S. Embassy in San Salvador, El Salvador, indicating that he is inadmissible under sections 212(a)(9)(B) and 212(a)(9)(A) of the Act (for prior unlawful presence and for seeking admission after having been ordered removed) and may file Form I-601 and Form I-212 to overcome those inadmissibility grounds. We note, however, that the record of proceedings includes a U.S. Department of State's immigrant visa refusal worksheet, dated on October 24, 2016, and signed by the U.S. Consul in San Salvador, El Salvador, which reflects that the visa request was refused upon the consular officer's determination that the Applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(II) of the Act due to a "conviction for selling marijuana."

We previously explained that consular officers have the exclusive authority to grant or refuse visas. *See* section 104(a) of the Act, 8 U.S.C. § 1104(a); section 221(a), (g) of the Act, 8 U.S.C. § 1201(a), (g). Here the consular officer determined that the Applicant was inadmissible to the United States on a ground for which a waiver is not available. As the Applicant does not submit evidence that the U.S. Department of State subsequently withdrew its October 24, 2016, finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act and reinstated his immigrant visa request, he has not overcome the basis for the denial of his Form I-601.

In conclusion, the Applicant has not demonstrated that we erred as a matter of law or USCIS policy in dismissing his appeal, or that our adverse decision was otherwise incorrect based on the evidence in the record of proceedings at the time. The Applicant's appeal therefore remains dismissed, and his Form I-601 remains denied.

**ORDER:** The motion to reconsider is dismissed.