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**U.S. Citizenship  
and Immigration  
Services**

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FILE:

[REDACTED]

Office: HARLINGEN, TEXAS

Date: **AUG 30 2007**

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:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Harlingen, Texas, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed.

The applicant [REDACTED] is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C). The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act. The district director concluded that the applicant had failed to establish extreme hardship would be imposed on a qualifying relative, and denied the Application for Waiver of Excludability (Form I-601). *Decision of the District Director*, dated January 28, 2006.

The AAO will first address the finding of inadmissibility under section 212(a)(2)(C) of the Act.

Section 212(a)(2) of the Act<sup>1</sup> states in pertinent part, that:

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

The record reflects that the defendant pleaded guilty to a single-count Criminal Information on August 16, 1994 for the following offense (18 U.S.C. § 4):

Misprision of felony, to wit: Having knowledge of the commission of a felony cognizable by a Court of the United States, that is, that Jose Fuentes did knowingly and intentionally conspire and agree with at least one other person to knowingly and intentionally possess, with intent to distribute marihuana, willfully did conceal the same, and did not, as soon as possible, make known the commission of said felony to a judge or other person in civil or military authority within the United States.

For the misprision of felony<sup>2</sup> conviction, the applicant was sentenced to 10 months imprisonment and one year of supervised release. *United States District Court, Southern District of Texas, McAllen Division, Judgment in a Criminal Case (For Offenses Committed On or After November 1, 1987).*

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<sup>1</sup> Section 212(a)(2)(C) is amended by section 809 of the Intelligence Authorization Act for Fiscal Year 2000, Public Law 106-120, dated December 3, 1999.

Based on the misprision of felony conviction, the district director concluded that the applicant is inadmissible under section 212(a)(2)(C) of the Act as a controlled substance trafficker.

The Board of Immigration Appeals (BIA) has stated that a conviction is unnecessary if the part of the statute concerning "reason to believe" that the person is a trafficker is relied upon. *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

The constitutionality of the reason to believe provision was upheld in *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 822-824 (9<sup>th</sup> Cir. 2003). The Ninth Circuit rejected the void for vagueness challenge to the "reason to believe" standard for someone deemed inadmissible as a drug trafficker and raising, but not deciding, whether a void for vagueness challenge may even be raised in regard to issues of admissibility. The fact that [REDACTED] was not convicted of drug-trafficking did not prevent the application of the exclusion.<sup>3</sup>

In *Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir.2000), the Ninth Circuit held that no conviction is required for section 212(a)(2)(C) of the Act to apply. The only requirement is that an immigration officer "knows or has reason to believe" that the applicant is an illicit trafficker in controlled substances or that the applicant has knowingly assisted, abetted, conspired with, or colluded with others in such illicit trafficking. The court stated that the way of determining whether the immigration judge and BIA had "reason to believe" that [REDACTED] knew he was participating in drug trafficking is to determine whether substantial evidence supports such a conclusion. The determination must be based on reasonable, substantial and probative evidence. *Id.* at 1119.

Here, the AAO finds that the evidence reflects that the applicant was convicted of having knowledge that [REDACTED] did knowingly and intentionally conspire and agree with at least one other person to knowingly and intentionally possess, with intent to distribute marijuana" and the applicant "willfully did conceal the same, and did not . . . make known the commission of said felony . . ." The applicant's willful concealment of [REDACTED] criminal activity brings him within the provisions of section 212(a)(2)(C) of the Act relating to a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled or listed substance as defined in section 102 of the Controlled Substances Act. Consequently, the record supports the district director's finding that the applicant is inadmissible under section 212(a)(2)(C) of the Act.

The AAO is not persuaded by counsel's assertion that even though the applicant failed to report the commission of a felony involving drugs, Citizenship and Immigration Services' (CIS) failure to interview the applicant deprived him of rebutting any presumption that he had been involved with drugs. The record

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<sup>2</sup> Under the federal misprision statute, 18 U.S.C. § 4, the defendant must commit an affirmative act to prevent discovery of the earlier felony. *See United States v. Adams*, 961 F.2d 505 (5th Cir.1992) (three elements required to support conviction for misprision of felony: (1) knowledge that a felony was committed; (2) failure to notify authorities of the felony; and (3) an affirmative act of concealment); *United States v. Wartens*, 885 F.2d 1266, 1275 (5th Cir.1989) ("Mere failure to make known does not suffice.").

<sup>3</sup> *Rojas-Garcia* at 823, fn. 9.

reflects that the applicant had an opportunity to submit such evidence in response to the director's Request for Evidence. Counsel had requested two extensions of time in which to submit evidence to show that the applicant had no role in the controlled substance offense. *See Request for Further Sixty Day Extension of Time to File Brief on Appeal, from [REDACTED], received on May 22, 2006 (Extension granted by CIS); Counsel's letter dated February 22, 2006, requesting a 90 day extension.* Ultimately, counsel indicated that the applicant had been unsuccessful in obtaining documentary evidence to show that he was not involved with the drug offense. It is noted that on appeal the applicant had an additional opportunity to submit evidence pertaining to his conviction.

Counsel's claim that the applicant's credible testimony is sufficient in establishing that he was not involved in the drug charge is not persuasive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Section 212(h) of the Act, U.S.C. § 1182(h), does not provide a waiver for inadmissibility pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C). Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.