

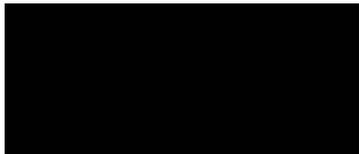


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

H4



FILE:



Office: HARLINGEN Date: NOV 02 2006

IN RE:

APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

Self-represented

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Harlingen, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on January 13, 1985, was admitted to the United States as a lawful permanent resident. On February 4, 1990, immigration officers arrested the applicant at an immigration checkpoint for possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D). The Report of Apprehension or Seizure (Form I-44) indicated that the applicant had driven the vehicle, containing 31lbs of marijuana, from Mexico through the Rio Grande, Texas, Port of Entry. On March 30, 1990, the applicant pled guilty to possession of marijuana and was sentenced to 5 years in jail. The applicant's sentence was suspended in favor of 5 years of probation. On January 22, 1995, immigration officers arrested the applicant at the Falcon Dam, Texas, Port of Entry, for possession of marijuana with intent to distribute. The Record of Deportable Alien (Form I-213) indicates that the applicant had driven a vehicle, containing 52lbs of marijuana, from Mexico to the Falcon Dam, Port of Entry, where he sought admission as a returning lawful permanent resident. On January 22, 1995, the applicant was placed in proceedings. On April 12, 1995, the applicant pled guilty to possession of marijuana and was sentenced to 10 years in jail. The applicant's sentence was suspended in favor of 10 years of probation. On July 26, 1995, the applicant withdrew his application for 212(c) relief and the immigration judge ordered the applicant removed from the United States. On July 27, 1995, the applicant was removed from the United States and returned to Mexico. On June 14, 1998, the applicant applied for admission at the Roma, Texas, Port of Entry. The applicant presented his lawful permanent resident card and was found inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant without valid entry documents. On June 18, 1998, the applicant was removed from the United States. On March 29, 1999, the applicant filed the Form I-212. The applicant is the father of three U.S. citizen children. The applicant is inadmissible under sections 212(a)(9)(A)(ii) and 212(a)(9)(C) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(ii) and 1182(a)(9)(C), and seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen children.

The district director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The district director denied the Form I-212 accordingly. *See Director's Decision* dated December 3, 2001.

On appeal, the applicant's children contend that the applicant should be granted permission to reapply for admission because he has been separated from his family who miss his presence in their lives and the applicant's children may be left with only one parent as the applicant's ex-wife may be suffering from a virus. *See Applicant's Children's Letters*, dated December 29, 2001.

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

- (1) 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 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.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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* (emphasis added.)

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. The AAO finds that the applicant is inadmissible 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 two separate counts of possession of marijuana, violations of a law related to a controlled substance.

The Act makes it very clear that the section 212(h) waiver applies only to controlled substance cases that involve a *single offense* of possession of *30 grams or less* of marijuana. In this case, the applicant was convicted on two occasions of possession of marijuana and in each instance was in possession of greater than 30 grams of marijuana.

Section 212(a)(2)(C) provides:

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

is inadmissible

Although the record in this matter shows that the applicant was not convicted of the crime of drug trafficking, the Board, in *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, one of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *Matter of Franklin*, 728 F.2d 994 (8th Cir., 1984).

Generally speaking, intent to distribute is established when the controlled substance is either found on the person of the accused, or in a vehicle or boat driven or occupied by the accused, or in a dwelling where the accused resided or visited frequently. It was held in *United States v. Franklin*, 728 F.2d 994 (8th Cir., 1984), that intent to distribute may be established by circumstantial evidence. The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. *United States v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980) (413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5th Cir. 1979) (26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978) (147 grams of cocaine).

The Form I-44 and the Form I-213, issued on the dates on which the applicant was apprehended in 1990 and 1995, clearly state immigration officers arrested the applicant with 31lbs of marijuana in his possession on February 4, 1990, and 52lbs of marijuana on January 22, 1995. In addition, the record of proceedings contains an arrest and conviction record, which indicates that the applicant was charged with smuggling marijuana and possession of marijuana with intent to distribute but only convicted of possession of marijuana and sentenced to jail in regard to the Border Patrol's arrests of the applicant while in possession of 31lbs and 52lbs of marijuana. As discussed above, a conviction is unnecessary to find the applicant inadmissible under section 212(a)(2)(C) of the Act. The AAO need only find that there is "reason to believe" that the person is a trafficker. The determination must be based on reasonable, substantial and probative evidence. *Alarcon v. Serrano*, 220 F.3d 1116 at 1119 (9th Cir. 2000). The AAO bases its finding on the records documenting the applicant's arrests, removals and convictions. As set forth in *Matter of U_H_* (23 I&N Dec 355 at 356 (BIA 2002)) the "reason to believe" standard may be equated to "probable cause." The applicant was arrested with 31lbs and 52lbs of marijuana, found in the vehicles the applicant was driving. This amount of the illicit drug found on the applicant is sufficient to infer that the applicant was drug trafficking. Therefore, the applicant is also inadmissible under section 212(a)(2)(C) of the Act, a ground of inadmissibility for which there is no waiver.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, which are very specific and applicable. No waiver is available to an alien who has been convicted of more than one violation of a controlled substance law or when the conviction(s) relates to possession of greater than 30 grams of marijuana. No waiver is available to an alien who is a trafficker in any controlled substance. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.