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U.S. Citizenship
and Immigration
Services

41



FILE: [REDACTED]
XSI-87-647-1161

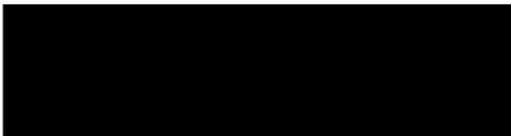
Office: CALIFORNIA SERVICE CENTER

Date: JAN 23 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Temporary Resident Status under Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the service center that processed your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The termination of temporary resident status by the Director, California Service Center, is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's status because the applicant had admitted to having trafficked in a controlled substance.

On appeal, counsel states that the admission was made under duress. She asserts that there was no valid admission, and points out that there was no conviction.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). An alien is also inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act, formerly section 212(a)(23) of the Act, 8 U.S.C. 1182(a)(2)(C).

The record contains the January 19, 1993 minutes of the United States District Court, Southern District of California, relating to the case of *U.S.A. vs. Osuna-Heredia, et al.*, No. 92-0147-R. The seven defendants, including the applicant, had been charged with the following:

1. Conspiracy to Possess Marijuana with Intent to Distribute (1), 21 U.S.C. § 841(a)(1) and 846;
2. Conspiracy to Possess Marijuana with Intent to Distribute (1s), 21 U.S.C. § 841(a)(1) and 846;
3. Possession of Marijuana with Intent to Distribute and Aiding and Abetting (2), 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;
4. Aiding and Abetting Possession of Marijuana with Intent to Distribute (2s), 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2;
5. Criminal Forfeiture (4s), 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 853.

The minutes reveal the case was dismissed against the applicant and most of the defendants. The issue that must be resolved is whether the applicant is nevertheless inadmissible pursuant to the above sections of law.

On November 20, 1997, the applicant stated the following in a written statement before an officer of the Immigration and Naturalization Service at National City, California, concerning the events that led to the above charges against her:

I [REDACTED] give the following declaration that on June – July 1992 I was driving a car with marijuana inside I knew what I had inside the car. I got pull over in the San Isidro border. I went to jail for 4½ months and I got pay 500.00 for driving the car. In the last court hearing my case was dismissed and I got out of jail I did probation for 3 months. Total of marijuana was 20 lbs.

On appeal, counsel maintains the applicant's statement was not given voluntarily. The applicant, in a declaration made over six years after the 1997 sworn statement, states that at the interview in 1997 the officer handed her a form and told her what to write down on it. She indicates that the officer did not explain

that he was putting together the elements of a crime for drug smuggling. She further states that she was simply following the officer's directive, and did not believe that she had the option of saying "no" or simply leaving the office. She concludes by declaring that the statement she wrote was not a voluntary one.

The precedent decisions, *Matter of J--*, 2 I&N Dec. 285 (BIA 1945), *Matter of L--*, 2 I&N Dec. 486 (BIA 1946), and *Matter of K--*, 7 I&N Dec. 594 (BIA 1957), set forth strict standards to determine whether an alien has either admitted to committing or admitted to committing acts which constitute the essential elements of a crime involving moral turpitude. These standards are best enunciated in *Matter of J--*, 2 I&N Dec. 285, at 288-289 (BIA 1945), as follows:

1. It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred.
2. The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor.
3. The alien must clearly admit conduct constituting the essential elements of the crime or misdemeanor and that he committed such offense. By the latter it is meant that he is guilty of the crime or misdemeanor.
4. It must appear that the crime or misdemeanor admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude.
5. The admissions must be free and voluntary.

The holding reached in *Matter of K--*, 7 I&N Dec. 594 (BIA 1957), also requires that an alien be furnished with a definition of the specific crime in question in reasonable terms in addition to those standards cited above in order to reach the conclusion that an alien has either admitted to committing or admitted to committing acts which constitute the essential elements of a crime involving moral turpitude.

These same standards were subsequently utilized by the court in *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) to determine whether an alien either admitted to committing, or admitted to committing acts that constitute the essential elements of, a crime involving a controlled substance.

The interview notes of the officer who interviewed the applicant and took the sworn statement from her on November 20, 1997, consist of the following:

Applicant admitted to have been arrested in (on or about) June or July 1992 for marijuana (crossing the border) SYS POE.... When applicant appeared in court she was told that the vehicle she was driving contained 20 lbs of marijuana.

The notes contain no indication that all of the standards cited above were strictly followed and imposed in order to reach the conclusion that the applicant has admitted to committing a crime involving a controlled substance or admitted to committing acts that constitute the essential elements of a crime involving a controlled substance. Moreover, the notes do not demonstrate that the applicant was provided with

definitions of the crimes relating to the five charges shown above and advised in a clear manner of the essential elements of the alleged crimes by the interviewing officer. Therefore, without regard to whether the applicant's statement was voluntary, the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act, as she has not admitted, pursuant to the above standards, to having committed a crime involving a controlled substance or having committed acts that constitute the essential elements of a crime involving a controlled substance.

The other issue to be resolved is whether the applicant is inadmissible under section 212(a)(2)(C) of the Act because of knowledge, or reason to believe, that the applicant has been an illicit trafficker in a controlled substance. As there is no arrest report in the record which could detail the exact involvement of the applicant in the events which led to her arrest, we are left with the fact of the arrest itself and the applicant's signed statement in determining whether there is knowledge, or reason to believe, the applicant has been a trafficker.

It is noted that the applicant, while disavowing the voluntariness of her admission, has not specified what parts of the statement are not true. If her written statement is truly comprised of what the officer told her to write, then it is incumbent upon her to now explain what parts of the statement are inaccurate. She has not stated, for example, that she was not the driver of the car, or that she did not know of the 20 pounds of marijuana in the car. Clearly, if she simply had been a passenger in a car that held, unbeknownst to her, 20 pounds of marijuana, it would be to her advantage to say so. She has not done so.

It is further noted that the applicant waited more than six years after having made the statement before disavowing it. An inference cannot be drawn that she is admissible simply because the applicant recants her admission, *particularly when she has not actually stated that she was not involved in trafficking.*

Even in cases where the burden of proof is upon the government, such as in deportation proceedings, a previous sworn statement voluntarily made by an alien is admissible, and is not in violation of due process or fair hearing. *Matter of Pang*, 11 I&N Dec. 213 (BIA 1965). Furthermore, in the absence of exceptional circumstances, a challenge to the voluntariness of an admission or confession will not be entertained when first made on appeal. *Matter of Stapleton*, 15 I&N Dec. 469 (BIA 1975). Given the circumstances here, it is concluded that there is no apparent reason to find that the statement was not voluntary.

Counsel points out that the charges lodged against the applicant were dismissed, and opines that the U.S. Attorney did so only because the applicant was free of any malfeasance. While it is not known why the charges were dismissed, it must be noted that charges are sometimes dismissed for technical reasons or due to prosecutorial discretion. Most importantly, an actual conviction of a drug trafficking offense is not necessary to establish inadmissibility under section 212(a)(2)(C). *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

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. 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].

In view of these facts, it is concluded that there is reason to believe the applicant has been involved in the trafficking of a controlled substance. Therefore, she is inadmissible under section 212(a)(2)(C) of the Act. Within the legalization program, no waiver is available to an alien inadmissible under section

212(a)(2)(C) of the Act except for a single offense of simple possession of thirty grams or less of marijuana.
Section 245A(d)(2)(B)(ii) of the Act.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.