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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
20 Massachusetts Avenue, N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H2

FILE: [redacted] Office: MEXICO CITY (PANAMA) Date: MAR 09 2011

IN RE: Applicant: [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); section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Colombia. The director found the applicant 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), for being a controlled substance trafficker or a knowing aider, abettor, assister, conspirator, or colluder with others; section 212(a)(3)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(3)(A)(ii), for seeking entry for unlawful activity; section 212(a)(9)(B)(i)(II), of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year; and section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9) (C)(i)(II), for having been previously removed from the United States.

The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative. Further, the director denied the Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212).

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) misapplied the "reason to believe" standard of sections 212(a)(2)(C)(i) and 212(a)(3)(A)(ii) of the Act. He contends that the applicant "was not a knowing and conscious participant in drug trafficking," and that the conclusion that he engages in criminal activities is not reasonable, substantial, and probative. Counsel maintains that the applicant was in deportation proceedings for having overstayed his authorized period of stay in the United States. Further, counsel contends that the applicant was convicted for structuring to evade reporting requirements, and that all other criminal charges were dropped. Counsel cites *Matter of Rico*, 16 I&N Dec. 181 (BIA 1997), and *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007) (unpublished), and claims that since the applicant was not convicted of any charge except for structuring to evade reporting requirements, his conviction should not constitute reasonable, substantial, and probative evidence to support a belief that the applicant was involved in drug trafficking. Moreover, counsel cites *Matter of R.H.*, 7 I&N Dec. 675 (BIA 1958), and states that the applicant was not a knowing and conscious participant in the drug trafficking. In addition, counsel cites *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); and *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995), and contends that a guilty plea alone, without conviction and any independent evidence of drug trafficking, is insufficient to establish the "reason to believe" standard.

Further, counsel asserts that the applicant left the United States in June 1994 in accordance with the deportation order and has not returned or attempted to return to the United States illegally. Counsel contends that USCIS erred in concluding that the applicant has lived in the United States since June 1994. Counsel indicates that the basis of USCIS' conclusion is a search of public records that reveal that the applicant's spouse owns real estate in the United States, and that the applicant, as her spouse, has an ownership interest in that property. Counsel declares that the applicant left the United States on June 28, 1994, and that proof of his departure was provided to USCIS in order to cancel the

applicant's bond. Counsel avers that USCIS had, in fact, cancelled the applicant's bond based upon that proof. In addition, counsel states that the applicant appeared at the American Consulate in Bogota, Columbia, on several occasions.

The AAO will first address the director's finding that the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States on June 1, 1982 through the J-1 exchange visitor program with authorization to remain in the United States for a temporary period not to exceed November 30, 1985. On April 19, 1993, an Order to Show Cause and Notice of Hearing was personally served to the applicant for remaining in the United States beyond November 30, 1985 without authorization, and for having been convicted on April 29, 1992 of structuring transactions to evade reporting requirements. The applicant received an amended Order to Show Cause and Notice of Hearing, which reflects that the applicant entered the United States on May 16, 1991, as a nonimmigrant treaty investor with authorization to remain in the United States for a temporary period not to exceed May 15, 1992. On August 10, 1993, an Order to Show Cause and Notice of Hearing was personally served to the applicant for remaining in the United States beyond May 15, 1992 without authorization. On November 19, 1993, a Notice of Hearing in Deportation Proceedings was personally issued to the applicant for a master hearing on December 3, 1993. On December 3, 1993, an immigration judge denied the applicant's application for voluntary departure, and ordered the applicant be deported to Columbia. On December 3, 1993, a warrant of deportation was issued. The evidence of departure form, signed by a deportation officer, and dated July 13, 2006, states that the applicant's attorney, [redacted]

provided a stamped passport bearing the date of the applicant's departure from the United States as June 28, 1994, and a bond cancellation. The AAO notes that the bond cancellation conveys that, based on an "interview with attorney," the applicant departed from the United States on June 28, 1994, and the bond was cancelled. There is a copy of a flight ticket to depart the United States on ARC that was issued on June 23, 1994 to the applicant. Lastly, we observe that the migratory registry provided by the Departamento Administrativo de Segurida states that the applicant has traveled to [redacted]t, *and other countries since 1995.*

Although the director states that public records indicate that the applicant continued to reside illegally in the United States despite the removal order and left the United States eight years after the order of removal, we find that the aforementioned evidence of the departure form and stamped passport bearing the date of the applicant's departure from the United States; the bond cancellation; the flight ticket; and the migratory registry collectively demonstrate that the applicant left the United States either in 1994 or 1995. The applicant, therefore, would not have accrued any unlawful presence in the United States, and is consequently, not inadmissible under section 212(a)(9)(B)(i)(II) of the Act.

The AAO will now address the finding that the applicant is inadmissible for being a controlled substance trafficker or a knowing aider, abettor, assister, conspirator, or colluder with others. Section 212(a)(2) of the Act provides, in pertinent part, that:

> (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-
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (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 section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.
>
> . . .
>
> (C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--
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> (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.

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

(h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of 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 if -

. . .

(1) (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 [now the Secretary of Homeland Security (Secretary)] 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 . . . .

On April 29, 1992, the applicant pled guilty to structuring transactions to evade reporting requirements in violation of 31 U.S.C. § 5324(3), count V of the indictment. The judge dismissed the remaining counts, and the applicant was ordered to pay an assessment, and serve a term of 12 months in prison.

The applicant was convicted under 31 U.S.C. § 5324(a)(3). That section provides:

(a) Domestic coin and currency transactions involving financial institutions.--No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508--

. . .

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

We note that the warrant for arrest charges the applicant with "conspiring to conduct a financial transaction involving narcotics proceeds with the intent to conceal the source of the proceeds, and also conducting the financial transaction." The indictment charges the applicant with violation of 18 U.S.C. § 1956, laundering narcotics proceeds. We also note that the United States' Response to the Defendant's Motion to Suppress states the following:

> The superseding indictment in this case contains 14 counts. Count I charges co-defendant [redacted], who is a fugitive, with conspiracy to possess cocaine with intent to distribute. Counts II and III charge defendant [redacted] with conspiracy and substantive offenses under 18 U.S.C. § 1956, the money laundering statute, relating to [redacted] delivery of approximately $100,000 in narcotics-derived United States currency to Delgado on May 15, 1990.
>
> Count IV charges solely [redacted] with a § 1956 violation involving his receipt of $100,000 in narcotics-derived U.S. currency on April 20, 1990. . . . Finally, the remaining counts charge defendant with violations of 31 U.S.C. § 5324, relating to defendant's structured currency deposits at financial institutions to evade the filing of Currency Transaction Reports (CTRs).

Counsel contends that a guilty plea alone, without conviction and any independent evidence of drug trafficking, is insufficient to establish the "reason to believe" standard. In support of his contention counsel cites *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967, 1968); *Matter of Seda*, 17 I&N Dec. 550 (BIA 1980); and *Matter of Thomas*, 21 I&N Dec. 20 (BIA 1995).

We note that in *Matter of Winter* the Board addressed whether a guilty plea to larceny, followed by something less than a conviction, is sufficient to sustain a finding of deportability for having committed a crime involving moral turpitude. 12 I&N Dec. at 643-644. In *Matter of Seda*, the Board determined whether the respondent's plea of guilty constitutes an admission of commission of forgery, a crime involving moral turpitude, which would render him ineligible for voluntary departure. 17 I&N Dec. 550 at 554. In *Matter of Thomas*, the Board addressed whether non-final convictions and the conduct underlying those convictions could be considered in the exercise of discretion. 21 I&N Dec. 20 at 22.

These cases are distinguishable from the instant matter and are therefore not persuasive. *Matter of Winter* and *Matter of Seda* address inadmissibility on the basis of having committed a crime involving moral turpitude, and *Matter of Thomas* addresses the consequences of non-final convictions on a discretionary grant of voluntary departure. However, the ground of inadmissibility in the instant matter is under section 212(a)(2)(C) of the Act, which is for being a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance. In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer "knows or has reason to believe" that the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer to have sufficient "reason to believe" that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) of the Act, the conclusion must be supported by "reasonable, substantial, and probative evidence." *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337, 1346-1347 (11th Cir. 2010) (citing *Alarcon-Serrano v. I.N.S.*, 220 F.3d at 1119.

Counsel cites *Matter of Rico*, 16 I&N Dec. 181 (BIA 1997) and *Igwebuike v. Caterisano*, 230 Fed. Appx. 278 (4th Cir. 2007) (unpublished), and claims that since the applicant was only convicted of

structuring transactions to evade reporting requirements, there is not reasonable, substantial, and probative evidence to support a belief that the applicant was involved in illicit drug trafficking.

However, an applicant may be inadmissible under section 212(a)(2)(C)(i) of the Act even where there has been no admission and no conviction, so long as there is "reason to believe" that the applicant engaged in the proscribed conduct relating to trafficking in a controlled substance. *Alarcon-Serrano*, 220 F.3d 1116 at 119. Even though a conviction itself no longer exists for immigration purposes, the underlying facts of the conviction can still support a "reason to believe" determination if they are established by "reasonable, substantial, and probative evidence." *Garces*, 611 F.3d 1337 at 1347 (citation omitted); *see also Matter of Rico*, 16 I&N Dec. at 184 ("A criminal conviction is unnecessary to establish a basis for exclusion" as an illicit trafficker.); and *Matter of Favela*, 16 I&N Dec. 753, 754-56 (BIA 1979) (alien excluded based on his admission that he attempted to smuggle marijuana, even though he was not convicted of a controlled substance crime). Furthermore, we note that in *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir.2003), the Ninth Circuit upheld the Board's decision to deny an application, finding there was sufficient reason to believe that the alien was involved in drug-trafficking because, in addition to a previous arrest for drug trafficking, two undercover detectives gave testimony that they had personally arranged drug deals with Rojas-Garcia. 339 F.3d 814 at 817-818, 823. The AAO notes that [redacted] was not convicted of drug-trafficking. *Id.* at 823, n. 9. Lastly, we point out that counsel is correct in that there must be sufficient evidence to establish that the applicant "knowingly and consciously participated" in trafficking of a controlled substance. *Garces*, 611 F.3d 1337 at 1350; *see also Matter of R.H.*, 7 I&N Dec. 675 (BIA 1958).

The record before the AAO contains the indictment, the superseding indictment, the plea agreement, the change of plea, the judgment, the Defendant's Objections to Presentence Investigation Report, the United States' Response to Defendant's Objections to Presentence Investigation Report, an exhibit and witness list, a completed Form 8300 signed by the applicant, the Motion to Suppress Physical Evidence and statements and memorandum of law, the United States' Response to the Defendant's Motion to Suppress, cedulas, and other documentation.

In view of the evidence in the record, particularly the United States' Response to the Defendant's Motion to Suppress and the plea agreement, the AAO agrees with the director's determination that there is sufficient "reason to believe" that the applicant is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance.

The facts that were used to support the charges against the applicant are stated in the United States' Response to the Defendant's Motion to Suppress. Those facts are based on detailed observations made by an agent of the Internal Revenue Service and detectives of the Metro-Dade Police Department. The facts include the following: The back office of [redacted], where the applicant is the manager and sole employee, had a large amount of U.S. currency in bundles on top of a coffee table. U.S. Response Def. Mot. Suppress, 3 (Jan. 8, 1991). The applicant told Detective Trujillo that "approximately one hour earlier an individual named '[redacted]' had delivered the currency, which totaled $100,000 and was delivered to purchase computer equipment for an individual in Columbia." U.S. Response Def. Mot. Suppress, 3. The applicant denied "that co-defendant [redacted]' adding tha[redacted] had departed the premises." U.S. Response Def. Mot. Suppress, 3. When asked how the applicant could complete a Form 8300 for the currency

delivery from [redacted]' without [redacted]' identification, the applicant could not explain. U.S. Response Def. Mot. Suppress, 3. Hussein denied any knowledge of the currency on the coffee table. U.S. Response Def. Mot. Suppress, 4. When asked for identification, [redacted] retrieved a briefcase that was empty except for his passport, keys, and papers reflecting narcotics and money laundering activities; and a search of his wallet revealed more keys and papers evidencing money laundering activities. U.S. Response Def. Mot. Suppress, 4. The applicant admitted to [redacted] that [redacted] and not [redacted] had delivered the currency, adding that he lied about [redacted] because he was nervous. U.S. Response Def. Mot. Suppress, 4-5. In his later deposition, the applicant changed his story and stated that he thought [redacted] was [redacted] U.S. Response Def. Mot. Suppress, 4, n.1. A narcotics detector dog alerted to the odor of cocaine on the money [redacted] had personally delivered to the applicant, and to an area which the applicant identified as covering a floor safe containing between $30,000 and $40,000 in currency. U.S. Response Def. Mot. Suppress, 5. A nearby desk had bank records reflecting multiple deposits of less than $10,000 in currency, and an envelope containing photocopies of "cedulas." U.S. Response Def. Mot. Suppress, 5. Searches of residences controlled by [redacted] revealed narcotics records and $2.2 million in narcotics-derived currency. U.S. Response Def. Mot. Suppress, 7. A special agent, acting in an undercover capacity, delivered $100,000 to the applicant on April 20, 1990 (as charged in Count IV of superseding indictment). U.S. Response Def. Mot. Suppress, 6, n.3. We observe that count IV of the superseding indictment charges the applicant with a § 1956 violation involving his receipt of $100,000 in narcotics-derived U.S. currency on April 20, 1990.

In addition, we observe that the plea agreement conveys that the applicant agreed to plea guilty to structuring bank deposits for the purpose of evading the currency transaction reporting requirements; to cooperate with the Offices of the United States Attorney, the Drug Enforcement Administration, the Federal Bureau of Investigation, and the Internal Revenue Service; and to forfeit currency seized by the Internal Revenue Service at Nietronics, Inc. and at the residences controlled by Hussein.

In view of *Garces*, *Rojas-Garcia*, and *Alarcon-Serrano*, and based on the aforementioned agreements made by the applicant in plea agreement and the foregoing facts in the United States' Response to the Defendant's Motion to Suppress, which specifically describe the applicant's receipt of money from a co-defendant who was involved in narcotic money laundering activities; the applicant's receipt of $100,000 on April 20, 1990 from a special agent acting in an undercover capacity; and the applicant's conviction for structuring bank deposits for the purpose of evading the currency transaction reporting requirements, the AAO finds that there is reasonable, substantial, and probative evidence to support a reason to believe that the applicant is a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance; and that he was a "knowing and conscious participant" in laundering narcotics-derived proceeds.

Thus, the AAO supports the director's finding that the applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C)(i) of the Act. There is reasonable, substantial, and probative evidence to support the belief that the applicant either has been or has endeavored to be a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.

The director also found the applicant to be inadmissible for seeking entry for unlawful activity. Section 212(a)(3)(A)(ii) of the Act provides: "Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity . . . is inadmissible."

On April 29, 1992, the applicant was convicted for the offense of structuring transactions to evade reporting requirements, and the crime was committed on or about January 22, 1990 in the United States. The applicant's record of conviction indicates that the applicant was in the United States in 1990, and USCIS records show that the applicant entered the United States on May 16, 1991 as a nonimmigrant treaty investor. However, we find that the evidence in the record is insufficient to support a finding that the director knows, or has reasonable ground to believe, that the applicant sought to enter the United States to engage solely, principally, or incidentally in unlawful activity. Thus, we cannot affirm that the applicant is inadmissible under section 212(a)(3)(A)(ii) of the Act.

The AAO has determined that the applicant is not inadmissible under section 212(a)(9)(B) of the Act. However, as previously stated, we have found the applicant to be inadmissible pursuant to section 212(a)(2)(C)(i) of the Act, a ground of inadmissibility for which there is no waiver available. Thus, no purpose is served in determining whether the applicant is eligible for a waiver of his inadmissibility under section 212(a)(9)(B) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.