

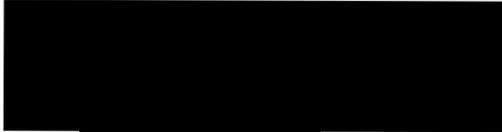
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U.S. Citizenship
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FILE:

Office:

MIAMI, FL

Date: DEC 23 2008

IN RE:



PETITION: Application for Waiver of Ground of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The applicant, a native and citizen of Mexico, was found inadmissible under section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), for falsely claiming U.S. citizenship. In addition, the applicant was found inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed acts which constitute the essential elements of a violation relating to a controlled substance. The applicant seeks waivers of inadmissibility under sections 212(i) and 212(h) of the Act in order to remain in the United States with her U.S. citizen spouse and child.

The acting district director found that the applicant was statutorily ineligible for a waiver and thus denied the waiver application accordingly. *Decision of the District Director*, dated June 16, 2006.

In support of the appeal, counsel for the applicant has provided a brief, dated October 11, 2006. The entire record was reviewed and considered in rendering this decision.

A. Applicability of Section 212(a)(6)(C)(ii) of the Act to the Applicant

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

(ii) Falsely claiming citizenship. –

(I) In General –

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible.

....

(iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

On November 16, 1978, the applicant made a false claim to U.S. citizenship, namely, by presenting a fraudulent U.S. birth certificate at the Port of Entry at San Ysidro, California. *See Prosecution Report*, dated November 16, 1978. The AAO notes that provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 afford aliens in the applicant's position, those making false claims to U.S. citizenship prior to September 30, 1996, the eligibility to apply for a waiver.

In considering a case where a false claim to U.S. citizenship has been made, Service [USCIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [USCIS] officers should then determine whether (1) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by [redacted] Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3. As the applicant made a false claim to U.S. citizenship in November 1978, the AAO finds that this one act of false claim to U.S. citizenship would have rendered her eligible to apply for a waiver under section 212(i) of the Act if it had been the only instance of a false claim to U.S. citizenship. The record establishes two additional instances when the applicant made a false claim to U.S. citizenship, thereby statutorily barring the applicant from obtaining a waiver of inadmissibility.

In September 1998, the applicant attempted to obtain a U.S. passport with fraudulent identification. *See Record of Deportable/Inadmissible Alien*, dated September 7, 1998. Based on said incident, the applicant was convicted in the United States District Court, Southern District of Florida, of Count I, making false statements to obtain passport, a violation of 18

U.S.C. § 1542¹, and Count III, Perjury, a violation of 18 U.S.C. § 1621. *See Judgment in a Criminal Case*, dated November 12, 1998. With respect to this judgment, counsel maintains that because the false claim to U.S. citizenship charge, referenced as Count II by counsel, was dismissed, the applicant should not be found inadmissible under section 212(a)(6)(C)(ii) of the Act.

To begin, the AAO notes that counsel has failed to establish that Count II, which clearly was dismissed as evidenced by the *Judgment* referenced above, related to the charge of False Claim to U.S. Citizenship. The documents in the record do not specifically delineate the charge related to Count II. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

However, even if counsel had established that Count 2, which was dismissed, related to a false claim to U.S. citizenship, the AAO still finds the applicant inadmissible; the fact that the applicant made an application for a U.S. passport confirms the fact that she claimed to be a U.S. citizen. A person who is not a U.S. citizen is ineligible to apply for a U.S. passport. The application itself confirms this understanding. *See Form DS-11, Application for a U.S. Passport*. As such, irrespective of the final judgment made against the applicant, the facts, as outlined in the record, establish that the applicant, by making a false statement in an application for a passport, attempted to present herself as a U.S. citizen to obtain a U.S. passport. Aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a

¹ 18 U.S.C. § 1542, False statement in application and use of passport, states, in pertinent part:

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement-

Shall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

waiver of inadmissibility. See Sections 212(a)(6)(C)(ii) and (iii) of the Act. The AAO thus finds that the applicant is statutorily ineligible for a waiver based on this incident.

Alternatively, were the AAO to conclude that the September 1998 incident did not statutorily make the applicant ineligible for a waiver, the AAO notes that in March 1997, the applicant made a claim to U.S. citizenship by virtue of birth in Los Angeles, California. During the secondary inspection interview, the applicant revealed that she was born in Mexico and was thus not a U.S. citizen. See *Record of Excludable Alien*, dated March 13, 1997. With respect to this incident, counsel asserts that there is no other evidence in the record of exactly what was said at the border by the applicant, and moreover, that the applicant made a timely retraction, and as such, the applicant should not be found inadmissible under section 212(a)(6)(C)(ii) of the Act. See *Brief in Support of Appeal*, dated October 11, 2006.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The record is clear that the applicant made a false claim to U.S. citizenship, as discussed above, and the applicant has not proven by a preponderance of the evidence that such event did not occur and/or that a timely retraction was made. As previously stated, the unsupported assertions of counsel do not constitute evidence. As such, the AAO finds that the applicant is statutorily ineligible for a waiver based on this incident as well.

As the AAO has found the applicant to be statutorily ineligible for a waiver based on her claims to U.S. citizenship, in September 1998 and/or March 1997, as discussed in detail above, the AAO does not find it necessary to analyze whether the applicant is also statutorily ineligible for a waiver under section 212(a)(2)(A)(II) of the Act, for controlled substances violation and/or under section 212(a)(2)(C) of the Act, for drug trafficking. Nevertheless, the AAO will analyze these grounds of inadmissibility, for the record.

B. Applicability of Section 212(a)(2)(A)(i)(II) of the Act to the Applicant

Section 212(a)(2)(A) of the Act provides, in pertinent part:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

. . .
- (II) a violation of . . . 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) .
.. is inadmissible.

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

The Attorney General [now Secretary, Homeland Security, (Secretary)] may, in his discretion, waive the application of ... subparagraph (A)(i)(II) of ... subsection [(a)(2)] 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 (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 . . .

In August 1995, the record establishes the following incident:

During primary inspection a special compartment was discovered in the trunk area of the vehicle. The vehicle was referred to vehicle secondary for further inspection by U.S. Customs. That inspection revealed 23.25 pounds of marijuana concealed in the trunk area. Prosecution was declined by U.S. Customs and Gastelum [the applicant] was turned over to the INS Deferred Prosecution Unit. During a video taped record of sworn statement...Gastelum admitted the following: 1) She entered into an agreement with her boyfriend...to drive the vehicle into the U.S. knowing full well that the vehicle contained Marijuana; 2) She stated that she knew that Alfonso [the applicant's boyfriend] was involved in marijuana trafficking and asked him to allow her to bring a load into the U.S. as she needed to buy school clothes for her children....

See Record of Deportable Alien, dated August 22, 1995.

Counsel contends that the applicant is not inadmissible under 212(a)(2)(A)(i)(II) of the Act because "she was not convicted of a controlled substance offense and she did not make a valid admission pursuant to BIA caselaw..." *Supra* at 6. The AAO concurs with counsel. In order for the admission of acts which constitute the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met, including: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime prior to

making the admission, and; 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957).

Upon review, the record does not reflect that the applicant was provided with the essential elements of the criminal law which she allegedly violated, namely, Importation of a Controlled Substance and/or Possession of a Controlled Substances. The AAO has reviewed all evidence in the record. No references were made to the criminal code or statute with respect to the applicant's drug-related conduct. The record does not show that the applicant was provided the essential elements of any criminal law prior to her admissions.

Based on the foregoing, the AAO finds that the applicant's statements with respect to a controlled substances violation do not constitute the admission of committing acts which constitute the essential elements of a crime relating to a controlled substance, as contemplated by section 212(a)(2)(i)(II) of the Act, due to the fact that the criteria for admissions provided by the BIA in *Matter of K-* were not met. *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957). Accordingly, the applicant is not statutorily inadmissible under section 212(a)(2)(i)(II) of the Act.

C. Applicability of Section 212(a)(2)(C) of the Act to the Applicant

Section 212(a)(2)(C) of the Act provides, in pertinent part:

Any alien who the consular officer or the Attorney General [now the Secretary of Homeland Security (Secretary)] knows or has reason to believe—

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical...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 a drug trafficking crime, in *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board of Immigration Appeals 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.

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).

As outlined in detail above, the applicant was found in possession of 23.25 pounds of marijuana in August 1995. Irrespective of the fact that the applicant was not convicted of drug trafficking, based on the large quantity of marijuana discovered in a special compartment in the trunk area of a vehicle which the applicant drove, and the applicant's own admissions that she knew the vehicle contained marijuana and that her boyfriend at the time was involved in marijuana trafficking, the AAO has reason to believe that the applicant was a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of marijuana, a controlled substance. The AAO thus finds that the applicant is statutorily inadmissible under section 212(a)(2)(C) of the Act, for drug trafficking.

D. Conclusion

In conclusion, although the AAO has concluded that the applicant is not statutorily inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substances violation, the AAO concludes that the applicant is statutorily ineligible for relief under section 212(a)(6)(C)(ii) of the Act, for false claims to U.S. citizenship and section 212(a)(2)(C) of the Act, for drug trafficking. Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether she has established extreme hardship to a qualifying relative or whether she merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.