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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

H2

FILE:

Office: SAN FRANCISCO

Date: MAR 18 2009

IN RE:

Applicant:

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:

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).

*Michael Shumway*

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico. He is the husband of a U.S. citizen and has a U.S. citizen child and two lawful permanent resident (LPR) children. He was found to be inadmissible to the United States under section 212(a)(2)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C)(i), as a person whom the Attorney General has reason to believe is or has been an illicit trafficker, or a knowing aider, abettor, assister, conspirator, or colluder, in illicit trafficking of a controlled substance. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen wife, his U.S. citizen child, and his two LPR children.

The director concluded that, because the applicant is excludable pursuant to section 212(a)(2)(C)(i) of the Act, waiver of inadmissibility is unavailable. On appeal, counsel argued that the evidence is insufficient to demonstrate that the applicant is or has been an illicit trafficker, or knowingly assisted, *etc.* in trafficking, in a controlled substance.

The AAO will first address in this decision the director's finding that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i).

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

Any alien who [sic] 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 by [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].

The statute at 21 U.S.C. § 802 subsection (6) defines "controlled substance" as anything on Schedules I through V of Part B. Part B states that heroin is a Schedule I drug.

The record shows that, on October 12, 1971, in Hayward, California, the applicant was arrested, under the name [REDACTED] and charged with a violation of 18 U.S.C. § 1325, illegal entry into the United States. The applicant was subsequently charged with a violation of section 11500.5 of the California Health and Safety Code, possession for sale of a controlled substance, to wit: heroin.

On December 15, 1971, the applicant was convicted, pursuant to his plea, of violating section 11910 of the California Health and Safety Code, possession of a controlled substance, charged as a felony, a lesser offense included in section 11500.5. On December 22, 1971 the applicant was placed on one year of court probation. [Action number [REDACTED]]

The record contains a Form I-213, Record of a Deportable Alien, prepared by an officer of the Immigration and Naturalization Service, now USCIS. The officer prepared that report at 11 am on

October 14, 1972. The paragraph of that report that pertains to the drug offense for which the applicant was arrested states,

Subject was arrested in Hayward, California during a Narcotic Investigation in conjunction with Hayward P.D., Union City P.D., and California State Narcotic Agents. Subject was transporting five ozs. Heroin in his 1963 Oldsmobile. He was enroute [sic] to meet with a female that was to make a switch and was to receive \$350 for each oz. that he was carrying. He was arrested on the Immigration Violation, Illegal Entry and taken into custody. He is to be a material witness for the trial of the others that were involved.

On the strength of the applicant's arrest and conviction, and the statement of the INS officer, the director found reason to believe that the applicant is or has been an illicit trafficker, or a knowing aider, abettor, assister, conspirator, or colluder in illicit trafficking of a controlled substance, and found the applicant inadmissible pursuant to section 212(a)(2)(C) of the Act. The director correctly noted that waiver is unavailable for this inadmissibility, and denied the application for waiver.

On appeal, counsel argued that the evidence in the record is insufficient to show that the applicant was a knowing participant in the planned drug transaction. Counsel noted that the report of the INS officer did not specify who provided the information in the Form I-213, that the applicant was *en route* to meet a woman who would take possession of the heroin. Counsel further noted that the wording of the sentence, "He was enroute [sic] to meet with a female that was to make a switch and was to receive \$350 for each oz. that he was carrying," is ambiguous, in that it is unclear whether the applicant would receive \$350 for each ounce of heroin or would pay the woman he was to meet.

The AAO acknowledges that the officer's report could be interpreted as counsel asserts. The record of the applicant's arrest on October 12, 1971, however, contains a list of the applicant's possessions when he was arrested. The only money he was carrying was \$59.57 in U.S. currency and six pesos, 20 centavos, Mexican money, the equivalent, at that time, of approximately U.S. \$.50. The applicant was not then capable of making a payment of \$1,750 to the woman he anticipated meeting. Further, that "a switch" was to be made indicates that something was to be traded for something else, in this case, the heroin was to be traded for the money.

The USCIS has the burden of producing reasonable, substantial, and probative evidence that demonstrates that the applicant was a knowing participant in drug trafficking activities. *See Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116 (9<sup>th</sup> Cir. 2000); *see also Lopez-Molina v. Ashcroft*, 368 F.3d. 1206 (9<sup>th</sup> Cir. 2004). This office finds that there is reasonable, substantial, and probative evidence showing that the applicant expected to receive money in exchange for the heroin.

Further, five ounces of heroin is an amount sufficient to provide reason to believe that the drug was not intended for the applicant's personal use, but that the applicant intended to sell the heroin. *See, e.g., U.S. v. Vergara*, 689 F.2d 57, 62-63 (5<sup>th</sup> Cir. 1982).

The last sentence of the report clarifies the source of the information about the planned transaction. The applicant, less than two days after his arrest, had agreed to testify for the prosecution, implicating his co-conspirators. He provided evidence pertinent to the drug conspiracy and the contemplated transaction. Unless the officer who prepared the report fabricated its contents, which

counsel declined to suggest, the clear implication is that the applicant himself provided the information about the planned transaction, the planned recipient, and the planned payment.

Counsel has provided no scenario pursuant to which the applicant could innocently have been carrying five ounces of heroin which he expected to deliver to a woman, and for which he was to receive, or with which he was to provide, \$1,750. The applicant's agreement to provide evidence earned him a reduced charge and he was released on probation. That does not diminish the opprobrium, for immigration purposes, of being apprehended with five ounces of heroin and the expressed intention to sell it for \$1,750.

The record contains reason to believe that the applicant is or has been an illicit trafficker, or a knowing aider, abettor, assister, conspirator, or colluder in illicit trafficking of a controlled substance. The remaining issues are whether waiver is available under section 212(h) of the Act for the applicant's inadmissibility, and, if it is, whether the applicant has established extreme hardship to his qualifying relatives such that he would be eligible to receive that waiver, and, if so, whether, on the balance, the AAO should, as a matter of discretion, grant that waiver.

A section 212(h) waiver is unavailable, however, to applicant's found inadmissible pursuant to section 212(a)(2)(C)(i) of the Act. Because the AAO has found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant has demonstrated extreme hardship to a qualifying relative or whether the applicant merits a waiver as a matter of discretion.

The record indicates other grounds of inadmissibility. The record shows that, on August 8, 2000, the applicant was arrested for a violation of section 273.5(a) California Penal Code, inflicting corporal injury on a spouse, cohabitant, or co-parent resulting in traumatic condition; a violation of section 11377(a) California Health and Safety Code, possession of a controlled substance, to wit: methamphetamine; a violation of section 11364 California Health and Safety Code, possession of drug paraphernalia; and a violation of section 166(4) California Penal Code, contempt of court by violating a court order. The applicant was convicted, pursuant to his plea of no contest, of possession of a controlled substance and possession of drug paraphernalia. Entry of judgment of those convictions was deferred and the remaining counts were dismissed. Those convictions render the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. Because the applicant's drug conviction record does not consist of a single conviction of simple possession of less than 30 grams of marijuana, no waiver would be available for that inadmissibility.

The AAO notes that the applicant has additional criminal offenses. The record shows that, on October 29, 1981, the applicant was convicted, pursuant to his plea, of two counts of violating section 23152(a) of the California Vehicle Code, driving under the influence of alcohol and/or a drug, based on offenses committed on two different days.

The record shows that, on December 10, 1984, the applicant was convicted, pursuant to his plea, of a violation of section 23152(b) of the California Vehicle Code, driving with a blood alcohol content of .80% or greater.

On March 31, 1994 the applicant was arraigned for a probation violation. The record indicates that, during 1984, the applicant had entered a plea to a charge, the nature of which is unknown to this

office, but then failed to return to court for sentencing. The applicant admitted the probation violation. The applicant was sentenced to 30 days confinement. [Case number §

The applicant was arrested, on February 18, 2001, for a violation of section 11377(a) California Health and Safety Code, possession of a controlled substance; a violation of section 11550 California Health & Safety Code, use of a controlled substance; a violation of 11364 California Health and Safety Code, possession of drug paraphernalia; and a violation of section 11357(b) California Health and Safety Code, possession of marijuana. On September 9, 2002, the applicant was sentenced to 18 months confinement in that case. Which of those drug charges the applicant was convicted of is unknown to this office. (Case number

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(2)(A) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.