

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

htz

[REDACTED]

FILE:

Office: PHOENIX

Date:

MAR 05 2010

IN RE:

[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)

ON BEHALF OF APPLICANT:

[REDACTED]

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).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Iraq who was found to be inadmissible to the United States pursuant to section 212(a)(2)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C)(i), for having been an assister in the illicit trafficking in a controlled substance. It is noted that the applicant is further inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant seeks 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 and reside with his U.S. citizen wife and children.

The field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Field Office Director's Form I-601 Denial*, dated July 11, 2007. The field office director found that the applicant's Form I-485 application to adjust his status to permanent resident had been denied, thus there was no underlying basis for the Form I-601 application for a waiver. *Id.* at 2. The applicant's Form I-485 application was denied based on the finding that he was inadmissible under section 212(a)(2)(C)(i) of the Act for which there is no waiver. *Field Office Director's Form I-485 Denial*, dated July 11, 2007.

On appeal, counsel for the applicant asserts that the applicant is not inadmissible under section 212(a)(2)(C)(i) of the Act, as the applicant's admission of drug trafficking activities did not meet the procedural requirements that render an admission a potential basis for inadmissibility. *Brief from Counsel*, dated September 5, 2007.

The record contains, in pertinent part, a brief and correspondence from counsel; letters from the applicant's family and community members; documentation relating to the applicant's criminal activities; documentation relating to the applicant's proceedings in Immigration Court, and; documentation in connection with the applicant's prior application for asylum in the United States. The entire record was reviewed and considered in rendering this decision.

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.
- (ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-
- (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or
 - (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).
- (B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.
- (C) 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.

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

As a preliminary matter, it is again noted that the field office director denied the present application for a waiver based on a finding that the applicant's Form I-485 application to adjust his status to permanent resident had been denied. The field office director addressed the applicant's admissibility in the decision to deny the applicant's Form I-485 application, but declined to reach the merits in the decision to deny the present application for a waiver.

Pursuant to 8 C.F.R. § 212.7(a)(1)(ii), the applicant filed his Form I-601 application for a waiver incident to his Form I-485 application in order to establish eligibility to adjust his status to permanent resident. United States Citizenship and Immigration Services (USCIS) records show that the applicant's Form I-485 and Form I-601 applications were denied on the same day, thus they were simultaneously before the field office director for consideration. As such, the field office director should have fully considered the applicant's eligibility for a waiver of inadmissibility in the course of adjudicating the applicant's Form I-601 application, prior to denying the applicant's Form I-485 application based on inadmissibility grounds. The field office director's assertion that the applicant's Form I-485 application had been denied was not a valid basis to deny the present application for a waiver.

However, the AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO will fully consider the applicant's inadmissibility and eligibility for a waiver.

The record reflects that the applicant was admitted to the United States as a refugee on January 25, 1982. On August 25, 1984, he became a permanent resident, backdated to his entry on January 25, 1982. On December 27, 1993, the applicant was found guilty of theft under Arizona Revised Statutes § 13-1802, 13-1801, 13-701, 13-702, 13-707, 13-801, 13-802, and 13-812 for his theft of a

motorcycle on April 16, 1993. The applicant was sentenced to two years probation and an assessment of \$1,170. *Superior Court of Arizona, Maricopa County*, [REDACTED] Order dated December 27, 1993.

The record contains documentation regarding an investigation of the applicant for selling cocaine and marijuana in 1999. A presentence investigation report states that the applicant sold cocaine to undercover police officers on three occasions in 1999. *Presentence Investigation*, dated November 20, 2000. Based on the applicant's actions described in the report, on December 22, 1999 a search warrant was executed on his residence. Law enforcement officers found marijuana and cocaine in the applicant's pockets. The applicant was charged with numerous criminal offenses as a result of the investigation and search of his home, including: Marijuana possession/use under Arizona Revised Statutes § 13-3405A(1); Narcotic drug – possession for sale under Arizona Revised Statutes § 13-3408A(2); multiple Narcotic drug violations under Arizona Revised Statutes § 13-3408, and; Burglary 3rd degree under Arizona Revised Statutes § 13-1506. Pursuant to a plea agreement resulting from these charges, on December 4, 2000 the applicant was convicted of burglary in the third degree, a class four felony, under Arizona Revised Statutes § 13-1501, 13-1506, 13-701, 13-702.1, and 13-801 for which he received a sentence of four months incarceration, five years probation, 360 hours of community service, a \$3,400 fine, and \$260 restitution to a police department. The applicant was not convicted of any drug-related charges. *Superior Court of Arizona, Maricopa County*, [REDACTED] Order dated December 4, 2000.

On July 23, 2004, a Notice to Appear for removal proceedings was served on the applicant due to a finding that he had been convicted of crimes involving moral turpitude. On September 8, 2004, the applicant lost his permanent resident status due to an Immigration Judge's determination that he was subject to removal, yet the Immigration Judge granted him cancellation of removal. The Department of Homeland Security (DHS) appealed the Immigration Judge's cancellation of removal order to the Board of Immigration Appeals (BIA). On February 28, 2005, the BIA overturned the Immigration Judge's cancellation of removal order and remanded the matter back to the Immigration Judge. On October 5, 2005, the Immigration Judge granted the applicant withholding of removal.

On June 14, 2006, the applicant pled guilty to solicitation to commit theft, a class five felony, under Arizona Revised Statutes § 13-1002, 13-1802, 13-701, 13-702, 13-702.01, and 13-801 for his conduct committed between May 17 and July 6, 2004. The applicant was sentenced to four months incarceration and three years probation. *Superior Court of Arizona, Maricopa County*, [REDACTED] Order dated July 20, 2006.

On January 28, 2007, the applicant filed a Form I-485 application to adjust his status to permanent resident. On May 14, 2007, the applicant was interviewed by an immigration officer in connection with his Form I-485 application. In the interview, the applicant admitted that he used cocaine and marijuana for two to four years prior to 1999, and that he sold cocaine for six to eight months. *Record of Sworn Statement*, dated May 14, 2007. The applicant admitted that he sold illicit drugs to an undercover detective three times between July and December 1999. *Id.* at 1. The applicant stated that he knew it was against the law to sell illegal drugs. *Id.* Based on his admission, the field office director found him to be inadmissible to the United States pursuant to section 212(a)(2)(C)(i) of the Act

for having been an assister in the illicit trafficking in a controlled substance. *Field Office Director's Form I-485 Denial* at 2. The field office director noted that, “[a]lthough the record indicates that the narcotics charges were dismissed, an actual conviction is not necessary in order to establish inadmissibility under section 212(a)(2)(C) [of the Act].” *Id.*

On appeal, counsel asserts that the applicant is not inadmissible under section 212(a)(2)(C)(i) of the Act, as the applicant’s admission of drug trafficking activities did not meet the procedural requirements that render an admission a potential basis for inadmissibility. *Brief from Counsel* at 3-11. Specifically, counsel highlights that the applicant’s 1999 drug-related charges were dismissed pursuant to a plea agreement, and that he was only convicted of burglary. *Id.* at 9. Counsel contends that, as the drug possession and trafficking charges against the applicant were dismissed, his subsequent admission to the underlying conduct may not serve as a basis for inadmissibility. *Id.* at 9-10 (citing *Matter of C-Y-C-*, 3 I&N Dec. 623 (BIA 1950)).

Upon review, the record supports that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, as there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. Section 212(a)(2)(C)(i) of the Act. As noted above, the applicant was investigated for trafficking cocaine and marijuana in 1999. A presentence investigation in connection with the applicant’s subsequent prosecution in the Superior Court of Arizona, Maricopa County, indicated that the applicant sold cocaine to an undercover police officer on July 9, July 16, and December 22, 1999. *Presentence Investigation* at 1 (summarizing police report of investigation of the applicant,

The presentence investigation indicated that on December 22, 1999 law enforcement officers executed a search warrant on the applicant’s residence and found cocaine and marijuana in the applicant’s pockets. *Id.* The presentence investigation noted that the applicant stated that “he sold a small quantity of cocaine to an undercover officer,” that “[h]e did not know the gentleman was a police officer,” and that it was “the ‘stupidest’ thing he ever did” *Id.* at 2.

As discussed above, the applicant provided a statement under oath to an immigration officer regarding his drug trafficking activities. Specifically, when asked if he had sold illegal drugs such as cocaine or marijuana, the applicant stated: “Yes. I sold coke for about six to eight months. I sold to an undercover detective about three times between July 1999 and December 1999. Someone wanted drugs; someone knew that I was able to get the drugs.” *Record of Sworn Statement* at 1. At no time has the applicant denied that he sold cocaine to undercover law enforcement officers.

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. Section 212(a)(2)(C) of the Act; *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.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)).

In the present matter, the record contains reasonable, substantial, and probative evidence that shows that the applicant sold cocaine on multiple occasions. This evidence includes the presentence investigation and the applicant's sworn testimony. The applicant does not contest that he sold cocaine to undercover police officers. Counsel concedes that "the [applicant] sold undercover police officers drugs on three occasions," amounting to "approximately 21.59 grams of cocaine." *Brief from Counsel* at 9. Counsel asserts that "[d]ue to the miniscule amounts of the drugs, a person of ordinary intelligence could not definitively conclude that the [applicant] was engaged in drug-trafficking." *Id.* at 10. However, section 212(a)(2)(C)(i) of the Act includes no de minimus exception, and the fact that the applicant sold cocaine in small amounts is not relevant to whether he has been an illicit trafficker in a controlled substance.

Counsel discusses the requirements for an admission to criminal conduct to serve as a basis for inadmissibility in the absence of a criminal conviction. *Brief from Counsel* at 3-5. It is noted that, in the absence of a conviction, a properly obtained admission to the essential elements of a crime involving moral turpitude may serve as a basis for inadmissibility under section 212(a)(2)(A)(i) of the Act. However, an applicant may be deemed 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. Section 212(a)(2)(C)(i) of the Act. In the present matter, there is reason to believe that the applicant has been an illicit trafficker in a controlled substance. Accordingly, whether his sworn statement made to an immigration officer in an interview to adjust his status to permanent resident met the requirements of a properly obtained admission is not determinative of whether he is inadmissible under section 212(a)(2)(C)(i) of the Act. Specifically, there is reasonable, substantial, and probative evidence to support the belief that he has been an illicit trafficker in a controlled substance. *See Alarcon-Serrano v. I.N.S.* at 1119.

Based on the foregoing, there is sufficient reason to believe that the applicant has been an illicit trafficker in a controlled substance, and he is inadmissible under section 212(a)(2)(C)(i) of the Act. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act. For this reason, the appeal must be dismissed.

The record reflects that the applicant is further inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude.

As noted above, on December 27, 1993 the applicant was found guilty of theft under Arizona Revised Statutes § 13-1802, 13-1801, 13-701, 13-702, 13-707, 13-801, 13-802, and 13-812 for his theft of a motorcycle on April 16, 1993. Arizona Revised Statutes § 13-1802 criminalizes the temporary or permanent taking of property, including a motorcycle. Arizona Revised Statutes § 13-1802(A)(1)-(2). There is ample support that a permanent taking of a vehicle constitutes a crime involving moral turpitude. *See U.S. v Esparza-Ponce*, 193 F.3d 1133, 1135-37 (9th Cir. 1999). Although, the BIA has found that a temporary taking of a vehicle is not a crime involving moral turpitude, (*see Matter of M-*, 2 I&N Dec. 686 (BIA 1946)), in the present matter, the record of conviction shows that the applicant was in possession of a stolen motorcycle in which the frame number had been replaced with that of another motorcycle. *Mesa Police Department Continuation*

Report, [REDACTED] at 1-3, 5, dated April 16, 1993 and incorporated by reference into the *Complaint, State of Arizona v. Joni Klyana*, Arizona Superior Court, Maricopa County, [REDACTED]. Thus, the record of conviction clearly shows that the applicant intended to permanently deprive the rightful owner of possession of the motorcycle. Accordingly, the applicant's theft constituted a crime involving moral turpitude.

On June 14, 2006, the applicant pled guilty to solicitation to commit theft, a class five felony, under Arizona Revised Statutes § 13-1002, 13-1802, 13-701, 13-702, 13-702.1, and 13-801 for his conduct committed between May 17 and July 6, 2004. Arizona Revised Statutes § 13-1002(B) reflects that an individual is guilty of the class five felony of solicitation when he solicits a class three felony. Thus, the applicant solicited a class three felony theft as defined by Arizona Revised Statutes § 13-1802. The Ninth Circuit has determined that, where an applicant has been convicted of solicitation under Arizona Revised Statutes § 13-1002 for soliciting a specific offense, the conviction for solicitation constitutes a crime involving moral turpitude where the underlying solicited offense is a crime involving moral turpitude. *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903 (9th Cir. 2007). As noted above, Arizona Revised Statutes § 13-1802 criminalizes the temporary or permanent taking of property, including an automobile. Arizona Revised Statutes § 13-1802(A)(1)-(2). In the present matter, the record reflects that the applicant was convicted for his attempt to dispose of an automobile by having it disassembled and sold for the purpose of defrauding an insurance company. *Amended Indictment and Plea Agreement, State of Arizona v. Joni Klyana*, Arizona Superior Court, Maricopa County, [REDACTED]. Accordingly, the record of conviction clearly shows that the applicant intended to permanently dispose of the automobile. Thus, the applicant solicited a crime involving moral turpitude, and his conviction for solicitation constitutes a crime involving moral turpitude. *Barragan-Lopez v. Mukasey* at 903.

Based on the foregoing, the applicant is also inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude, and he requires a waiver of inadmissibility under section 212(h)(1)(B) of the Act. However, as the applicant is not eligible for a waiver of his inadmissibility under section 212(a)(2)(C)(i) of the Act, no purpose would be served in adjudicating an application for a waiver of his inadmissibility under section 212(a)(2)(A)(i)(I) 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, 8 U.S.C. § 1361. Here, the applicant has not met that burden, in that he has not established that a purpose would be served by adjudicating his eligibility for a waiver under section 212(h)(1)(B) of the Act due to his inadmissibility under section 212(a)(2)(C)(i) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.