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



**U.S. Citizenship
and Immigration
Services**

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[REDACTED]

FILE:

[REDACTED]

Office: MIAMI
(WEST PALM BEACH)

Date:

MAR 16 2011

IN RE:

[REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Act,
8 U.S.C. § 1182(h)

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,

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(C), as a controlled substance trafficker. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. Citizen husband and son.

The District Director denied the *Application for Waiver of Grounds of Inadmissibility* (Form I-601) based on a finding that there is no waiver available for inadmissibility under section 212(a)(2)(C) of the Act. *Decision of the District Director*, dated October 5, 2007.

On appeal, counsel asserts that the director's finding that the applicant is inadmissible under section 212(a)(2)(C) of the Act is in error. Counsel states that there is no "sufficient, reasonable, substantial or probative" evidence to support the finding that the applicant is an illicit trafficker in a controlled substance. Counsel states that the director failed to indicate that the application was denied based on a "reason to believe" that the applicant is an illicit trafficker in a controlled substance. Counsel contends that the applicant is eligible for a waiver of inadmissibility, and she has established extreme hardship to her qualifying relatives. *Statement on the Form I-290B, Notice of Appeal*, dated November 1, 2007.

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

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.

The phrase "any illicit trafficking in any controlled substance" includes any unlawful trading or dealing in any controlled substance. *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the BIA determined that an alien was inadmissible to the United States because he attempted to smuggle 162 pounds of marijuana into the United States. The BIA concluded that in light of the large quantity of marijuana involved, it was not intended for personal use, and the alien was an illicit trafficker as contemplated by the statute. *Id* at 186. Similarly, in *Matter of P-*, 5 I&N Dec. 190, 192 (BIA 1953), the BIA concluded that an illicit trafficker in controlled substances is a person who purchases or possesses any controlled substance for purposes of resale in the United States.

In *Matter of Rico*, the BIA noted that a finding of excludability must be based upon “reasonable, substantial, and probative evidence.” 26 I&N Dec. at 185; *see also Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000)(stating that a “reason to believe” an alien has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) must be supported by “reasonable, substantial, and probative evidence.”). Conversely, it is the applicant’s burden to establish that she is not inadmissible under section 212(a)(2)(C) of the Act, by reasonable, substantial, and probative evidence. *See* Section 291 of the Act, 8 U.S.C. § 1361.

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. The arrest and conviction records in the file confirm that the applicant and another individual, [REDACTED] were involved in the unlawful trading or dealing in any controlled substance. The probable cause affidavit issued by the Broward County Sherriff’s Office provides that “a controlled delivery of a box of marijuana” took place at the applicant’s residence. The affidavit further states that inside the applicant’s bedroom “was a bag of marijuana, baggies and a small scale.” *Complaint Affidavit*, dated November 15, 1995.

The arrest record contains a detailed narrative of the applicant’s arrest, including a description of the property seized by police detectives. The list of the impounded property includes a: “White cardboard box that contains suspect marijuana and one express mail label. Approximate gross wt. 10 lbs. Field test positive.”; a “Plastic ziplock type baggie that contains suspect marijuana” which was “found on suspect Wilsons person [co-defendant].”; and a “Brown paper bag that contains one large clear ziplock type baggie that contains suspect marijuana. Approx gross wt. 264 grams.” *Property Receipt*, dated November 15, 1995. The event report lists additional evidence sized by the police detectives, including: “One box of Glad trash bags, one box ziplock bags, one stapler, one box of staples, one plastic bag that contains assorted baggies, paper bags and pair of scissors”; “Three plastic bags that contain one brown bag. Inside the paper bag is one large clear ziplock type baggie that contains suspect marijuana. Also in the bag is one small scale w/residue. Approx. gross weight 564 grms.” The event report narrative notes that “Post office research indicated that since August 23, 1995 the above location has received 10 parcels with the total weight of approximately 90 lbs. There could be as many as 25 parcels.” *Event Report*, Dated December 6, 1995.

The record reflects that the applicant was charged with possession of cannabis over 20 grams, a felony, in violation of Florida Statutes § 893.13 and possession of a firearm during commission of a felony, in violation of Florida Statutes § 790.07. *Event Report*, page 1 of 9, dated December 6, 1995. The charge was reduced to misdemeanor possession of not more than 20 grams of marijuana in violation of Florida Statutes § 893.13(6)(b). *Disposition of the Circuit/County Court in and for Broward County, Florida*. On March 19, 1997, the applicant changed her plea to nolo contendere, and was sentenced to one year probation on the condition that she “testify truthfully” and consent to random urinalysis (Case No. [REDACTED] *Id.*

Based on the large quantity of marijuana discovered at the applicant’s residence and the evidence that she was engaged in the packaging and distribution of the substance, the AAO finds that the record contains reasonable, substantial, and probative evidence of her drug-trafficking activities. The

police detectives had a reason to believe that the applicant was an illicit drug trafficker or at least a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. Accordingly, we affirm the District Director's finding that the applicant is inadmissible under section 212(a)(2)(C) of the Act.

Counsel asserts that USCIS must provide the applicant with a copy of any derogatory evidence used in the denial of her application and indicate the basis of the derogatory evidence. The regulation at 8 C.F.R. § 103.2(a)(16) provides, "If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered." Had the information supporting the director's decision not been known to the applicant, the director would have been required to advise the applicant of the information and to provide her with an opportunity to rebut the information, as specified in 8 C.F.R. § 103.2(a)(16). However, counsel has not disputed that the applicant was aware of the evidence in the record concerning her arrest and conviction, and it appears that the applicant submitted that evidence in the first instance. Accordingly, the AAO finds that the director was within her authority to issue a finding of inadmissibility based on the conviction records and arrest reports.

Counsel further asserts that the applicant is eligible for an I-601 waiver of inadmissibility, and she has demonstrated extreme hardship to her U.S. citizen spouse and child. However, there is no waiver available for inadmissibility under section 212(a)(2)(C) of the Act. The AAO notes that the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime related to a controlled substance, for which there is a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (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 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.

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

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or 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

....

(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 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

Since the applicant was convicted OF misdemeanor possession of not more than 20 grams of marijuana in violation of Florida Statutes § 893.13(6)(b), she is eligible for a section 212(h) of the Act waiver of the ground of inadmissibility arising under section 212(a)(2)(A) of the Act. However, even if the AAO found extreme hardship to the applicant's qualifying relatives, as required for a section 212(h) waiver, she would nevertheless be inadmissible under section 212(a)(2)(C) of the Act, for which there is no waiver available. No purpose is served in adjudicating a waiver application where, as in this case, an adjustment of status application cannot be approved because of a separate non-waivable ground of inadmissibility. Accordingly, the AAO affirms the director's finding that the applicant is statutorily ineligible for a waiver.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. The applicant has failed to overcome the basis of denial of her Form I-601 waiver of inadmissibility. The appeal will therefore be dismissed and the Form I-601 will be denied.

ORDER: The appeal is dismissed.