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



U.S. Citizenship
and Immigration
Services

[REDACTED]

H2

Date: APR 25 2012

Office: LOS ANGELES

FILE: [REDACTED]

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)

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 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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Los Angeles, California, 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 who was found to be inadmissible to the United States pursuant to 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 been convicted of a crime involving a controlled substance; and section 212(a)(2)(C) of 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. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that there is no waiver available for inadmissibility under section 212(a)(2)(C) of the Act.

On appeal, counsel disputes the field office director's denial of the waiver application. Counsel states that the applicant's prior conviction for violation of section 11352 of the California Health and Safety Code was vacated on constitutional grounds pursuant to section 1016.5 of the California Penal Code, and that the offense therefore cannot be used to render the applicant inadmissible to the United States.

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

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 —

...

(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)(II) . . . insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if — . . . in the case of an immigrant who is 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 permanent resident spouse, parent, son, or daughter of such alien.

The record shows that on March 1, 1988, the applicant pled guilty to violation of section 11352 (transportation, sale, giving away, etc., of designated controlled substances) of the California Health and Safety Code, and that the controlled substance for sale was heroin. The judge placed the applicant on probation for three years and ordered that the applicant spend the first six months in county jail.

At the time of the applicant's arrest section 11352 of the California Health and Safety Code provided that:

Transportation, sale, giving away, etc., of designated controlled substances;
punishment

Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

On November 5, 2003, the judge set aside the applicant's plea and vacated the judgment pursuant to Cal. Penal Code § 1016.5.

Cal. Penal Code § 1016.5 provided that:

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the Board of Immigration Appeals held that any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. In *Matter of Pickering*, the Board reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). In view of these aforementioned cases, we find that the court’s vacating of the applicant’s March 1, 1988 conviction under Cal. Penal Code § 1016.5 eliminated this conviction for immigration purposes.

The field office director also found the applicant was inadmissible under section 212(a)(2)(C) of the Act. That section provides that:

- (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.

The ground of inadmissibility is under section 212(a)(2)(C) of the Act, being a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance. In order for a person 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 person 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 a controlled substance, 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.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)).

A person 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 person engaged in the proscribed conduct relating to trafficking in a controlled substance. *Alarcon-Serrano*, 220 F.3d 1116 at 119. In *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005), the Ninth Circuit stated that section 1182(a)(2)(C) does not require a conviction, but only a “reason to believe” that the alien is or has been involved in drug trafficking. (citing *Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1209 (9th Cir.2004)). 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 [REDACTED] [REDACTED] 339 F.3d 814 at 817-818, 823. [REDACTED] had been not convicted of drug-trafficking. *Id.* at 823, n. 9.

Upon review, there is sufficient “reason to believe” that the applicant is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in trafficking a controlled substance. Decisions upholding “reason to believe” determinations have been based on substantial evidence such as when the alien either admits that he had trafficked in drugs, or was caught with a significant quantity of drugs. *See Matter of Favela*, 16 I&N Dec. 753, 754 (BIA 1979) (alien “admitted his conscious participation” in attempt to smuggle marijuana); *Matter of Rico*, 16 I&N Dec. 181, 182-83 (BIA 1977) (Drug Enforcement Agency, Border Patrol, and Customs agents testified that alien was caught at the border with 162 pounds of marijuana in his truck; alien told agents he knew “something” was in the truck and offered to give information on other drug traffickers; alien’s later story of only borrowing the truck for the day was contradicted by agents’ testimony of seeing the alien cross the border several times before in the same vehicle); and *Matter of R-H-*, 7 I&N Dec. 675, 678 (BIA 1958) (alien admitted helping dealer deliver marijuana cigarettes to customers).

In the instant case, the applicant was arrested on March 1, 1988 for violation of section 11352 of the California Health and Safety Code for sale of heroin, a controlled substance. The applicant pled guilty to this charge and was placed on probation. The record also shows that on March 1, 1990, the applicant was arrested for violation of section 11351 of the California Health and Safety Code for possession or purchase of cocaine base for purposes of sale. On May 14, 1990, pursuant to section 1203.2 of the California Penal Code, the judge revoked the applicant’s probation and ordered his imprisonment for a low term of three years.¹ Thus, based on the evidence in the record, there is “reasonable, substantial, and probative evidence” to believe that the applicant is or has been an illicit trafficker or a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in a controlled substance and is inadmissible under section 212(a)(2)(C) of the Act for which no waiver is available.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ Section 11351 of the California Health and Safety Code stated that:

Possession or purchase for sale of designated controlled substances; punishment

Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.