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



U.S. Citizenship
and Immigration
Services

Date: **MAY 30 2013**

Office: TEGUCIGALPA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v) respectively, and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Nicaragua 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. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being a controlled substance trafficker. The record shows that the applicant was further found to be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and again seeking readmission within 10 years of his last departure from the United States, and pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed under any provision of law and seeking admission within 10 years of the date of his departure or removal. The applicant is married to a U.S. citizen. On April 15, 2011, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). He seeks waivers of inadmissibility pursuant to sections 212(h) and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h), (a)(9)(B)(v), and permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen wife.

In a decision dated May 23, 2012, the field office director found that the applicant's June 16, 1992, arrest for possession and delivery of marijuana rendered the applicant inadmissible as an alien whom the immigration officer knows or has reason to believe has been an illicit trafficker in a controlled substance or has been a knowing assister, abettor, conspirator, or colluder with others in the trafficking of a controlled substance. The director denied the Form I-601 waiver application stating that a waiver was not available for inadmissibility under section 212(a)(2)(C) of the Act. The field office director further denied the waiver application in the exercise of discretion, as the applicant's history of arrests show a disregard for the laws of the United States.

On appeal, counsel for the applicant states that the field office director erred in finding that there was "reason to believe" the applicant was a drug trafficker. Counsel states that the applicant's conviction for possession and delivery of marijuana was vacated on substantive grounds, and that both charges were subsequently "nolle prossed." Counsel contends that there is not sufficient evidence in the record to support a "reason to believe" finding, and that the director's conclusion contradicts case law. Counsel asserts that the applicant is eligible for a waiver under section 212(h)(2)(B) and that the evidence outlining medical and emotional difficulties demonstrate extreme hardship to his U.S. citizen wife.

The record includes, but is not limited to: counsel's brief; the applicant's wife's statement; medical documentation; a copy of the applicant's marriage certificate; medical and prescription records; medical records; financial documentation; documentation regarding the applicant's deportation proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(C) of the Act provides, in pertinent part, 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 phrase “any illicit trafficking in any controlled substance” includes any unlawful trading or dealing in any controlled substance. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board of Immigration Appeals (BIA) determined that an alien was inadmissible into the United States pursuant to section 212(a)(23) of the Act, currently section 212(a)(2)(C), 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 deemed an illicit trafficker as contemplated by the statute. *Id.* at 186. Similarly, in *Matter of P-*, 5 I&N Dec. 190 (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 order for an adjudicator 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.” *Matter of Rico*, 16 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 he is admissible. *See* Section 291 of the Act, 8 U.S.C. § 1361.

In this case, the record shows that on June 16, 1992, the applicant was arrested for possession and delivery of 5 grams of cannabis to an undercover police officer. On July 29, 1992, the applicant was charged with violations of Florida Statutes §§ 893.13(1)(a) and 893.13(6)(a). The Criminal Report Affidavit alleges that on May 8, 1992, the applicant did

possess and deliver 5 grams marijuana to affiant [redacted] for the purchase price of \$35.00 of U.S. currency which affiant personally handed to [the applicant]. A field test indicated positive for T.H.C. content. This occurred in Hillsborough County.

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Your affiant can identify the above listed [applicant] who did this hand to hand transaction.

On August 13, 1992, the applicant pled guilty in the Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida, to delivery of cannabis in violation of Florida Statutes § 893.13(1)(a) and possession of cannabis in violation of Florida Statutes § 893.13(6)(a), and was sentenced to two years of probation and court costs. The record includes the transcript of the plea hearing convened on August 13, 1992 before Circuit Court Judge [REDACTED]. The transcript reflects that the applicant appeared before the circuit court represented by [REDACTED] Assistant Public Defender, to enter a guilty plea to the charges in the Criminal Report Affidavit. As factual basis for the guilty plea, the court accepted the following narrative:

“On May 5th or May 8th, 1992, Detective [REDACTED] were working undercover when they came into contact with the [applicant]. At that time Detective [REDACTED] negotiated with the [applicant] for five grams of marijuana. The [applicant] did sell to Detective [REDACTED] for \$35.00, marijuana, which valtoxed positive.”

It is also noted that on page 6 of the transcript, Judge [REDACTED] stated that “I’m finding there is a factual basis for the plea.” The applicant’s attorney, [REDACTED] stated: “Judge, we have no objections to the factual basis.” The applicant was therefore convicted of the aforementioned offenses and was sentenced to probation and court costs.

However, the record reflects that on April 13, 1999, the applicant, through counsel, filed a Motion to Withdraw Plea requesting the Hollsborough County Circuit Court that his guilty plea be withdrawn and vacated pursuant to Florida Rules of Criminal Procedure 3.850 and 3.172(c)(8), on the grounds that the applicant was not advised of the immigration consequences of his plea. The record also includes a case progress abstract indicating that on April 19, 1999, Judge [REDACTED] of the Hillsborough County Circuit Court granted the applicant’s Motion to Withdraw Plea. Consequently, the applicant’s guilty plea was withdrawn, and that the judgment and sentence were vacated. On June 7, 1999, the Office of the Florida State Attorney filed a “*Nolle Prossed*” for the delivery of cannabis and possession of cannabis charges, which means that the state declined to prosecute both charges. The field office director nevertheless found the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been an illicit trafficker in a controlled substance.

The AAO notes that an applicant may be deemed inadmissible under section 212(a)(2)(C) 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. Here, the Criminal Report Affidavit reflects that law enforcement officers were conducting an undercover narcotics-related investigation, which resulted in a drug transaction involving the applicant. Per the sworn statements contained in the report, the applicant delivered 5 grams of marijuana to an undercover officer in exchange of \$35.00. The affidavit indicates that Officer [REDACTED] personally handed the defendant \$35.00 in U.S. currency in exchange for five grams of marijuana. Moreover, the plea transcript reveals that the applicant admitted to State Court Judge [REDACTED] that he had sold a bag of marijuana to a police officer who was working undercover.

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. As noted above, the only requirement for an applicant to be inadmissible under section 212(a)(2)(C) of the Act 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. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). Here, the AAO finds, based on the applicant’s admission to the trial court that he sold a bag of marijuana to an undercover police officer, and the evidence that the applicant was involved in the sale of a controlled substance, that the record contains reasonable, substantive, and probative evidence of the applicant’s involvement in a drug-trafficking activity. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) (noting that the phrase “any illicit trafficking in any controlled substance” includes any unlawful trading or dealing in any controlled substance). Moreover, the sworn statements of Officer [REDACTED] in the Criminal Report Affidavit indicate that the applicant personally delivered to him five grams of marijuana for the purchase price of \$35.00, in what he described as a “hand-to-hand transaction.” The field office director therefore had sufficient “reason to believe” that the applicant was an illicit drug trafficker or a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. The burden of proving that an applicant is not inadmissible as a drug trafficker remains with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361.

The applicant in this case has not provided sufficient evidence to overcome the record evidence supporting the finding that there is “reason to believe” he was involved in the trafficking of cannabis. Though the AAO acknowledges a letter in the record from the applicant in which he states that his friend was the one who actually handed the marijuana to the undercover police officer, we note that the record includes reliable countervailing evidence supporting a “reason to believe” finding. The applicant’s version of the events in an unsworn statement is contradicted by the admissions he made to State Judge [REDACTED] under oath as part of his guilty plea. Specifically, page 7 of the plea transcript reflects that the applicant admitted to Judge [REDACTED] that “[he] did sell [to Officer [REDACTED] that bag [of marijuana].” The AAO notes that it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel points to *Garces v. U.S. Att’y Gen.*, a case in which the Eleventh Circuit held that in the particular circumstances of the case, an alien’s vacated guilty plea along with police reports did not amount to reason to believe the alien trafficked in controlled substances. 611 F.3d 1337, 1350 (11th Cir. 2010). The Eleventh Circuit reached its finding only after noting that the applicant’s conviction for trafficking in cocaine had been vacated due to procedural defect, the record of conviction was unavailable, the alien offered a different account of the events that led to his arrest while denying any involvement in drug trafficking, and the conclusions in the police report did not amount to a reasonable probability that the alien was involved in drug trafficking. *Id.* at 1345-49. Importantly, the Eleventh Circuit noted that the police report reflected that “no drugs or drug paraphernalia were found on [the alien] or in his car, and [the alien] was not in the room when [the drug trafficker] handed the drugs to the undercover officer.” *Id.* at 1349. Though the Eleventh Circuit recognized

that the reason to believe charge does not require evidence that an alien actually handled a drug transaction, there must be some reasonable, substantial, and probative evidence that the alien is a knowing participant in a drug-related offense. *Id.* at 1350. Consequently, in the circumstances of that particular case, the alien's act of driving his neighbor to a hotel in which he would sell cocaine to undercover agents was insufficient to establish "reason to believe" the alien was a drug trafficker.

In the present case, however, the record of proceedings contains reasonable, substantive, and probative evidence demonstrating a reason to believe the applicant was involved in drug trafficking. The AAO makes this finding only after examining the entirety of the record evidence relating to the applicant's June 16, 1992 arrest. In this case, the record of conviction includes the plea transcript, which indicates that the applicant admitted to selling to an undercover police officer five grams of marijuana for the purchase price of \$35.00. The record of proceedings further includes the Criminal Report Affidavit, which indicates that the applicant personally handed five grams of marijuana to a police officer in exchange of \$35.00. Additionally, though the applicant's conviction was subsequently vacated, the factual basis of an alien's expunged conviction is properly allowed into evidence on the issue of the alien's inadmissibility for being a controlled substance trafficker. *See Castano v. I.N.S.*, 956 F.2d 236, 239 (11th Cir. 1992) ("[T]he factual basis of petitioner's conviction was properly allowed into evidence on the issue of petitioner's admissibility to the United States."); *see also Garcés*, 611 F.3d at 1345 ("[T]he fact that a drug conviction was subsequently vacated, for whatever reason, does not bar immigration authorities from using the facts that led to the conviction as the basis for a "reason to believe" charge."). Lastly, the applicant does not specifically dispute the police officer's observations and conclusions as contained in the police report, and we note that his most recent version of the events that resulted in his arrest is contradicted by his admissions to the state court during his guilty plea hearing and the sworn statements of the police officer who conducted the investigation that led to the applicant's arrest.

Based on the foregoing, the AAO finds that there is sufficient reason to believe that the applicant was involved in the illicit trafficking of a controlled substance, and he is inadmissible to the United States under section 212(a)(2)(C) of the Act. There is no provision under the Act that allows for a waiver of inadmissibility under section 212(a)(2)(C) of the Act.

The AAO notes that the applicant is also inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued unlawful presence in the United States in excess of one year. Section 212(a)(9)(B)(i)(II) of the Act provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

The record shows that the applicant entered the United States on November 21, 1984. On May 12, 1994, the applicant was ordered deported *in absentia* and remained in the United States until October 7, 2009, when the applicant was deported from the United States to Nicaragua. The AAO finds that the applicant thus accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in October 2009. As the applicant accrued unlawful presence of more than one year and is seeking admission within 10 years of his 2009 departure, he is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(9)(B)(v) of the Act provides that:

Waiver.-The Attorney General [Secretary of Homeland Security] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 of Homeland Security] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

The AAO notes that a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. As such, it appears that the applicant would be eligible to apply for a section 212(a)(9)(B)(v) waiver of the ground of inadmissibility arising under section 212(a)(9)(B)(i)(II) of the Act. Nevertheless, the applicant is inadmissible under section 212(a)(2)(C) of the Act, for which no waiver is available. Since the applicant is inadmissible under a provision of law for which there is no waiver, no purpose would be served in addressing the claim for a waiver under section 212(a)(9)(B)(v). For the same reason, no purpose would be served in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) (holding that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application).

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. The appeal will therefore be dismissed

ORDER: The appeal is dismissed.