

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

(b)(6)

[REDACTED]

DATE: **SEP 25 2013** OFFICE: OAKLAND PARK, FL

FILE: [REDACTED]
[REDACTED] CONSOLIDATED

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, but the underlying application remains denied.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), for being a controlled substance trafficker. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to remain in the United States.

The Field Office Director concluded that there was reason to believe that the applicant was inadmissible under section 212(a)(2)(C) of the Act for having been an illicit trafficker in a controlled substance, namely, cocaine, or having been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance. *Decision of the Field Office Director*, dated October 13, 2010. The Field Office Director denied the waiver application accordingly, finding there was no waiver for this ground of inadmissibility. *Id.* The AAO rejected the applicant's subsequent appeal as untimely. *See AAO Decision*, June 20, 2012.

On motion, filed by counsel on July 16, 2012 and received by the AAO on July 19, 2013, counsel submits briefs in support. Therein, counsel contends the applicant filed the appeal within 33 days of the mailed decision, and that consequently the appeal was submitted timely. Proof of timely filing was provided on motion. Counsel moreover asserts that the record contains insufficient evidence to establish there was reason to believe the applicant was an illicit trafficker in a controlled substance, or that he had knowingly aided, abetted, assisted, conspired, or colluded with others in such illicit trafficking.

The record includes, but is not limited to, evidence of birth, marriage, divorce, residence, and citizenship, other applications and petitions, letters from family and friends, documentation of criminal proceedings, and photographs. The entire record was reviewed and considered in rendering a decision on the motion.

The AAO will first address the finding of inadmissibility. 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.
- ...
- (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 . . .

The record reflects that the applicant was arrested on March 9, 1987, and charged with importation, distribution, and conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841, 846, 952, 963 and 18 U.S.C. §2. *See Warrant for Arrest*, filed March 3, 1987. On or about August 26, 1988, the applicant was additionally charged with two counts of aiding and abetting in the concealment of a material fact from the Internal Revenue Service (IRS) in violation of 18 U.S.C. §§1001 and 2. As the result of a plea agreement, on July 15, 1988 the applicant pled guilty and was found guilty in the

United States District Court of the Southern District of Florida of the two counts of violating 18 U.S.C. §§1001 and 2. *See judgment in a criminal case*, July 15, 1988. The applicant was sentenced to 24 months of imprisonment for each count, and he was ordered to pay a \$100 special assessment. *Id.* The remaining charges against the applicant, including the ones related to importation, distribution, and conspiracy to distribute cocaine were dismissed on motion of the United States. *Id.*

Inadmissibility under section 212(a)(2)(C) of the Act applies when the adjudicator “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. *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977); *see also Garces v. U.S. Attorney General*, 611 F.3d at 1345-46; *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for the 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. A conviction or a guilty plea is not necessary to find a “reason to believe.” *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992); *Nunez-Payan v. INS*, 815 F.2d 384 (5th Cir. 1987); *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979).

In regards to section 212(a)(2)(C) of the Act, a “reason to believe” may be established by “reasonable, substantial, and probative evidence,” which has been found to include police reports and the facts underlying even an expunged conviction. *See Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1209 (9th Cir. 2004); *Castano v. INS*, 956 F.2d at 238-39 (holding that the “facts underlying prior conviction for drug trafficking which has been expunged pursuant to the Federal Youth Corrections Act may provide basis for denying alien admission to the United States under provision of the Immigration and Nationality Act making inadmissible any alien whom immigration officer knows or has reason to believe is or has been illicit drug trafficker”). Whether a police report constitutes “reasonable, substantial, and probative” evidence in the context of an inadmissibility finding under section 212(a)(2)(C) is a determination that is made on a case by case basis.

In the present case, the Field Office Director held there was sufficient evidence of record to support a finding there was 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 substance, or endeavored to do so. *See Decision of Field Office Director*, October 13, 2010. In the brief, counsel contends the sole piece of evidence leading to the Field Office Director’s finding, the pre-trial detention hearing transcript, is an insufficient basis for a “reason to believe” finding.

In the pre-trial detention hearing transcript, a government witness testifies that the applicant owned 85 percent of the [REDACTED] dealership he had with his business partner, the dealership’s warehouse was used to store cocaine, and that 1,490 kilograms of cocaine were imported in the operation. *Pre-trial detention hearing transcript*, March 11, 1987, at 9. The witness added that [REDACTED] vehicles were given to the members of the smuggling distribution ring, and that the vehicles were used to transport the cocaine to other locations. *Id.* The witness moreover stated that

the applicant would give directions to the boat crew members who were smuggling cocaine when his business partner was unavailable, and that he paid for the boat fuel with the company credit card. *Id.* at 10. The witness reported that other witnesses saw the applicant's hands on some of the cocaine, and that he actually participated in offloading the drugs. *Id.* at 11.

Counsel asserts that the trustworthiness of allegations made at pre-trial detention hearings raise serious questions about the facts found therein, as the federal rules of evidence (FRE) do not apply at those hearings. Whereas the AAO takes evidentiary standards into account when evaluating documents such as the applicant's hearing transcripts, it is noted that during the hearing the applicant was represented by an attorney who had opportunities to rebut the government's contentions on these factual matters. Furthermore, the AAO notes that although the FRE did not apply to the applicant's pre-trial detention hearing, the applicant was not without some procedural protection as he had counsel present at his appeal of his pre-trial detention hearing, and had an opportunity to correct the record at that time. There is no evidence in the record that the statements of the witness at the pre-trial detention hearing were found to be incorrect.

Counsel contends that the pre-trial hearing transcript is similar to a police report, as it is based entirely on the officer's conclusions, and that as such it should be given "little weight" without corroborating evidence, citing *Matter of Arrequin*, 21 I&N Dec. 38 (BIA 1995).¹ *Matter of Arrequin*, however, does not exclude the use of police reports and arrest records in the "reason to believe" determination at hand. In *Matter of Arrequin*, which does not involve a determination of inadmissibility under section 212(a)(2)(C), but rather involves another section of the Act, the court gave an "apprehension report" little weight where "prosecution was declined" and there was "no corroboration, from the applicant or otherwise." 21 I&N Dec. at 42 (granting relief under section 212(c) of the Immigration and Nationality Act).

It is the applicant's burden of proof in these proceedings, and he has offered no proof to call into question the evidence of record. Section 291 of the Act, 8 U.S.C. § 1361; *see also Garces v. U.S. Attorney General*, 611 F.3d at 1345-46 (stating that "we do not require every alien seeking admission to the United States to produce evidence proving clearly and beyond a doubt that he is not a drug trafficker, unless there is already some other evidence-some 'reason to believe'- that he is one"). 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). In this case, the applicant has not provided sufficient, objective evidence to rebut the information contained in the investigation reports and the pre-trial hearing transcripts.

There is reason to believe the applicant knowingly aided, abetted, and assisted others in the illicit trafficking of a controlled substance. Specifically, there is reasonable, substantial, and probative evidence to support the belief that he "has been a knowing aider, abettor, assister, conspirator, or

¹ Counsel provides no legal support for the assertion that the pre-trial hearing should be treated as a police report for purposes of determining inadmissibility under section 212(a)(2)(C) of the Act.

colluder with others in the illicit trafficking” in a controlled substance. *See Alarcon-Serrano v. I.N.S.* at 1119. The applicant has provided no credible evidence to overcome the evidence supporting the finding that he is inadmissible under section 212(a)(2)(C)(i) of the Act. The AAO therefore affirms the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, and is consequently ineligible for a waiver of inadmissibility.

In light of the applicant’s inadmissibility under section 212(a)(2)(C)(i) of the Act, the AAO will not determine whether the applicant is additionally inadmissible under section 212(a)(2)(A)(i) of the Act for his 1988 convictions under 18 U.S.C. §§1001 and 2 (1988).

The AAO additionally notes that on August 6, 2010, approximately two months prior to the Field Office Director’s decision to deny the applicant’s I-601 application, the applicant received an I-551 temporary resident stamp in his passport. USCIS records do not indicate the applicant’s Form I-485 application was approved, nor is there any documentation as to why the applicant’s passport reflects he was granted temporary residence until August 5, 2011. This matter should be examined by the Field Office Director to determine how the stamp was placed in the applicant’s passport.

In application proceedings, it is the applicant’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Therefore, although the motion is granted, the underlying application remains denied.

ORDER: The motion is granted, but the underlying application remains denied.