



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: APR 02 2014

OFFICE: OAKLAND PARK

IN RE:

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:

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 Field Office Director, Oakland Park, Florida denied the waiver application and a subsequent appeal was rejected by the Administrative Appeals Office (AAO). The AAO dismissed an appeal on motion. This matter is now before the AAO on a second motion. The motion will be granted and the prior AAO decision is affirmed.

The applicant is a native and citizen of the United Kingdom who was found to be inadmissible to the United States under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), for reason to believe that he illicitly trafficked in any controlled substance. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse.

The Field Office Director concluded that the record established reason to believe that the applicant is inadmissible under section 212(a)(2)(C) of the Act and denied the application accordingly. *See Decision of the Field Office Director* dated October 13, 2010. The AAO rejected the applicant's appeal as untimely. *See Decision of the AAO*, dated June 20, 2012. On motion, the AAO also determined that the applicant is inadmissible under section 212(a)(2)(C) of the Act. *See Decision of the AAO*, dated September 25, 2013.

The applicant has submitted a second motion. On motion, counsel for the applicant asserts that the applicant is a legal permanent resident who has not had this status revoked. Counsel further asserts that the applicant is not inadmissible to the United States under section 212(a)(2)(C) of the Act as the evidence was not reviewed as a whole and there is no reasonable, substantial and probative evidence for this determination.

In support of the applicant's motion, the applicant submitted identity documents and documents related to the applicant's criminal proceedings. The entire record was reviewed and considered in rendering a decision on the motion.

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

(A) Conviction of certain crimes.-

(i) [A]ny 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 . . . 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:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 [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 on May 12, 1987, the applicant was indicted on ten counts related to the import or distribution of cocaine and seven counts related to the concealing of facts required to be reported to the Internal Revenue Service. On July 15, 1988, the applicant was convicted in the United States District Court of the Southern District of Florida of two counts of aiding and abetting in concealment of fact from the Internal Revenue Service in violation of 18 U.S.C. §§ 1001 and 1002. The applicant was sentenced to two years imprisonment and a special assessment.

Counsel for the applicant initially asserts that the applicant was issued a I-551 stamp on his passport at an InfoPass appointment, demonstrating that he is a legal permanent resident of the United States, and subsequently travelled to and from the United States. Counsel contends that as the applicant is a legal permanent resident, this status cannot be revoked without complying with 8 C.F.R. § 205.2.

The applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, denied on May 27, 2009. The record reflects that the applicant's Form I-485 was never approved so that lawful permanent resident status was not conferred upon the applicant. It is noted that 8 C.F.R. § 205.2 refers to the revocation following approval of a petition, which is not applicable in this matter, as the applicant's Form I-485 application was not approved. It is also noted that the I-551 stamp in the applicant's passport, with an expiration date of August 5, 2011, is marked as cancel without prejudice.

Counsel for the applicant asserts that the section 212(a)(2)(C) inadmissibility finding against the applicant was not based on reasonable, substantial and probative evidence. Counsel cites the Department of State's Foreign Affairs Manual section 40.23 N2 in asserting that a reason to believe is to be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government or several reliable and corroborative reports. Counsel contends that none of these possible grounds for a reason to believe finding have been satisfied. It is noted that although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. Further, the Foreign Affairs Manual actually states that "reason to believe" *might* be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports. 9 FAM § 40.23 N2 (emphasis added). The note further states that the essence of the standard is that there must be a probability, supported by evidence, rather than a mere suspicion that the alien is or has been engaged in trafficking. *Id.*

As noted in the AAO's previous decision, the record contains transcripts from a pre-trial hearing during which the applicant's attorney was present and had an opportunity to question the witness and appeal the proceedings. During the hearing, a witness testified that the applicant owned 85 percent of a car dealership whose warehouse was used to store cocaine, with 1,490 kilograms of cocaine imported throughout the operation. The witness stated that cars from the dealership were given to drug distribution members and used to transport cocaine. The witness further testified that the applicant was seen participating in the offloading of drugs, gave directions to boat crew members smuggling cocaine, and paid for the boat fuel with a company credit card.

Counsel for the applicant indicates that the Eleventh Circuit Court of Appeals and Board of Immigration Appeals in *Garces v. U.S. Attorney General*, 611 F.3d 1337 (11th Cir. 2010) and *Matter of Arreguin De Rodriguez*, 21 I&N Dec. 38 (BIA 1995), respectively, both held that police reports alone do not provide enough reason to believe that an alien trafficked in a controlled substance. Counsel contends that, likewise, the pre-trial hearing transcripts for the applicant should not be used against him without further corroboration. However, as noted in the AAO's previous decision, *Matter of Arreguin* does not address inadmissibility under section 212(a)(2)(C) of the Act and refers to an apprehension report with no corroboration and a declined prosecution. 21 I&N Dec. at 42. Further, the court in *Garces v. U.S. Attorney General* refers to an uncorroborated police report that does not "say much" and makes conclusions rather than statements of fact. 611 F.3d at 1349. However, the applicant's pre-trial hearing, unlike an arrest report, took place before a magistrate in a United States District Court and included his right to counsel, cross-examine and appeal, all rights exercised by the applicant during and following the

hearing. The witness for the government in the pre-trial hearing provided clear facts and accusations concerning the applicant's dealings in drug trafficking.

Counsel for the applicant asserts that the record contains evidence indicating that the applicant did not have any involvement in drug trafficking. Counsel cites *Diallo v. U.S. Attorney General*, 596 F.3d 1329 (11th Cir. 2010) in asserting that the reason to believe determination against the applicant needs to be based upon a review of all of the evidence as a whole. It is noted that the applicant in *Diallo v. U.S. Attorney General* is an alien seeking asylum in the United States based upon past persecution. *Id.* Further, the *Diallo* language cited by counsel refers not to the field office or AAO's need to make a reason to believe determination based upon the evidence as a whole, but rather the Eleventh Circuit Court of Appeals standard for review of Board of Immigration Appeals decisions. 596 F.3d at 1332.

Counsel for the applicant asserts that two of the applicant's co-defendants indicated that the applicant had no involvement in drug trafficking. The pre-trial hearing appeal transcript indicates that one of these co-defendants also stated that he was not aware of any involvement that the applicant had in drug trafficking and the applicant may have had that involvement with others. The second co-defendant referenced by counsel apparently told another prisoner that the applicant was not involved, but there is no affidavit or any other details concerning this allegation. In any case, there is information on the record to support the reason to believe determination despite the conflicting testimony from one co-defendant. Counsel also asserts that if there had been any evidence that the applicant were involved in drug trafficking, then the charges against him would not have been dropped by the government. Counsel's assertions are speculative in nature. The drug trafficking charges against the applicant were dropped in a plea deal that resulted in two federal convictions for concealing material facts from the IRS in connection with several bank deposits for the business where the drug trafficking took place. Further, a conviction or guilty plea is not necessary to find a "reason to believe." *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992).

Since immigration proceedings are not criminal, the standard for finding a reason to believe are considerably less than the showing of beyond a reasonable doubt required for criminal convictions. *See Matter of Rico*, 16 I&N Dec. 181 (BIA 1997). As noted in the AAO's previous decision, the applicant bears the burden of proof in these proceedings. Section 291 of the Act, 8 U.S.C. § 1361; *See Garces v. U.S. Attorney General*, 611 F.3d at 1345-1346 (stating "we do not require every alien seeking admission to the United States to produce evidence proving clearly and beyond a doubt a drug trafficker, unless there is already some other evidence – some 'reason to believe' – that he is one"). The record is sufficient to determine that the applicant is inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act.

As the applicant is inadmissible under section 212(a)(2)(C) of the Act, the AAO will not address whether he is also inadmissible under section 212(a)(2)(A)(i) of the Act for convictions for crimes of moral turpitude.

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. Accordingly, the prior AAO decision is affirmed.

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NON-PRECEDENT DECISION

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ORDER: The motion is granted and the prior AAO decision dismissing the appeal is affirmed.