



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-L-D-

DATE: DEC. 4, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF
INADMISSIBILITY

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Los Angeles Field Office, denied the application. We dismissed a subsequent appeal. The matter is now before us on motion to reconsider. The motion to reconsider will be denied.

The Applicant was found to be inadmissible under 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 violated a law relating to a controlled substance. The Applicant was also found inadmissible under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i), for having been an illicit trafficker of a controlled substance. The Applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h).

In a decision dated May 22, 2014, the Director denied the waiver application, concluding that as a result of the denial of the Applicant's Form I-485, Application to Adjust Status the Applicant was not eligible to file an application for a waiver.

On appeal, the Applicant asserted that he was eligible for adjustment of status because he was admitted after inspection as a legalization applicant and that his conviction under 21 U.S.C. § 176(a) "does not categorically constitute a controlled substance offense."

In a decision dated April 14, 2015, we determined that the Applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense relating to a controlled substance and under section 212(a)(2)(C) of the Act for having been an illicit trafficker in any controlled substance. We further determined that the Applicant was statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(II) of the Act and that there was no waiver of inadmissibility available for inadmissibility under section 212(a)(2)(C)(i) of the Act. The appeal was dismissed accordingly.

On motion the Applicant again contends that his conviction does not categorically constitute a controlled substance offense. With the appeal the Applicant submits a brief. The entire record was reviewed and considered in rendering this decision.

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

(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(a)(2)(C) of the Act states 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 record reflects that on [REDACTED] 1968, before the United States District Court for the Southern District of California, the Applicant was found guilty of "smuggling marihuana, in violation of U.S.C. Title 21, Section 176(a)." The Applicant was sentenced to five years imprisonment, pursuant to 18 U.S.C §4208(a)(2).

In dismissing the Applicant's appeal we concluded that although the section of law under which the Applicant was convicted, 21 U.S.C. §176(a), was repealed, the historical and statutory notes indicated the section 176(a) "covered the illegal importation and smuggling of marihuana, set penalties for such illegal importation and smuggling, made unexplained possession of marijuana sufficient evidence for such conviction, and defined 'marihuana.'" 21 U.S.C.A. §176 (Historical and Statutory Notes). We determined there was no documentation in the record indicating that this section of the law did not qualify as a conviction for a controlled substance violation under section 212(a)(2)(A)(i)(II), which is retroactive.

We further found that section 212(a)(2)(C) of the Act only required that there be a "reason to believe" the Applicant had been an illicit trafficker in any controlled substance or had been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such defined controlled substance. We concluded that as a result of the Applicant's conviction he was inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of an offense relating to a controlled substance.

On appeal the Applicant contends that the statute under which he was convicted is broader than the controlled substance ground of inadmissibility because it outlaws activity of a principal offender as well as others, and that the offender need not be in possession of the controlled substance to be convicted. As we noted in dismissing the Applicant's appeal, the historical and statutory notes indicate section 176(a) "covered the illegal importation and smuggling of marihuana, set penalties for such illegal importation and smuggling, made unexplained possession of marijuana sufficient evidence for such conviction, and defined 'marihuana.'" In the present matter, the Applicant was clearly convicted of a law relating to a controlled substance and has not met his burden to show that he was erroneously deemed inadmissible under section 212(a)(2)(A)(i)(II) of the Act as a result of his conviction.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . 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) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that -

- (i) . . . 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

....

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

In order to be eligible for consideration for a waiver under section 212(h) of the Act, the Applicant must establish that his conviction relates to simple possession of 30 grams or less of marijuana. The Applicant has submitted no evidence to establish that his conviction relates to a single offense of simple possession of 30 grams or less of marijuana and is therefore statutorily ineligible to apply for a waiver of section 212(a)(2)(A)(i)(II) of the Act.

As noted, we also determined because of the Applicant's conviction record indicating he was found guilty of "smuggling marihuana" and the criminal complaint associated with the conviction he was also inadmissible under section 212(a)(2)(C) of the Act for having been an illicit trafficker in any controlled substance.

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, supra*, 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).

The fact that an alien has not been convicted of a drug trafficking offense does not prevent a finding that he or she is or has been involved in trafficking of a controlled substance. *See Matter of Favela*, 16 I&N Dec. 753, 756-57 (BIA 1979). Even if the alien is arrested for, but not charged with, a drug trafficking offense, or if a criminal complaint has been dismissed, an alien may still be denied admission under section 212(a)(2)(C)(i) of the Act if the immigration officer has reason to believe that the alien was involved in illicit trafficking of a controlled substance. *See id.*; *see also Matter of Rico*, 16 I&N Dec. 181, 184 (BIA 1977).

In the Applicant's case his conviction record indicates that he was found guilty of "smuggling marihuana" and the criminal complaint associated with the conviction indicates that the Applicant "knowingly smuggled and clandestinely introduced, without declaration and invoicing, approximately 60 pounds of marijuana into the United States from Mexico."

The Applicant does not provide any contrary evidence with the instant motion to rebut the record and it is the Applicant's burden of proof in these proceedings to establish that he is clearly and beyond a doubt admissible. Section 291 of the Act, 8 U.S.C. § 1361; Section 235(b)(2)(A) of the Act, 8 U.S.C. § 1225(b)(2)(A); *see also Garces, supra*, 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"). The Applicant has provided no credible evidence on motion to overcome the evidence supporting the finding that he is inadmissible under section 212(a)(2)(C)(i) of the Act. There is no provision under the Act that allows for a waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.

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.

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ORDER: The motion to reconsider is denied.

Cite as *Matter of L-L-D-*, ID# 14335 (AAO Dec. 4, 2015)