



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

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

MATTER OF H-R-

DATE: NOV. 2, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a citizen of Bosnia and Herzegovina, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Applicant 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), concerning controlled substance traffickers. The Applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative and seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse, children, and mother.

In a decision dated October 24, 2014, the Director concluded that the Applicant is inadmissible under section 212(a)(2)(C) of the Act and is therefore not eligible for a waiver of inadmissibility. The waiver application was denied accordingly.

On appeal, filed on November 24, 2014, and received by us on April 16, 2015, the Applicant asserts that his 2005 conviction for attempted possession of a controlled substance has been vacated and he no longer has a conviction for immigration purposes. The entire record was reviewed and considered in rendering this decision.

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.

*Matter of H-R-*

The record reflects that on [REDACTED] the Applicant pled guilty in the Circuit Court of [REDACTED] Missouri, to Attempted Possession of a Controlled Substance, a Class D felony, and was sentenced to four years imprisonment, suspended, and placed on five years' probation.<sup>1</sup>

On December 14, 2009, the Applicant was placed in removal and was ordered removed by an immigration judge on February 3, 2010. The Applicant was removed to Bosnia and Herzegovina on March 16, 2010.

The record shows that on [REDACTED] the Applicant filed a motion in the Circuit Court of [REDACTED] Missouri, to set aside or vacate his judgment and sentence, citing *Padilla v. Commonwealth of Kentucky*, 130 S.Ct. 1473 (2010) and asserting that his counsel had failed to inform him of the risk of deportation in his plea of guilty. On April 1, 2011, the Applicant's judgment was set aside and vacated, and on October 31, 2013, charges against the Applicant were dismissed. On appeal the Applicant maintains that as his conviction has been vacated he no longer has a conviction for immigration purposes, and avers that otherwise his conviction would be essentially eliminated under the Federal First Offender Act 18 U.S.C. section 3607 (1988) because it is his only drug related conviction and he was [REDACTED] years old at the time of his offense.

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 (9<sup>th</sup> 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).

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<sup>1</sup> The Director's decision indicates that the Applicant was convicted of Distribute Deliver or Manufacture a Controlled Substance, in violation of section 195.211 of the Missouri statutes, but this appears to be an error. Nevertheless, the Applicant remains inadmissible as discussed in detail above.

(b)(6)

*Matter of H-R-*

In the Applicant's case there are detailed police reports recording interactions between the Applicant and undercover police officers, with surveillance teams involved. Police reports in the record, from two separate occasions in [REDACTED], detail the sale of drugs by the Applicant, amounts later determined to be 421.66 and 245.69 grams. The Applicant pled guilty to Attempted Possession of a Controlled Substance, a conviction later vacated for reasons unrelated to the facts surrounding the Applicant's arrest. The record also includes charges against the Applicant in April 2003 of Delivery of a Controlled Substance. Thus, we find that the police report and criminal record of the Applicant constitutes reasonable, substantial, and probative evidence that the Applicant has been an illicit trafficker in any controlled substance or has been a "knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance."

The Applicant does not provide any contrary evidence with the instant appeal 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 appeal 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) 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.

**ORDER:** The appeal is dismissed.

Cite as *Matter of H-R-*, ID# 13973 (AAO Nov. 2, 2015)