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



U.S. Citizenship  
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Services

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H4

[REDACTED]

FILE:

[REDACTED]

Office: DALLAS, TX

Date: MAY 21 2009

RELATES)

IN RE:

[REDACTED]

APPLICATION: 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)

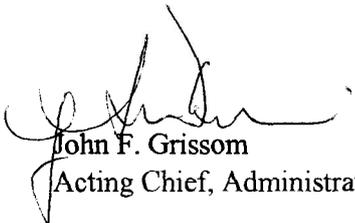
ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Dallas, Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native of Nigeria and citizen of India who, on May 14, 2001, was placed into immigration proceedings for having violated his nonimmigrant student status since 1993. On August 25, 2003, the immigration judge made a finding of adverse credibility and denied the applicant's application for adjustment of status because he is inadmissible 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 an illicit trafficker of a controlled substance. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On August 25, 2004, the BIA dismissed the applicant's appeal. The applicant filed a petition of review with the Fifth Circuit Court of Appeals (Fifth Circuit). On November 12, 2004, the Fifth Circuit denied the applicant's petition for review. The applicant filed a petition for writ of habeas corpus with the United States District Court (District Court). On March 4, 2005, the District Court dismissed the applicant's petition. On April 27, 2005, the applicant was removed from the United States and returned to India. On February 20, 2008, the applicant filed the Form I-212, indicating that he resided in India. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into 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 spouse and U.S. citizen child.

The field office director determined that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for accruing more than one year of unlawful presence.<sup>1</sup> The field office director also determined that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act and that no waiver is available for this ground of inadmissibility. The field office director determined that no purpose would be served in adjudicating the Form I-212 and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated April 22, 2008.

On appeal, counsel contends that the applicant is eligible to adjust his status and therefore should be granted permission to reapply for admission. *See Counsel's Brief*, dated June 13, 2008. In support of his contentions, counsel submits the referenced brief, an affidavit from the applicant's friend, letters of recommendation and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(2)(C) provides:

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<sup>1</sup> The AAO notes that an Application to Register Permanent Residence or Adjust Status (Form I-485), a Petition for Alien Relative (Form I-130) and an Application for Waiver of Grounds of Inadmissibility (Form I-601) filed on May 15, 2007, reflect that the applicant was present and residing in the United States on the date of filing. There is no evidence in the record to establish that the applicant legally reentered the United States after his removal in 2005. Even though the applicant may have since departed the United States and currently resides in India, the evidence reflects that the applicant illegally reentered the United States after having been removed and is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007).

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(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.-Any alien not described in clause (i) who
  - (I) has been ordered removed under section 240 or any other provision of law, or
  - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The record reflects that police reports, arrests warrants and affidavits relating to charges brought against the applicant in regard to a controlled substance and drug paraphernalia were submitted to the immigration judge. Testimony from police officers involved in the applicant's case show that police officers were called to the applicant's residence when an alarm was tripped. The police officers entered the residence upon suspicion of a break-in, as evidenced by a rock that appeared to have been thrown through the glass of the rear entrance. The police officers found no intruders and that none of the residents of the house were present. The police officers did, however, find in plain view in the applicant's bedroom, a large plastic bag containing 120 grams of marijuana, a set of measuring scales, a box of Ziploc bags in which only one bag was left and a pipe, next to the applicant's checkbook and credit card. A fully loaded AK-47 was located under the applicant's bed. Two other weapons were located in other areas of the house. These items were confiscated by the police. In attempting to contact the applicant in regard to the marijuana found in the house, the applicant avoided contact with the investigating officer. The applicant was arrested for possession of greater than 4 ounces and less than 5 pounds of marijuana. The police officers testified that, in their experience, from the drug paraphernalia combined with the amount of marijuana found, it was

reasonable to conclude that the applicant was engaged in illicit trafficking of marijuana, a controlled substance. While charges were submitted to the district attorney's office for filing, the district attorney returned the case to the investing officer a year later for further investigation. The record reflects that no further actions were taken against the applicant.

While the applicant offered countervailing testimony from a narcotics officer of the Dallas Police Department, the officer testified that, while he believed further investigation was needed in order to prosecute the applicant, the presence of an amount of marijuana in the amount of four ounces did suggest the possibility that the owner of the drugs could be involved in drug trafficking. Furthermore, while the applicant testified that he did not know from where the drugs or AK-47 came and he had been unable to determine who owned the marijuana, the immigration judge found the applicant to lack credibility. The immigration judge concluded that there was reason to believe that the applicant is a drug trafficker or is involved in drug trafficking and is inadmissible pursuant to section 212(a)(2)(C) of the Act.

On appeal, counsel contends that the applicant was not convicted of any crime related to a controlled substance and that the immigration judge could not look behind the statute and into the facts of the applicant's case; however, a finding of inadmissibility under section 212(a)(2)(C) of the Act, does not require a conviction and the immigration judge can look beyond any record of conviction in order to find the applicant inadmissible under this section of the Act. Although the record in this matter shows that the applicant was not convicted of the crime, the Board, in *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, one of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *Matter of Franklin*, 728 F.2d 994 (8th Cir., 1984).

Generally speaking, intent to distribute is established when the controlled substance is either found on the person of the accused, or in a vehicle or boat driven or occupied by the accused, or in a dwelling where the accused resided or visited frequently. It was held in *United States v. Franklin*, 728 F.2d 994 (8th Cir., 1984), that intent to distribute may be established by circumstantial evidence. Evidence the applicant possessed a controlled substance with the requisite intent to distribute is sufficient as a matter of law, where the controlled substance is packaged in a manner consistent with distribution and/or there is evidence of paraphernalia, a large amount of cash, weapons, or other indicia of narcotics distribution. The intent to distribute a controlled substance has been inferred solely from possession of a large quantity of the substance. *United States v. Koua Thao*, 712 F.2d 369 (8th Cir. 1983) (154.74 grams of opium); *United States v. DeLeon*, 641 F.2d 330 (5th Cir. 1980) (294 grams of cocaine); *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980) (413.1 grams of 74% pure cocaine); *United States v. Love*, 559 F.2d 107 (5th Cir. 1979) (26 pounds of marijuana); *United States v. Muckenthaler*, 584 F.2d 240 (8th Cir. 1978) (147 grams of cocaine).

Counsel contends that the immigration judge erred in finding reasonable, substantial and probative evidence that the applicant was a participant in drug trafficking. On appeal, counsel does not address the affidavit from the applicant's friend, dated February 22, 2005, claiming that he had left the marijuana and scales in the applicant's bedroom on March 27, 2001. The AAO notes that the affidavit does not

address the pipe and AK-47 located in the applicant's bedroom. The affidavit also does not address how the applicant would be unaware of the presence of these items in his bedroom if they had been left on March 27, 2001, but not located by police officers until 9pm on March 28, 2001. Furthermore, the affiant's claim that he was concerned that the applicant would be deported from the country and thus decided to come forward, contradicts testimony given by the applicant, on August 25, 2003, in which he stated that he did not know to whom the drugs belonged. The AAO finds that the affidavit is insufficient evidence to overcome the immigration judge's finding that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act. Finally, such evidence was provided to the BIA, Fifth Circuit and District Court on appeal and petition. The record reflects that the District Court found that the Fifth Circuit necessarily found that the applicant was involved in drug trafficking within the meaning of 212(a)(2)(C) of the Act. *See Demello v. Barrows, et. Al*, 2005 WL 517861 (N.D. Texas 2005) at 8.

The AAO therefore finds that the applicant is inadmissible pursuant to section 212(a)(2)(C) of the Act, for involvement in the illicit trafficking of a controlled substance, marijuana. No waiver is available to individuals found inadmissible under section 212(a)(2)(C) of the Act.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) held 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.

The applicant is subject to the provisions of section 212(a)(2)(C) of the Act, which are very specific and applicable. No waiver is available to an alien who is a trafficker in any controlled substance. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.