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



U.S. Citizenship
and Immigration
Services

HS

FILE:

Office: PHOENIX, ARIZONA

Date:

MAR 22 2010

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i), 8 U.S.C. § 1182(i), of the Immigration and Nationality Act.

ON BEHALF OF APPLICANT:

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, [REDACTED] is a native and citizen of Mexico 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 sought a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), for falsely claiming United States citizenship so as to procure admission to the United States. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that a waiver is not available for inadmissibility under section 212(a)(2)(C) of the Act. *Decision of the Field Office Director, dated August 23, 2007.*

On appeal, counsel asserts that 29 years ago the applicant was charged with and convicted of selling heroin in violation of section 11352 of the Cal. Health and Safety Code. She contends that the applicant was never provided with an opportunity to explain the criminal charge and its circumstances to an immigration officer. Counsel states that the applicant never sold any drugs and the drug he possessed amounted to approximately one-half ounce. Counsel cites to *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003), and asserts that “[d]ue to the miniscule amounts of the drugs, a person of ordinary intelligence could not definitively conclude that the [applicant] was engaged in drug-trafficking.” (emphasis omitted). Counsel maintains that because the applicant had not answered the immigration officer’s questions “a negative inference would have been drawn.” She asserts that there is not sufficient, reasonable, substantial, and probative evidence to indicate that the applicant was a heroin trafficker.

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

On April 17, 1978, in the Superior Court of the State of California, the applicant was charged with violation of Cal. Health and Safety Code § 11352. The Information alleges that he and another defendant did:

[W]illfully and unlawfully transport, import into the State of California, sell, furnish, administer, and give away, and offer to transport, import into the State of California, sell, furnish, administer, and give away, and attempt to import into; the State of California and transport a controlled substance, to wit, heroin.

It is further alleged that at the time of the commission of the above offense the defendants [] and [] did sell and offer to sell one-half ounce or more of a substance containing heroin within the meaning of Penal Code section 1203.07(2).

The Complaint reflects that the defendants also had been charged with the offense of having in their possession for the purpose of sale a controlled substance, methamphetamines, in violation of Cal. Health and Safety Code § 11378, which crime is a felony. The Minute Order, which shows a conviction for violation of section 11352 of the Cal. Health and Safety Code, does not relate to the applicant, but is for [] who was the other defendant.

Counsel admits on appeal that the applicant was convicted of violation of Cal. Health and Safety Code § 11352. On January 6, 1992, the applicant was issued a Notice of Intent to Deny (NOID), which notice requested submission of court dispositions for all arrests, including for the above described criminal charges. In response to the NOID, the applicant filed the Form I-694, Notice of Appeal of Decision Under Section 210 or 245A of the Immigration and Nationality Act. In the appeal, the applicant admitted to having two felony convictions.

Upon review, the record supports that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, as there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. The applicant was charged with violation of Cal. Health and Safety Code §§ 11352 and 11378 in 1978. Although the record before the AAO does not contain the disposition of the criminal charges alleging violation of Cal. Health and Safety Code §§ 11352 and 11378, counsel admits that the applicant was convicted of violation of Cal. Health and Safety Code § 11352 and the applicant admitted to having two felony convictions in his Form I-694.

In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer “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. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer 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.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)).

In the present matter, the Information and Complaint contained in the record present reasonable, substantial, and probative evidence to show that the applicant sold and offered to sell one-half ounce or more of a substance containing heroin and possessed for the purpose of sale methamphetamines. Counsel asserts that “[d]ue to the miniscule amounts of the drugs, a person of ordinary intelligence could not definitively conclude that the [applicant] was engaged in drug-trafficking.” The applicant was charged and convicted of possessing a controlled substance for the purpose of sale, which the AAO determines is a trafficking offense. Section 212(a)(2)(C)(i) of the Act includes no de minimus exception, and the fact that the applicant sold and/or possessed for sale a controlled substance in a small amount is not relevant in light of the applicant’s conviction for a trafficking offense.

Counsel discusses the procedural requirements for an admission to criminal conduct to serve as a basis for inadmissibility in the absence of a criminal conviction. But the admissions in this case do not serve as the basis for the finding of inadmissibility; they merely substantiate that the applicant was in fact convicted of an offense that renders him inadmissible. It is noted that in the present case the applicant was charged with violation of Cal. Health and Safety Code § 11352 and § 11378. Although the AAO does not have the court records showing the final disposition of those charges, counsel acknowledged that the applicant was convicted of violation of section 11352, the applicant admitted to having two felony convictions, and the AAO has records showing that the applicant’s co-defendant was convicted. This evidence substantiate that the applicant was convicted of an offense that renders him inadmissible under section 212(a)(2)(A)(i) of the Act. It is the applicant’s

burden to prove eligibility, and this burden includes the burden of producing relevant criminal records. *See* section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 103.2(b).

Furthermore, it is noted that an applicant may be deemed inadmissible under section 212(a)(2)(C)(i) of the Act even where there has been no admission and no conviction, so long as there is “reason to believe” that the applicant engaged in the proscribed conduct relating to trafficking in a controlled substance. In the present matter, there is reason to believe that the applicant has been an illicit trafficker in a controlled substance. Specifically, there is reasonable, substantial, and probative evidence to support the belief that he has been an illicit trafficker in a controlled substance. *See Alarcon-Serrano v. I.N.S.* at 1119.

Based on the foregoing, we find that there is sufficient reason to believe that the applicant has been an illicit trafficker in a controlled substance, and he is inadmissible under section 212(a)(2)(C)(i) of the Act. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.

The record also reflects that the applicant is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii), as a result of falsely claiming United States citizenship to procure admission to the United States. On December 12, 1974, the applicant sought to gain admission into the United States at the Calexico Port-of-Entry by presenting a valid Certificate of Live Birth issued by the State of California Department of Public Health bearing the name [REDACTED] and the date of birth of December 17, 1954. The applicant claimed to have found the U.S. birth certificate.

Based on the foregoing, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for misrepresenting a material fact to procure admission to the United States, and he requires a waiver of inadmissibility under section 212(i) of the Act. However, as there is no waiver available for the applicant’s inadmissibility under section 212(a)(2)(C)(i) of the Act, no purpose would be served in adjudicating an application for a waiver of inadmissibility under section 212(i) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.