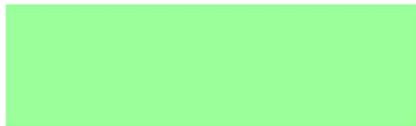




U.S. Citizenship
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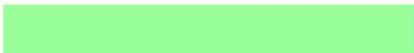
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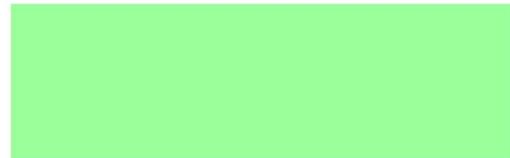
Office: SAN FERNANDO VALLEY, CA

FILE: 

IN RE: 

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

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 Rosenber
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Iran and a lawful permanent resident of Canada who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by a willful misrepresentation of a material fact when he failed to disclose a criminal conviction involving a controlled substance. The applicant is married to a U.S. citizen and has two U.S. citizen daughters. He seeks a waiver of inadmissibility pursuant to section 212(i) of the Act to reside in the United States with his family.

In a decision, dated September 6, 2013, the Field Office Director found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for not disclosing a 1985 criminal conviction when applying for his nonimmigrant visa. The field office director then found that the applicant had failed to establish that his U.S. citizen spouse would suffer hardship rising to the level of extreme hardship as a result of his inadmissibility. Finally, the field office director found that even if the applicant established extreme hardship to his spouse, he would not warrant the favorable exercise of discretion. His waiver application was denied accordingly.

In a brief on appeal, counsel states that the applicant does not require a waiver under section 212(i) of the Act because he did not commit a willful misrepresentation. She also states that the field office director erred in finding that the applicant's spouse would not suffer extreme hardship and that the applicant did not warrant the favorable exercise of discretion. Finally, counsel asserts that the applicant's waiver application was unfairly adjudicated because the applicant is subject to the Controlled Application Review and Resolution Program (CARRP).¹

On June 19, 2014, we issued a Notice of Intent to Dismiss, indicating that the record included sufficient reason to believe that the applicant was a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of a controlled substance, and, as a result, is inadmissible to the United States under section 212(a)(2)(C) of the Act. We indicated that there is no provision under the Act that allows for a waiver of inadmissibility under section 212(a)(2)(C) of the Act. We also indicated that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by a willful material misrepresentation when he failed to disclose his criminal conviction involving a controlled substance.

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

(C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--

¹ We will not address this assertion as CARRP has no relevance to the finding of inadmissibility in our decision.

(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.

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). Conversely, it is the applicant’s burden to establish that he is admissible. *See* Section 291 of the Act, 8 U.S.C. § 1361.

The record indicated that on October 2, 1984, in the United States District Court, [REDACTED] the applicant was indicted by a grand jury for conspiracy to violate 21 U.S.C. § 841(a)(1). The Indictment states that on or about and between August 29, 1984 and September 12, 1984, the applicant and two co-defendants did unlawfully, knowingly, and willfully conspire, confederate, and agree together and with each other to unlawfully possess with intent to distribute cocaine. In count one the indictment found that the applicant and two co-defendants planned to obtain the cocaine from persons unknown in the Southern and Central Districts of California and thereafter distribute the cocaine to persons unknown in the [REDACTED]. Count two of the indictment found that on September 9, 1984, one of the applicant’s co-defendants did willfully and unlawfully possess with intent to distribute two kilograms of cocaine to an agent employed by the Drug Enforcement Agency who was working in an undercover capacity.

On November 15, 1985, the applicant pled guilty to the charge of conspiracy to violate 21 U.S.C. § 841(a)(1) and on December 16, 1985 he was sentenced to three years probation.

At the time of the applicant’s conviction, 21 U.S.C. § 841(a)(1) stated, in pertinent part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

On November 23, 2010, the applicant, through counsel, filed a Petition for Writ of Error *Coram Nobis* in the U.S. District Court, Central District of California, Southern Division. *Coram nobis* relief affords a remedy to attack the “lingering collateral consequences” of an unconstitutional conviction in cases where the petitioner has already served his sentence. In deciding whether to grant a writ of error *coram nobis*, the court uses a three-part test: 1. a petitioner must explain his or her failure to seek relief from judgment earlier, 2. demonstrate continuing collateral consequences from the conviction, and 3. prove that the error is fundamental to the validity of the judgment.

In the applicant’s case he established that he was suffering continuing collateral immigration consequences as a result of his conviction; he received ineffective assistance of counsel in violation of his Sixth Amendment right; he was delayed in filing the writ because he was not aware of the erroneous advice given to him by counsel until he spoke with an immigration specialist; and that he would not have agreed to plead guilty to the initial charge if he had been aware that the consequences of the conviction would have been so detrimental to his immigration status in the United States. On February 24, 2012, the applicant’s petition was granted by the court, the charges in the 1984 indictment were dismissed, and the conviction vacated.

Under the current statutory definition of “conviction” set forth in section 101(a)(48)(A) of the Act, a conviction remains a conviction for immigration purposes unless it is vacated on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings. See *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999) and *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) *reversed on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). The writ of error *coram nobis* is not rehabilitative relief, but substantive relief based on an unconstitutional conviction. Thus, the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act for being convicted of a controlled substance violation.

However, as stated above, an applicant is inadmissible under section 212(a)(2)(C) 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. The record establishes, through facts provided in a grand jury indictment, that there was substantial reason to believe the applicant was a conspirator to traffic in cocaine.

In a response to our NOID, dated July 16, 2014, counsel states that the applicant is not inadmissible under the reason to believe standard of section 212(a)(2)(C) of the Act. First, counsel asserts that we mischaracterized the applicant’s criminal charge as a direct violation of 21 U.S.C. § 841(a)(1), when in fact he was charged with conspiracy to violate 21 U.S.C. § 841(a)(1). Although, in our NOID, we failed to clarify in two references to the applicant’s criminal charge that his violation of 21 U.S.C. § 841(a)(1) involved a conspiracy and not a direct act, we clearly cited to the Indictment in the applicant’s case and the fact that the applicant was charged with conspiring, confederating, and agreeing together, with two co-defendants, to violate 21 U.S.C. § 841(a)(1). In addition, we indicated that the record established through a grand jury indictment, that there was reason to believe the applicant was a conspirator to traffic in cocaine. Thus, our initial decision did not mischaracterize the applicant as being the illicit trafficker in cocaine, but we have always maintained that his inadmissibility under section 212(a)(2)(C) of the Act stems from his being a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of cocaine.

Counsel states that the applicant cannot be found to have been involved in a conspiracy because conspiracy as defined by the U.S. Code at 21 U.S.C. § 846 does not require an overt act and, thus, does not meet the definition of conspiracy under the Act as interpreted by the Ninth Circuit in *United States v. Garcia-Santana*, 743 F.3d 666 (9th Cir. 2014). Counsel states that in *United States v. Garcia-Santana*, 743 F.3d 666,675-76(9th Cir. 2014), the Ninth Circuit found that “conspiracy” under section 101(a)(43)(U) of the Act, which defines an aggravated felony, required an overt act. *United States v. Garcia-Santana*, 743 F.3d 666 (9th Cir. 2014) interprets “conspiracy” as it relates to an aggravated felony, not how it relates to inadmissibility under section 212(a)(2)(C) of the Act. Thus, it is not clear that this interpretation would be applicable to an interpretation of section 212(a)(2)(C) of the Act. Assuming this interpretation was applicable to the applicant’s case, it would have no consequence on our conclusion. The applicant’s actions, as stated through the Indictment, can be interpreted as not only conspiring, but also aiding, abetting, assisting, or colluding with two other individuals to possess, sell, and distribute cocaine. A finding of inadmissibility under section 212(a)(2)(C) of the Act is appropriate when an applicant knowingly aids, abets, assists, conspires, or colludes with others in the illicit trafficking of cocaine. Furthermore, when interpreting whether an applicant is inadmissible under section 212(a)(2)(C) of the Act one is not limited to the criminal statute involved, but can look to the particular actions as they are described in the record. In addition, counsel assertions regarding inadmissibility under section 212(a)(2)(C) of the Act only occurring when someone is actively engaged in drug trafficking are unfounded. Counsel cites to four cases involving section 212(a)(2)(C) of the Act to support this assertion. We agree that a finding of inadmissibility under section 212(a)(2)(C) of the Act is appropriate when someone has actively engaged in drug trafficking, but it is also appropriate when someone is a knowing aider, abettor, assister, conspirator, or colluder with others in illicit drug trafficking. The statutory language and case law support this fact. *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003), a case cited by counsel, also supports this fact. The petitioner in *Rojas-Garcia v. Ashcroft* was engaged in negotiations for the sale of five kilograms of cocaine. In the applicant’s case, the record indicates that there is reason to believe that the applicant was involved in planning to obtain, transport, possess, distribute, and sell cocaine, 2 kilograms of which was found on a co-defendant in his criminal case. Therefore, the differences in the definitions of “conspiracy” as interpreted in the U.S. Code versus the Act, as it relates to an aggravated felony, are of no consequence to the applicant’s case. The applicant’s case involves section 212(a)(2)(C) of the Act, not section 101(a)(43)(U) of the Act and the applicant can also be found to have been a knowing aider, abettor, assister, or colluder with others in illicit drug trafficking.

Counsel states that the facts alleged in the Indictment cannot be used for the purposes of section 212(a)(2)(C) of the Act. Counsel states that the Indictment cannot be relied upon without an opportunity for cross examination of the officers whose statements form the factual basis for the complaint. Counsel cites to *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823(9th Cir. 2003) and *Pronsvikulchai v. Gonzales*, 461 F.3d 903, 908 (7th Cir. 2006) to support this assertion. These cases do not support counsel’s assertions. *Rojas-Garcia v. Ashcroft* states that the BIA did not violate due process when it summarily dismissed an appeal because their notice procedures were sufficient. *Rojas-Garcia* at 822. The decision also states that an applicant cannot raise a “void-for-vagueness” challenge to section 212(a)(2)(C) of the Act, an admissibility statute. *Id.* at 823. Moreover, the Ninth Circuit indicated that the testimony in this case was unchallenged by the applicant. *Id.*

Pronsvakulchai v. Gonzales, 461 F.3d 903, 908 (7th Cir. 2006) indicates that an immigration judge violated a petitioner's due process when she refused to consider his testimony refuting the government of Thailand's claim that he was involved in committing a non-political crime. These cases do not indicate that the Indictment is not credible because the applicant did not have an opportunity to cross examine the officers whose statements made up the factual basis of the complaint. However, we note that we have provided the applicant with an opportunity to refute the facts as they are alleged in the Indictment by issuing a Notice of Intent to Dismiss. The applicant has not refuted the facts as alleged in the Indictment.

In addition, a grand jury indictment, like the one obtained in the applicant's case, requires probable cause be established through witness testimony and evidence presented. Black's Law Dictionary defines probable cause as, "a reasonable ground to suspect that a person has committed a particular crime...."

Counsel states that the now vacated plea cannot be used for the purposes of section 212(a)(2)(C) of the Act. Although the applicant's conviction was subsequently vacated, the factual basis of an applicant's vacated conviction is properly allowed into evidence on the issue of the applicant's inadmissibility for being a controlled substance trafficker. See *Castano v. I.N.S.*, 956 F.2d 236, 239 (11th Cir. 1992) ("[T]he factual basis of petitioner's conviction was properly allowed into evidence on the issue of petitioner's admissibility to the United States."); see also *Garces v. U.S. Attorney General*, 611 F.3d. 1337, 1345 (11th Cir. 2010) ("[T]he fact that a drug conviction was subsequently vacated, for whatever reason, does not bar immigration authorities from using the facts that led to the conviction as the basis for a "reason to believe" charge."). Counsel states that these cases do not support our decision to use the factual basis of the vacated plea as evidence in finding inadmissibility under section 212(a)(2)(C) of the Act . In regards to *Castano v. I.N.S.*, 956 F.2d 236, 239 (11th Cir. 1992), counsel states correctly that *Castano* involves an expungement and not a vacated conviction. However, the fact pattern in *Garces v. U.S. Attorney General*, 611 F.3d. 1337, 1345 (11th Cir. 2010) involves, like in the applicant's case, an invalid plea because the court failed to advise the applicant of the possible immigration consequences of his plea. *Garces* at 1344. The Court in *Garces* states that the underlying facts of a charge linger on because the charge on which the applicant was found removable does not depend on a criminal conviction, but depends on a "reason to believe" an applicant engaged in drug trafficking. *Id* at 1345. Counsel's assertions regarding our use of *Garces* to support our assertions are flawed because they assume that we are relying on the guilty plea itself as the basis for our decision, when we are relying on the underlying facts as presented in the Indictment as the basis for our decision. Further, we are not stating that the vacated guilty plea establishes that the applicant admitted that he was guilty of the alleged facts in the case. We are stating that the underlying facts as stated in the Indictment indicate that there is "reason to believe" the applicant committed the actions alleged therein. Thus, the underlying facts of the vacated conviction can continue to be used for the purposes of finding that the applicant is inadmissible under section 212(a)(2)(C) of the Act.

The record also indicates that in 1995 when applying for an immigrant visa at the U.S. Consulate in Turkey, the applicant failed to disclose his arrest and conviction on his immigrant visa application.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

In her response to our NOID, counsel states that the immigrant visa application completed by the applicant in 1995 did not ask about arrests and the applicant did not make a willful misrepresentation of his criminal record. Counsel submits a copy of this application showing that the question asked whether the applicant had been convicted of or had admitted committing a crime involving moral turpitude or had violated any law related to a controlled substance. Counsel also states that the applicant did not make a willful misrepresentation when he failed to disclose his conviction because he was under the erroneous belief that he did not have to disclose the conviction because he was granted a Judicial Recommendation Against Deportation (JRAD) in 1986. Counsel previously cited to a non-precedent decision by the AAO to support his assertions. However, we find these assertions to be unpersuasive. The previous AAO decision cited by counsel involved whether an applicant could reasonably determine what a crime of moral turpitude was in order to truthfully answer a question on his I-94 card. In the applicant's case, his crime pertains to a controlled substance violation, a term much more clear in defining what type of offenses the question is addressing. It is not reasonable to believe that the applicant did not realize he needed to answer "yes" to a question pertaining to conviction for a violation relating to a controlled substance when at the time of this misrepresentation, 17 years before the charges were dismissed and conviction vacated, the applicant had been arrested and convicted of an offense involving cocaine. It is also not reasonable to believe that the applicant thought his JRAD excused him from disclosing his criminal record. The immigration consequences of a conviction may be affected by issuance of a JRAD, but it does not erase the fact that an individual was convicted. In addition, the applicant was not in removal proceedings when he filed this application, which is the immigration consequence the JRAD addresses. Thus, the applicant is inadmissible under section 212(a)(6)(C) of the Act.

A waiver of inadmissibility under section 212(i) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

Unlike a removal hearing in which the government bears the burden of establishing a respondent's removability, the burden of proof in the present proceedings is on the applicant to establish his eligibility for admission to the United States "to the satisfaction of the Attorney General [Secretary of Homeland Security]." *See* Section 291 of the Act, 8 U.S.C. § 1361. The Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." *See* section 235(b)(2)(A) of the Act. *See* also 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an

application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008). See *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008). See *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). In the applicant's case he has not met this burden.

As the applicant is inadmissible under section 212(a)(2)(C) of the Act, for which no waiver is available, his request for a waiver under section 212(i) is dismissed as a matter of discretion.

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.