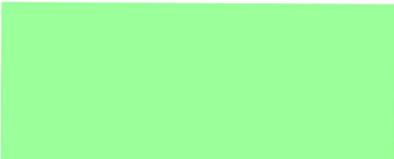


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U.S. Citizenship
and Immigration
Services



Date: **MAR 27 2013**

Office: KINGSTON FIELD OFFICE

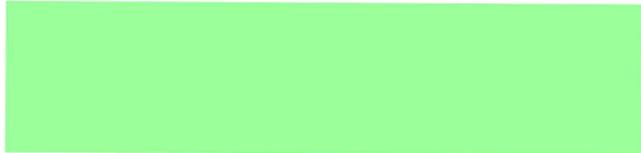
FILE: 

IN RE:

Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Kingston, Jamaica. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be granted, but the waiver application will remain denied.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

In a decision dated April 25, 2012, the AAO determined that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence and had failed to establish extreme hardship to his wife if she joined him to live in Jamaica. In addition, the AAO found there is sufficient "reason to believe" that the applicant is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in trafficking a controlled substance, and is thus inadmissible under section 212(a)(2)(C) of the Act for which no waiver is available.

On motion, counsel asserts that the consular officer denied the waiver application finding that extreme hardship was not established, but the AAO denied the appeal based on a "reason to believe" the applicant is a drug trafficker. Counsel argues that the U.S. Department of Homeland Security (USDHS) did not charge the applicant with inadmissibility for drug trafficking under section 212(a)(2)(C) of the Act, that this new ground of inadmissibility is not supported by the facts, and the applicant was not provided with an opportunity to present arguments and evidence regarding this allegation. Counsel asserts that the determination that the applicant is a drug trafficker is incongruent with the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), which was approved on June 17, 2008.

Counsel cites *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), to assert that in denying the applicant the right to present evidence in response to the new ground of inadmissibility (drug trafficking) raised by the AAO, the applicant's constitutional due process rights were violated. Counsel states that the AAO erred in relying on *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), to determine that the applicant has no due process rights for the case is relevant in the context of an alien who is abroad and applying for *initial* entry into the United States, but not for an alien who was admitted to the United States "and begins to develop the ties that go with permanent residence, [for] his constitution status changes accordingly." 459 U.S. 21 at 32. Counsel declares that the applicant has ties that go with permanent residency: his U.S. citizen wife and child, his friends, a job offer in Miami and a history of paying income taxes. Counsel states that the appellants in *Spencer* and *Landon* were seeking a hearing, but the applicant seeks an opportunity to present evidence refuting the AAO's "reason to believe" finding.

Counsel argues that the AAO erroneously concluded that the applicant was involved in drug trafficking because he "was present in the bedroom when crack cocaine was sold and [he] was in contact with his brother, [REDACTED] who was under investigation for and later convicted of

drug trafficking.” Counsel cites *Matter of Rico*, 16 I&N Dec. 181, 185 (BIA 1997), to contend that “[t]he AAO erroneously came to the conclusion that [the applicant] was inadmissible without meeting the proper standard of proof for its allegations –reasonable, substantial, and probative evidence.” Counsel asserts that “[i]n making its determination the AAO implied that [the applicant’s] presence near a possible drug sale and his association with a man named [REDACTED] constituted reasonable, substantial, and probative evidence that he was a drug trafficker. The AAO’s finding was essentially . . . guilt by association and violates his due process.”

Counsel contends that the AAO suggests that the applicant lived with his girlfriend, [REDACTED] and that she “sold crack cocaine” from her residence. Counsel asserts that [REDACTED] was not a drug dealer. She was arrested once for possession with intent to deliver (on August 29, 1991), but this charge was dismissed. She was never arrested for any other drug related offense.” Counsel argues that “there is insufficient evidence to suggest that crack cocaine was sold in [REDACTED] home on a regular basis. The only evidence is an arrest report indicating that an unrelated co-defendant purchased \$40 worth of crack from [REDACTED] on one occasion.” Counsel asserts that “[t]here is no evidence of other transactions or amounts of drugs [REDACTED] possessed . . . [the applicant’s] and [REDACTED] arrest reports do not even mention the amount of drugs found in the apartment . . . Therefore the AAO inappropriately assumed that [REDACTED] was a drug dealer.”

Counsel contends that the incident that led to the applicant’s arrest on August 29, 1992 –the police report which states “that when the police entered the home of [REDACTED] they observed [the applicant] putting a gun away and standing by cocaine on the floor,” formed the AAO’s basis for its “reason to believe” the applicant was a drug trafficker, but the drug cases against the applicant and [REDACTED] were dropped. Counsel cites *Garces v. U.S. Atty. Gen.*, 611 F.3d 1337 (11th Cir. 2010), to assert that “[a] reason to believe sole based on this report is insufficient and cannot be sustained. . . . given the brevity in the police report and the absence of additional evidence to support a “reason to believe,” [the applicant’s] arrest . . . cannot serve as a basis for a “reason to believe” under INA § 212(a)(2)(C).”

Counsel argues that the police report and decision by the immigration judge cited by the AAO convey the applicant was present in a house where drugs were allegedly sold, but it is telling that the applicant was not charged with any wrongdoing. Counsel cites *In Re Arreguin De Rodriguez*, 12 I&N Dec. 38, 42 (BIA 1995), for the proposition that “an arrest report should not be given substantial weight ‘absent a conviction or corroborating evidence of the allegations contained therein.’” Counsel declares that “[j]ust as in *Arreguin*, [the applicant] was not prosecuted for any wrong-doing and the immigration judge’s decision merely indicates that he was present when others were arrested for a drug sale.” Counsel contends that “[i]n the instant case at hand, there is no reliable proof or corroboration that [the applicant] has ever been involved in drug trafficking.”

Counsel asserts that “[i]n the few cases where the BIA has found an alien inadmissible . . . the alien either admitted to drug trafficking or was caught by immigration agents with drugs.” (citing *Matter of Favela*, 16 I&N Dec. 783, 754 (BIA 1979), *Matter of Rico*, 16 I&N Dec. 181, 186 (BIA 1997), and *Matter of R-H-*, 7 I&N Dec. 675, 678 (BIA 1958)). Counsel states that the examples in the Foreign Affairs Manual of a “reason to believe” an alien has been involved in drug trafficking involve “a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports.” (citing 9 FAM 40.23 Notes n.2(b)).

Counsel contends that “[the applicant’s] situation does not fit within any of those scenarios. He has only one arrest involving drugs, where the government’s refusal to prosecute him was due to his innocence in the situation.” Counsel asserts that “[t]here has been no admission or conviction and there are no other reports suggesting that he was involved in drug trafficking.” Counsel thus contends that “the AAO did not base its decision on any reasonable, substantial, and probative evidence.”

Counsel declares that “[the applicant] has never admitted to being involved in drug-trafficking . . . he has never been found with drugs. His presence in a location where a drug sale may have taken place is therefore not reasonable, substantial, and probative evidence that he engaged or aided in drug trafficking.” Counsel argues that “his association with someone named [REDACTED] does not suggest that [the applicant] was also trafficking drugs,” and that “mere suspicion is not enough for a reason to believe than an alien is a drug trafficker.” (citing *Garces*, 611 F.3d at 1346; 9 FAM 40.23 Notes n.2(b)). Counsel contends that “[c]harges were never filed against [the applicant] because he was innocent of any wrong doing. His arrest cannot be used . . . because it does not prove that he did anything wrong – it certainly does not support “reason to believe” grounds of inadmissibility.” Counsel argues that it is a violation of the applicant’s due process rights, and contrary to the constitutional presumption of innocence and fundamental fairness to find the applicant inadmissible under section 212(a)(2)(C) of the Act.

Counsel argues that the applicant has two brothers – [REDACTED] and [REDACTED] but is not the brother of [REDACTED]. Counsel states that the applicant was acquainted with [REDACTED] but the association with him does not suggest that the applicant is trafficking drugs, for mere suspicion is not enough for a reason to believe that an alien is a drug trafficker. 611 F.3d 1337 at 1346; 9 FAM 40.23 Notes n.2(b)). Counsel asserts that that [REDACTED] is a common last name in Jamaica, and the applicant “testified on October 7, 1996 before an immigration judge that [REDACTED] is not his brother.” Counsel declares that “[t]he AAO cited an arrest record signed by [the applicant] where he calls [REDACTED] his brother, as proof of their relationship as siblings. However, [the applicant] only signed the arrest record so the government would not impound his car . . . It should not be given any weight as to whether [REDACTED] is in fact [the applicant’s] brother.” Counsel contends that “there is no evidence tying [REDACTED] drug trafficking convictions to the applicant . . . this final basis for the AAO’s “reason to believe” is inappropriate.”

Counsel argues that the applicant is eligible for a waiver of inadmissibility and the hardship to the applicant’s wife from not allowing him to return to the United States is beyond the hardship normally associated with a prolonged absence, and that the applicant and his spouse would not be able to survive financially in Jamaica. Counsel cites *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), for the proposition that freedom of choice in personal matters such as a marital relationship is protected by the Due Process Clause and separation of the applicant from his wife has ruined their lives. Counsel contends that the applicant’s wife is stressed from the financial burden of having to endure foreclosure and bankruptcy proceedings while separated from her husband.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2). As to reconsideration, counsel makes new arguments contending that the applicant and [REDACTED] drug charges were dropped, the applicant never admitted to drug trafficking and was never found with any drugs, and in view of *Garces* there is insufficient evidence

in which to have a “reason to believe” the applicant is a drug trafficker; that *Arreguin* indicates that an arrest report should not be given substantial weight; that the AAO did not use the proper standard of proof (reasonable, substantial, and probative evidence) in finding the applicant was a drug trafficker; that the applicant is not the brother of [REDACTED] and there is no evidence tying him to [REDACTED] drug trafficking; that the applicant’s approved Form I-212 is inconsistent with the AAO’s finding of inadmissibility for drug trafficking; and that the applicant’s constitutional rights were violated by the AAO. As to reopening, counsel provides new evidence consisting of police records, bankruptcy documents, and a letter from an attorney with [REDACTED] dated May 5, 2010.

Upon review of motion to reopen and reconsider, the AAO will grant the motion, but for the reasons set forth in this decision, we will again dismiss the appeal and deny the waiver application.

Section 212(a)(2)(C) of the Act provides:

- (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.

On August 29, 1991, in Florida, the applicant was arrested for possession of crack cocaine in violation of Fl. Stat. § 893.13 and possession of a firearm with serial numbers removed in violation of Fl. Stat. § 790.27. The applicant provided a disposition notice stating that the Assistant State Attorney declined to prosecute him for these charges. On motion, the applicant provides additional records stating that prosecution was declined.

Counsel cites *Garces* to argue that an arrest report in itself is not enough to justify a “reason to believe” an alien is inadmissible under section 212(a)(2)(C) of the Act, but the police arrest reports in *Garces* were not useful in determining *Garces* involvement in drug trafficking because they did not record the direct observations of facts and stated that “no drugs or drug paraphernalia were found on *Garces* or in his car, and that *Garces* was not in the room when *Canevaro* handed the drugs to the undercover officer.” *Id.* at 1349-1350.

In the instant case, the applicant’s arrest report dated August 29, 1991 is a recorded observation of facts. The arrest report states:

At [approximately] 11:30pm on 08/09/91 undercover officers were conducting a narcotics investigation in the [REDACTED] apartments. An individual known as [REDACTED] met with officers and promised that if he could get a [illegible] he could get them crack cocaine. He then led officers to this subjects [the applicant’s] residence. Officers made one \$40 crack purchase from the home by sending [REDACTED] in. The second

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time [redacted] was given \$40 officers followed him in. Once inside officers observed this individual [the applicant] in a bedroom where [redacted] was conducting an exchange with [redacted]. [The applicant] was observed as he shoved a cocked 25 automatic under a mattress. The numbers had been removed from the gun. Additional crack was on the floor.

In view of the arrest report, which states that the applicant was present in the bedroom when crack cocaine was sold and the applicant shoved a cocked 25 automatic under a mattress, there is sufficient evidence for a "reason to believe" that the applicant was a knowing aider, abettor, assister, conspirator, or colluder with others in trafficking cocaine. A "reason to believe" charge does not require evidence that the alien himself actually handled the drugs, but there must be some reasonable, substantial, and probative evidence that the alien was a "knowing and conscious participant" in a drug transaction. *Id.* at 1350. (citing *Rico*, 16 I&N Dec. at 186; *R-H-*, 7 I&N. Dec. 675, 678 (BIA 1958)).

Counsel cites *Arreguin* as stating that "an arrest report should not be given substantial weight 'absent a conviction or corroborating evidence of the allegations contained therein.'" *Id.* at 42. However, the Board's statement about the weight of an arrest report is made in the context of an arrest for suspicion of smuggling aliens and whether discretionary relief should be granted, and is not relevant in determining inadmissibility for drug trafficking under section 212(a)(2)(C) of the Act.

Counsel declares that aliens who engage in drug trafficking admit to drug trafficking or are caught by immigration agents with drugs. Counsel contends that in the instant case [redacted] is not a drug dealer because she was arrested only once for possession with intent to deliver (on August 29, 1991), the arrest report does not mention the quantity of drugs found in the apartment, and the drug charges against the applicant and [redacted] were dismissed.

Section 212(a)(2)(C) of the Act requires only that an immigration officer "knows or has reason to believe" that the person 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 a controlled substance, or endeavored to do so. "A criminal conviction is unnecessary to establish a basis for exclusion under this provision." *Matter of Rico* at 181. *See also Matter of Favela*, 16 I&N Dec. 753 (BIA 1979) ("This Board has held that even where a criminal complaint has subsequently been dismissed, an alien could be excluded under section 212(a)(23) of the Act as a trafficker when the immigration officer had reason to believe that the alien was a trafficker." Section 212(a)(2)(C)(i) of the Act includes no de minimus quantity of a controlled substance, and no requirement of multiple arrests or convictions for finding illicit trafficking. An alien 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.

The oral decision of the immigration judge dated October 7, 1996 provides further "reason to believe" the applicant was involved in drug trafficking. The decision states the following:

The police officer who arrested the [applicant] on that occasion, also testified before the Court today. He stated that [redacted] was a man known to sell crack cocaine in the streets. [redacted] was approached by the police to go into that house, which was

pointed out by [REDACTED] as a house where crack cocaine could be purchased, and was asked to go inside and made a \$40 purchase. [REDACTED] did so and returned with the crack cocaine to the police. He was asked to go and get another \$40 worth of crack cocaine and on that occasion the police followed suit inside the house. The officer who testified, stated that he saw [REDACTED] the girlfriend of the [applicant], selling the crack cocaine to [REDACTED]. At that point, [REDACTED] threw the cocaine on the ground and the [applicant] was charged with possession of crack cocaine because he admitted to living in that residence.

Additionally, the police officer testified to having personally observed the [applicant] with the firearm in his hands and then placed it under the mattress of the bed. He testified that he remembered the case closely, because at the time of that arrest, a phone call came to the house. The police officer answered and talked with a man by the name of [REDACTED]. The police officer posed as a Jamaican in the house and talked with this man, [REDACTED] about a drug deal. Unbeknownst to the officer, the phone of [REDACTED] was being tapped pursuant to a drug investigation.

The [applicant] was asked who was [REDACTED]. He attempted to deny knowledge of the man, stating that some people said he was some sort of far away cousin, but that he did not really know him until he came to live in the United States and tried to make the Court believe that there really was no connection between him and [REDACTED]. The officer had stated that [REDACTED] has been convicted of drug trafficking and is serving a 35-year prison sentence. Another of the [applicant's] witnesses, [REDACTED] also admitted to knowing that [REDACTED] was convicted of said crime. Moreover, he stated that he knew both [REDACTED] and the [applicant], and knew them to be brothers.

When the [applicant] was asked if [REDACTED] was his brother, he denied him being his brother. Yet, in Composite Exhibit 6, tab number 4, the arrest record has a statement signed by the [applicant], in which the [applicant] admitted to having signed, which states: "I request my brother, [REDACTED] be given my vehicle." This is the same [REDACTED] that [REDACTED] stated was the brother of the [applicant] and who is currently serving a 35-year prison sentence.

In view of the events described in the August 29, 1991 arrest report and the oral decision of the immigration judge, it is clear the applicant was present in the bedroom when crack cocaine was sold. Counsel argues that the applicant is not the brother of [REDACTED]. Even if we accept that the applicant is not the brother of [REDACTED] the applicant was in contact with [REDACTED]. In sum, the events in the arrest report and the oral decision of the immigration judge provide a sufficient basis for a reason to believe that the applicant has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in cocaine. Accordingly, we find the applicant is inadmissible under section 212(a)(2)(C) of the Act for which no waiver is available.

Counsel argues that the applicant has an approved Form I-212 and the determination that the applicant is a drug trafficker is inconsistent with the approval. The Form I-212 application is a

separate application from the Form I-601 waiver application. An approved Form I-212 does not preclude the AAO from finding inadmissibility under section 212(a) of the Act.

Counsel contends that the applicant's constitutional due process rights were violated because the applicant was not provided with an opportunity to present evidence in response to the new ground of inadmissibility (drug trafficking) raised by the AAO on appeal. But even were this a procedural error, it is not clear what remedy would be appropriate beyond the motion process itself. The applicant has in fact made new arguments and presented new evidence on motion, which the AAO has considered.

The burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the waiver application will remain denied.

ORDER: The waiver application remains denied.