



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

H2

Date: **DEC 07 2012**

Office: WEST PALM BEACH

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

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 our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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,

for Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a crime involving a controlled substance. The applicant was also found to be inadmissible to the United States pursuant to section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), for being a controlled substance trafficker. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen spouse.

On September 7, 2010, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based upon his approved immigrant petition and an Application for Waiver of Grounds of Inadmissibility (Form I-601).

In a decision dated March 23, 2011, the field office director found the applicant inadmissible for having been convicted of the offense of possession of cannabis/20 grams or less. The director also found that the applicant's September 22, 2009, arrest for "possession of marijuana over 20 grams" rendered the applicant inadmissible as an alien whom the immigration officer knows or has reason to believe has been an illicit trafficker in a controlled substance or has been a knowing assister, abettor, conspirator, or colluder with others in the trafficking of a controlled substance. The director denied the Form I-601 waiver application stating that a waiver was not available for inadmissibility under section 212(a)(2)(C) of the Act.

On appeal, counsel for the applicant states that the field office director erred in finding that there was "reason to believe" the applicant was a drug trafficker. Counsel states that the director "placed too much evidentiary importance" on the arrest report, and that the director's conclusion contradicts Eleventh Circuit precedent case law. Counsel asserts that the applicant is eligible for a waiver under section 212(h)(2)(B) and that the evidence outlining medical and emotional difficulties demonstrate extreme hardship to his U.S. citizen wife.

The record includes, but is not limited to: a copy of the applicant's marriage certificate; the applicant's spouse's declaration; medical records; tax documents and pay stubs; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

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

- (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.

The phrase “any illicit trafficking in any controlled substance” includes any unlawful trading or dealing in any controlled substance. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board of Immigration Appeals (BIA) determined that an alien was inadmissible into the United States pursuant to section 212(a)(23) of the Act, currently section 212(a)(2)(C), because he attempted to smuggle 162 pounds of marijuana into the United States. The BIA concluded that in light of the large quantity of marijuana involved, it was not intended for personal use, and the alien was deemed an illicit trafficker as contemplated by the statute. *Id* at 186. Similarly, in *Matter of P-*, 5 I&N Dec. 190 (BIA 1953), the BIA concluded that an illicit trafficker in controlled substances is a person who purchases or possesses any controlled substance for purposes of resale in the United States.

In order for an 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; *see also Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000) (stating that a “reason to believe” an alien has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) must be supported by “reasonable, substantial, and probative evidence.”). 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 shows that on September 22, 1999, the applicant was arrested for possession of more than 20 grams of cannabis and possession of drug paraphernalia. On October 9, 1999, the applicant was charged with violations of Florida Statutes §§ 893.13(6)(a) and 893.147(1). The Information alleges that on September 22, 1999, the applicant did:

“knowingly be in actual or constructive possession of a controlled substance, to-wit: more than twenty (20) grams of cannabis, commonly known as marijuana.”

“unlawfully use, or possess with intent to use, drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, OR to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance.”

On October 25, 1999, the applicant was convicted of possession of drug paraphernalia, and was sentenced to time served. On September 23, 2002, the Office of the Florida State Attorney filed a “*Nolle Prosequi*” for possession of over 20 grams of cannabis, which means that the state declined to prosecute the charge. On May 20, 2009, the 19th Judicial Circuit Court in and for [REDACTED]

Florida, entered a disposition vacating the applicant's "use or possession of drug paraphernalia" charge.

The AAO notes that an applicant may be deemed 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. Here, the Arrest Affidavit reflects that law enforcement officers were conducting a narcotics-related investigation, which led them to the applicant's home. The applicant consented to a search of his home after stating that he was the only person that lived at the home. The affidavit indicates that the law enforcement officers searched the home for drugs and found 51 grams of cannabis and a triple beam scale. The applicant then admitted to the police officers that the marijuana and the scale they found belonged to him.

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. As noted above, the only requirement for an applicant to be inadmissible under section 212(a)(2)(C) of the Act 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 (9<sup>th</sup> Cir. 2000). Here, the AAO finds, based on the quantity of marijuana found in the applicant's home, and the fact that the police officers found inside the applicant's home an instrument commonly used in drug trafficking operations to weigh the quantities sold, that the record contains reasonable, substantive, and probative evidence of a drug-trafficking activity. *Cf. U.S. v. Gamboa*, 166 F.3d 1327, 1332 (11th Cir. 1999) (intent to distribute in the criminal law context was shown by the quantity of drugs, paraphernalia, and triple-beam scales found inside a residence). Moreover, the applicant told the police officers that he was the only person residing at the home and that he had moved into the house three weeks before the officers conducted the search. Additionally, the Arrest Affidavit reflects that the applicant told the officers that the cannabis and the scale were his. The field office director therefore had "reason to believe" that the applicant was an illicit drug trafficker or a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. The burden of proving that an applicant is not inadmissible as a drug trafficker remains with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant in this case has not provided any evidence to overcome the record evidence supporting the finding that there is "reason to believe" he was involved in the trafficking of cannabis.

Counsel points to *Garces v. U.S. Att'y Gen.*, a case in which the Eleventh Circuit held that in the particular circumstances of the case, an alien's vacated guilty plea along with police reports did not amount to reason to believe the alien trafficked in controlled substances. 611 F.3d 1337, 1350 (11th Cir. 2010). The Eleventh Circuit reached its finding after noting that the applicant's conviction for trafficking in cocaine had been vacated due to procedural defect, the record of conviction was unavailable, the alien offered a different account of the events that led to his arrest while denying any involvement in drug trafficking, and the conclusions in the police report did not amount to a reasonable probability that the alien was involved in drug trafficking. *Id.* at 1345-49. Importantly, the Eleventh Circuit noted that the police report reflected that "no drugs or drug paraphernalia were

found on [the alien] or in his car, and [the alien] was not in the room when [the drug trafficker] handed the drugs to the undercover officer.” *Id.* at 1349. Though the Eleventh Circuit recognized that the reason to believe charge does not require evidence that an alien actually handled a drug transaction, there must be some reasonable, substantial, and probative evidence that the alien is a knowing participant in a drug-related offense. *Id.* at 1350. Consequently, in the circumstances of that particular case, the alien’s act of driving his neighbor to a hotel in which he would sell cocaine to undercover agents was insufficient to establish “reason to believe” the alien was a drug trafficker.

In the present case, however, the record of proceedings contains reasonable, substantive, and probative evidence demonstrating a reason to believe the applicant was involved in drug trafficking. The AAO makes this finding only after examining the entirety of the record evidence relating to the applicant’s September 22, 1999 arrest. The record includes: the Information, which states that the applicant unlawfully possessed more than 20 grams of cannabis; and the Arrest Affidavit, which indicates that 51 grams of cannabis and a triple beam scale were found in his home after law enforcement officers conducted a search to which he consented. The applicant does not dispute the police officer’s observations and conclusions as contained in the police report, nor has he offered a different version of the events that transpired that day.

Based on the foregoing, the AAO finds that there is sufficient reason to believe that the applicant was involved in the illicit trafficking of a controlled substance, and he is inadmissible to the United States under section 212(a)(2)(C) 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.

The AAO notes that the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a separate crime involving a controlled substance. Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

- (i) [A]ny 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 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.

Section 212(h) of the Act provides, in pertinent part:

- (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

...

(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 [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 . . . .

The record further shows that on May 20, 2009, the same day the state court vacated the applicant's possession of drug paraphernalia conviction, the applicant was convicted in the Circuit Court for [REDACTED] Florida of possession of cannabis/20 grams or less. The record of conviction conclusively demonstrates that the applicant was found guilty of a controlled substance violation involving less than 20 grams of marijuana. The field officer found that the applicant's conviction of possession of cannabis rendered him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant does not contest inadmissibility resulting from this conviction on appeal. Additionally, the AAO notes that the only waiver available for a controlled substance offense is under section 212(h) of the Act for simple possession of 30 grams or less of marijuana. As such, it appears that the applicant would be eligible to apply for a section 212(h) waiver of the ground of inadmissibility arising under section 212(a)(2)(A)(i)(II) of the Act. Nevertheless, the applicant is inadmissible under section 212(a)(2)(C) of the Act, for which there is no waiver available. Accordingly, the AAO finds the applicant is statutorily ineligible for a waiver, and the waiver application is dismissed.

Section 291 of the Act provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. The appeal will therefore be dismissed and the Form I-601 will be denied.

**ORDER:** The appeal is dismissed.