U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Eloy Detention Ctr,1705 E. Hanna Rd
Eloy, AZ 85131

Name: GUTIERREZ-RODRIGUEZ, JOSE... **A 090-835-106**

Date of this notice: 9/26/2016

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

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GUTIERREZ-RODRIGUEZ, JOSE LUIS
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Name: GUTIERREZ-RODRIGUEZ, JOSE... **A 090-835-106**

Date of this notice: 9/26/2016

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam:

File: A090 835 106 – Eloy, AZ

Date: SEP 26 2016

In re: JOSE LUIS GUTIERREZ-RODRIGUEZ a.k.a. Jose Gutierrez

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Johnny Sinodis, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (withdrawn)

Lodged: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status (sustained)

APPLICATION: Adjustment of status; remand

The respondent appeals from the Immigration Judge's April 21, 2016, decision denying his application for adjustment of status under section 245(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1255(a). The record will be remanded to the Immigration Court for further proceedings.

The respondent is a native and citizen of Mexico who entered the United States without inspection at an unknown date (I.J. at 1-2; Exhs. 1, 1A). His status was adjusted to that of a temporary resident pursuant to section 240A(a) of the Act, effective February 26, 1988, and he was admitted to the United States at the port-of-entry in Nogales, Arizona, after presenting his valid Temporary Resident Card (Form I-688) in April 1991 (I.J. at 2; Exhs. 1, 1A). The respondent did not adjust his status to that of a lawful permanent resident, and his temporary resident status was terminated on November 18, 1996 (I.J. at 2). He remained in the United States longer than permitted without authorization (I.J. at 2).

On September 16, 2013, the respondent pled guilty to solicitation to commit possession of marijuana for sale in violation of sections 13-1002 and 13-3405 of the Arizona Revised Statutes, and disorderly conduct in violation of section 13-2904 of the Arizona Revised Statutes, class 6 felonies for which he was sentenced to 12 months of incarceration and 2 years of probation (I.J. at 4-5; Exh. 3). The respondent was placed into these removal proceedings with the service of a Notice to Appear ("NTA") on September 17, 2014 (I.J. at 1; Exh. 1). The Department of Homeland Security ("DHS") withdrew the charge of removability under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), and lodged an additional charge of removability under section 237(a)(1)(C)(i) of the Act, 8 U.S.C. § 1227(a)(1)(C)(i), on March 12, 2015 (I.J. at 1-2; Exhs. 1, 1A). The respondent conceded removability under section 237(a)(1)(C)(i) of the Act, and applied for adjustment of status based on his marriage to his United States citizen wife (I.J. at 2-3; Exhs. 1A, 6).

The elements of the offense of conviction require that the respondent, with the intent to promote or facilitate the commission of possession of marijuana for sale, commanded, encouraged, requested or solicited another person to engage in specific conduct which would constitute possession of marijuana for sale or to establish the other's complicity in its commission (I.J. at 5; Exh. 3). Arizona Revised Statutes §§ 13-1002 and 13-3405. In entering his guilty plea, the respondent acknowledged that he "had discussions with other people about selling marijuana, and in fact, there was marijuana available for sale" (I.J. at 6-7; Exh. 23 at 6). Moreover, police reports note the purchase of six grams of marijuana for $100.00 by an undercover officer from the respondent through an intermediary on March 20, 2012, the purchase of an additional 11 grams of marijuana for $200.00 by the same officer through the same intermediary in front of the respondent's residence on April 5, 2012, the purchase of an additional six grams of marijuana for $100.00 by the same officer from the respondent through an intermediary on April 6, 2012, and the purchase of an additional six grams of marijuana for $100.00 by the same officer through an intermediary at the respondent's address on April 12, 2012 (I.J. at 7; Exhs. 7, 17). The record also reflects that the respondent arranged for the same undercover officer to purchase approximately one quarter ounce of marijuana for $160.00 from his girlfriend through the same intermediary on April 20, 2012 (I.J. at 7-8; Exh. 17).

In an April 21, 2016, decision, the Immigration Judge found that the elements of the offense to which the respondent pled guilty, which were corroborated by the factual basis accepted by the respondent during the plea proceedings, establish a "reason to believe" that he has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in a controlled substance (I.J. at 5-10). Although the respondent's expert witness maintained that the police reports, probable cause statement, and grand jury testimony are unreliable due to numerous irregularities, the uncontested portion of these records supports the conclusion that the respondent participated in the illicit trafficking of marijuana (I.J. at 7-8; Exh. 7, 17; Tr. at 74-105). While noting that the respondent denied any involvement in drug trafficking, the Immigration Judge found that he lacked credibility based on inconsistencies between his testimony during his hearing and his guilty plea before the criminal court (I.J. at 8-9; Exh. 23; Tr. at 232-50). Consequently, the Immigration Judge found that the respondent did not meet his burden of proof in showing his admissibility in the face of evidence establishing a "reason to believe" that he participated in the illicit trafficking of marijuana (I.J. at 10).[1]

For purposes of section 212(a)(2)(C) of the Act, "illicit trafficking" refers to any act of unlawful trading or dealing in a controlled substance, or any act that knowingly aids, assists, or facilitates another in such activity. *Matter of P-*, 5 I&N Dec. 190, 192-93 (BIA 1953); *cf. also Matter of Davis*, 20 I&N Dec. 536, 540-41 (BIA 1992). Although there is no controlling case law defining a "reason to believe" as that phrase is used in section 212(a)(2)(C) of the Act, similar language has generally been interpreted as importing a "probable cause" requirement. *See Matter of A-H-*, 23 I&N Dec. 774, 789 (A.G. 2005) (applying a probable cause standard to determining whether there are "reasonable grounds for regarding [an alien] as a danger to the security of the United States" within the meaning of former section 243(h)(2)(D) of the Act,

[1] An alien's inadmissibility under section 212(a)(2)(C)(i) constitutes a "ground for mandatory denial" of an application for adjustment of status because it precludes the applicant from demonstrating that he is admissible to the United States as required by section 245(a) of the Act.

8 U.S.C. § 1253(h)(2)(D) (1994)); *Matter of U-H-*, 23 I&N Dec. 355, 356 (BIA 2002) (applying a probable cause standard to determining whether there is "reasonable ground to believe" that an alien is engaged in, or is likely to engage in, terrorist activity within the meaning of section 212(a)(3)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(3)(B)(i)(II) (2000)). We find "probable cause" to be a reasonable interpretation of the "reason to believe" requirement of section 212(a)(2)(C), and adopt that interpretation here.

We find that the Immigration Judge was justified in concluding that the respondent was a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. The objective facts of this case justify an immigration officer in having probable cause or a reason to believe that the respondent was involved in drug-trafficking. *See Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (noting that an alien may be excluded if an immigration officer knows or has reason to believe the alien is or has been an illicit trafficker in drugs). The respondent has not provided credible evidence disputing this finding and thus has not shown that he is not inadmissible and eligible for adjustment of status. *See* section 245(a) of the Act. Finally, we note that the ground of inadmissibility set forth at section 212(a)(2)(C) of the Act is not waivable under section 212(h) of the Act, 8 U.S.C. § 1182(h). *Matter of K-L-*, 20 I&N Dec. 654, 660 & n.7 (BIA 1993).

Contrary to the respondent's assertions on appeal, this case is not controlled by *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013) (Respondent's Brief at 2-4, 11-13). In contrast to the alien in *Moncrieffe v. Holder*, *supra*, the respondent has not been charged with removability for having been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). *See* 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii).

During the pendency of the appeal, the respondent filed a motion to remand and administratively close the case or continue proceedings pending the adjudication of his application for a U visa, which is available to certain victims of physical or mental abuse as outlined at section 101(a)(15)(U) of the Act, 8 U.S.C. § 1101(a)(15)(U). In *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012), the Board outlined the factors that the Immigration Judge should properly consider in adjudicating any request for a continuance related to a pending U visa application. United States Citizenship and Immigration Services ("USCIS") has exclusive jurisdiction over the U visa application (along with any application for adjustment of status that may be filed should the U visa be approved), notwithstanding the existence of a removal order. However, *Matter of Sanchez Sosa*, *supra*, concludes that continuances for the adjudication of a U visa application may still be appropriate under certain circumstances. *See* section 245(m) of the Act, 8 U.S.C. § 1255(m); 8 C.F.R. § 245.24(k); *Matter of Sanchez Sosa*, *supra*, at 810-12.

In *Matter of Sanchez Sosa*, *supra*, we identified several salient factors for the Immigration Judge to consider in determining if good cause exists for granting a continuance based on an applicant's potential U visa eligibility, including, but not limited to: (1) the DHS's position with respect to the request; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for the continuance request, along with any other relevant procedural factors. *See id.* at 812-13. As we explained in *Matter of Sanchez Sosa*, *supra*, if the DHS does not oppose the continuance, generally no further inquiry is required. *See id.* at 813. However, where the DHS opposes the continuance, the Immigration Judge should consider the likelihood of the U visa application's success by (1) first inquiring whether the applicant has demonstrated that she

suffered substantial physical or mental abuse as the victim of a qualifying crime, and if so, (2) next exploring whether the applicant has been, is being, or will be helpful to the authorities. *See id.* at 813-14.

In *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), the Board outlined a list of factors for Immigration Judges to consider in determining whether administrative closure is appropriate notwithstanding one party's objection to this action. *See id. overruling Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996). Therein, we outlined a non-exhaustive list of considerations, including, as appropriate (1) the reason(s) for administrative closure, (2) the basis for any opposition to administrative closure, (3) the likelihood that the applicant will succeed on any petition, application, or other action she is pursuing outside of proceedings, (4) the anticipated duration of closure, (5) the responsibility of either party, if any, in contributing to any current or anticipated delay, and (6) the ultimate outcome of proceedings when the case is recalendared before the Immigration Judge. *See id.* at 696.

Based on the foregoing, we conclude that a remand of the record is appropriate. Notably, both *Matter of Sanchez Sosa*, *supra*, and *Matter of Avetisyan*, *supra*, set forth fact-specific criteria for evaluating the propriety of any continuance request related to pursuit of a U visa and administrative closure over a party's objection, respectively, such that the Immigration Judge should have the opportunity to develop the record with regard to these considerations in issuing a new decision.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion, and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ELOY, ARIZONA

File: A090-835-106 April 21, 2016

In the Matter of

JOSE LUIS GUTIERREZ-RODRIGUEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: INA Section 237(a)(1)(C)(i), a nonimmigrant visitor who has failed to comply with the conditions of the status under which he was admitted

APPLICATIONS: Adjustment of status pursuant to INA Section 245(a), waiver of inadmissibility pursuant to INA Section 212(h)

ON BEHALF OF RESPONDENT: Mr. Johnny ~~Sonotes~~Sonodis, Esquire

ON BEHALF OF DHS: Ms. Julie Nelson, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL HISTORY

These removal proceedings were initiated by the filing of a Notice to Appear dated September 17th, 2014, by the Department of Homeland Security. Exhibit 1. The Department later filed an additional charging document, a Form I-261, Additional Charges of Inadmissibility/Deportability, dated March 12th, 2015. Exhibit 1A. The sum of those documents is that the Department alleges that the respondent is not a citizen or

national of the United States but is a native and citizen of Mexico who last entered the United States on an unknown date, doing so without having been admitted or paroled after inspection by an immigration officer. The Department alleges that the respondent's status was adjusted to that of a temporary resident pursuant to INA Section 245(a) of the Act, effective February 26th, 1988, that on or about April 1991 the respondent was admitted to the United States at the Nogales, Arizona, port of entry by presenting his valid Form I-688 Temporary Resident Card, that the respondent did not adjust his status to that of a lawful permanent resident, and that his temporary resident status was terminated pursuant to 8 C.F.R. §245(a)(D)(2)(c) on November 18th, 1996. Finally, the Department alleges that the respondent remained in the United States after November 18, 1996, without the authorization of the Immigration and Naturalization Service or its successor, the Department of Homeland Security. Based on those allegations, the Department charges that the respondent is subject to removal from the United States pursuant to INA Section 237(a)(1)(C)(i), as a nonimmigrant who failed to comply with the conditions of the nonimmigrant status under which he was admitted.

REMOVABILITY

The respondent admitted each of the factual allegations with the exception of Allegation 4, alleging that the respondent was not admitted or paroled after inspection on his last entry. He conceded his removability as charged pursuant to INA Section 237(a)(1)(C)(i). Based on the respondent's admissions and concessions, the court sustains the charge by clear and convincing evidence.

RELIEF

Respondent designated Mexico as the country of removal and expressed no fear of return to that country recognizable under INA Sections 208 or 241(b)(3) or Article 3 of the Convention Against Torture. The respondent seeks relief from removal

in the form of adjustment of status pursuant to INA Section 245(a) and waiver of inadmissibility pursuant to INA Section 212(h).

Burden of proof:

The respondent has the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief apply, the alien has the burden of proving by a preponderance of the evidence that such grounds do not apply. INA Section 240(c)(4)(A); 8 C.F.R. §1240.8(d); Young v. Holder, 634 F.3d 1014 (9th Cir. 2012); and Matter of Grijalva, 19 I&N Dec. 713 (BIA 1988).

The court may grant an application solely on the basis of credible testimony without further corroboration. INA Section 240(c)(4)(C). But the court will do this only if it's satisfied that the respondent's "testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the" respondent is eligible for the relief sought. Id. In determining whether the respondent has met the burden of proof, the court "may weigh credible testimony along with other evidence of record." Id.

In making credibility determinations, the court must "consider the totality of the circumstances and all relevant factors." Id. The court "may base a credibility determination on the witness' or applicant's demeanor, candor, responsiveness," as long as the "inherent plausibility of the account." Id. The court may also consider the consistency between "written and oral statements (whenever made, whether or not under oath, and considering the circumstances under which such statements were made), the internal consistency of each statement, the consistency of such statements with other evidence of record...and any inaccuracies or falsehoods in such statements without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart

of the applicant's claim or any other relevant factor." Id.

Adjustment of status:

To be eligible to adjust to lawful permanent resident status under INA Section 245(a), the alien must show that he is not inadmissible from the United States or that all grounds of inadmissibility have been waived. INA Section 245(a).

If eligibility is established, adjustment may be granted in the exercise of discretion. Matter of Arai, 13 I&N Dec. 494 (BIA 1970). The alien bears the burden of establishing eligibility for adjustment of status and demonstrating that relief is merited in the exercise of discretion. See Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981).

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However, the Department asserts that the respondent is unable to establish his admissibility because a consular or immigration officer has a "reason to believe" that he has been involved in drug trafficking pursuant to INA Section 212(a)(2)(C), for which no waiver of inadmissibility is available. INA Section 212(a)(2)(C) provides that "any alien who the consular officer or the Attorney General knows or has reason to believe (i) is or has been an illicit trafficker of 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 of any such controlled or listed substance or chemical or endeavored to do so." INA Section 212(a)(2)(C). The Department relies on the elements of the respondent's conviction on September 16th, 2013, in the Arizona Superior Court for solicitation to commit possession of marijuana for sale, a Class 6 felony violation of ARS §§1002, 3401, 3405, 3418, 701, 702, and 801. The facts and circumstances of the respondent's July 5th, 2012, arrest leading to that conviction, as detailed in the Mesa Police Department "Incident/Investigation

Supplemental Report," in case number 2012-0690700 and the probable cause statement filed with the North Mesa justice of the peace court -- the latter submitted to justify the respondent's arrest on charges of possession of marijuana for sale, misconduct involving weapons, and possession of drug paraphernalia. Exhibits 3 and 7. The respondent asserts that errors in the police report and probable cause statement make those sources unreliable, ~~and~~ that the respondent's decision to plead guilty to the charge of ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of marijuana for ~~sale~~ Sale was tactical and not reflective of his actual guilt, and that this court may not consider the elements of the respondent's conviction beyond the element of ~~solicitation~~ Solicitation in determining whether there exists a reason to believe that the respondent has been complicit in the illicit trafficking of a controlled substance. Exhibits 11 and 22.

Contrary to the respondent's assertion, he was not convicted simply of "~~solicitation~~Solicitation" in violation of ARS §13-1002, but was convicted of "~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~Sale" in violation of ARS §§13-1002, 3401, 3405, 3418, 701, 702, and 801. Exhibits 3 and 7. The elements of the offense to which the respondent pled guilty are that he, with the intent to promote or facilitate the commission of possession of marijuana for sale, commanded, encouraged, requested, or solicited another person to engage in specific conduct which would constitute possession of marijuana for sale or establish the other's complicity in its commission. ARS §§1002 and 3405.[1]

[1] Section 3405 of Chapter 13 of the Arizona Revised Statutes divisibly delineates, in four subsections of Subsection A, several different marijuana-related crimes. The portion of the record of conviction available to the court does not identify which subsection the respondent's conviction is based upon. However, the "Suspension of Sentence-Probation Granted" (conviction document) ~~relatively~~ narratively describes the respondent's conviction as being for "~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~Sale." Possession of ~~marijuana~~ Marijuana for ~~sale~~ Sale is specifically

Standing alone, those elements -- with the intent to promote or facilitate the possession of marijuana for sale the respondent encouraged, et cetera, another person to engage in possession of marijuana for sale -- establish an INA Section 212(a)(2)(C) "reason to believe" that the respondent "is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any [controlled substance]." INA Section 212(a)(2)(C).

In entering his plea of guilty to that offense, the respondent necessarily admitted to the factual basis which would establish those elements. 16 ARS Rules (Procedural Rule 17.3). The transcript of the plea proceedings reflects the following colloquy:

The Court: How do you plead to count 23, as amended, ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~Sale, Class 6 designated felony, guilty or not guilty?

The Defendant: Guilty.

The Court: And Mr. Raynak, are you going to assist in the factual basis on that court?

Mr. Raynak: Yes.

The Court: Go ahead.

Mr. Raynak: Judge, on that date in Maricopa County, my client had discussions with other people about selling marijuana, and in fact, there was marijuana available for sale.

The Court: Okay, and, Mr. Gutierrez, you heard what Mr. Raynak said that you did on that date. Is that in fact what you did?

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prohibited by ARS §13-3405(a)(2), and it is the elements of that offense and the elements of ~~solicitation~~ Solicitation in violation of ARS §13-1002 that the court cites.

The Defendant: Yes, your honor.

Exhibit 23, Page 6.

Thus, the elements of the respondent's offense, corroborated by the factual basis accepted by the respondent, establish a "reason to believe" that the respondent "is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any...controlled substance." INA Section 212(a)(2)(C).

The record also includes the police reports (Exhibits 7 and 17) and probable cause statement reflected on the release questionnaire and supplemental release questionnaire. Exhibit 7. Those documents detail the purchase of six grams of marijuana for $100 by an undercover officer from the respondent through an intermediary and in the officer's presence on March 20th, 2012; an additional 11 grams of marijuana for $200 by the same officer through the same intermediary and in the officer's presence on April 5th, 2012, in front of a residence at 852 South Spur in Mesa; an additional six grams of marijuana for $100 by the same officer from the respondent through an intermediary and in the officer's presence on April 6th, 2012; and an additional six grams of marijuana for $100 by the same officer through the same intermediary on April 12th, 2012, at the same address.[2] The police report also details a purchase of approximately one quarter ounce of marijuana for $160 by the same officer through the same intermediary from respondent's girlfriend -- a purchase that was

[2] On this occasion, the undercover officer did not actually see the respondent. The officer drove with the intermediary to the same residence he had visited on April 6th, 2012 and where he had purchased marijuana from the respondent. The officer had, following the April 6th, 2012, buy, utilized a computer system to identify the resident of 852 South Spur in Mesa, and through the computer search confirmed by name and photograph that the respondent was the resident. Upon exiting the residence and returning to the officer's vehicle on April 12th, 2012, the intermediary told the respondent that "he gave his brother, Jose Gutierrez, the listed $100 for an ounce of marijuana (approximately seven grams)." Exhibit 7, Page 3.

arranged by the respondent.[3] The documents also detail the results of a May 18th, 2012, search of the residence at 852 South Spur in Mesa, Arizona. When confronted by law enforcement officers there to conduct the search, the respondent said that "he knew what this was about and could show us where everything was in the house." The search of the residence, which the respondent shares with his wife and two small children, revealed small quantities of methamphetamine, cocaine, and marijuana, several items of drug paraphernalia, a scale, a handgun, and a shotgun.

The respondent argues that the police report is unreliable because of numerous irregularities. Corina Griffith-~~[phonetic]~~, a private investigator and former officer with the Maricopa County Sherriff's Department and the Buckeye Police Department, an expert on the writing of police reports and identifying the indicia of drug dealing, described the reports as "sloppy" and with more mistakes than any report she had ever seen. Ms. Griffith also cited ~~the~~ to errors in the probable cause statement and grand jury testimony. Indeed, Ms. Griffith assumes that the numerous errors were why the respondent wasn't charged with all of the incidents reflected in the probable cause statement (detailed above) -- including four counts of sale of marijuana. The supervising officer who approved the release questionnaire/probable cause statement (Exhibit 7), Sergeant Jalyn Bellows of the Mesa Police Department, testified that while the police report does contain some errors -- principally in the suspect name fields on various laboratory reports, that the respondent was not convicted of any offense that he

[3] On this occasion, the intermediary told the officer "that his brother had Super Bubba Kush," marijuana for sale of $160 a quarter ounce. The intermediary told the officer to drive to his brother's house at 852 South Spur -- the same address where the previous two purchases of marijuana had taken place -- in order to purchase the marijuana. However, when they arrived, they found that the intermediary's "brother Jose was not home." The intermediary "contact [e.d.] Jose via cellular phone, and Jose told [the intermediary] to wait on his girlfriend, who was going to arrive in a Jeep Liberty passenger car. A few minutes passed, and the listed vehicle arrived. [The intermediary] approached a female subject who exited the driver's side of the vehicle. The female exchanged with [the intermediary] a clear plastic baggie containing a green, leafy substance for $160." The intermediary then gave the baggie to the officer. Exhibit 17.

did not commit.

In testimony before this court, the respondent denied any complicity or participation in the sale of marijuana. He further testified that he pled guilty to the charge of ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~ Sale on advice of his attorney, notwithstanding his innocence, because it was the best charge in terms of immigration consequences. He also testified that, notwithstanding the factual basis provided by his criminal attorney and which he acknowledged as accurate under oath before the criminal court, that ~~that~~ the information in the factual basis was in fact false. Insofar as the respondent's testimony is inconsistent with his plea of guilty before the ~~ears of the~~Arizona criminal court and his acknowledgement before that court of the accuracy of the factual basis presented in support of his plea, this court finds that the respondent was not credible.

Notwithstanding the respondent's protestations of innocence before this court and notwithstanding the cited deficiencies in the police report, probable cause statement, and grand jury testimony, none alter the fact of the respondent's conviction, pursuant to his plea of guilty supported by a factual basis wherein the respondent acknowledged before the trial court that he "had discussions with other people about selling marijuana, and in fact there was marijuana available for sale" for ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~sale, the elements of which, as noted, establish an INA Section 212(a)(2)(C) "reason to believe" that the respondent has been complicit in drug trafficking. In essence, the respondent seeks to collaterally attack his conviction by having this court find, based on sloppy police administration and the respondent's contrary testimony before this court, that the respondent was not complicit in the sale of controlled substances and consequently not guilty of ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~

Marijuana for ~~sale~~ Sale -- the elements of which establish his complicity. This the court cannot do. See Matter of Danesh, 19 I&N Dec. 669 (BIA 1988).

Given the respondent's conviction pursuant to his plea of guilty to an offense -- ~~solicitation~~ Solicitation to commit ~~possession~~ Possession of ~~marijuana~~ Marijuana for ~~sale~~ Sale -- the elements of which required his intent to promote or facilitate the commission or possession of marijuana for sale, the court finds that the respondent is unable to establish that he is admissible and that the INA Section 212(a)(2)(C) bar to admissibility -- that a consular or immigration officer has a reason to believe that the respondent "is or has been an illicit trafficker in any controlled substance or...is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking of any controlled or listed substance" -- does not apply. That determination is further and independently established by the respondent's necessary acceptance before the Arizona criminal court of a factual basis establishing the elements of his offense before his plea of guilty was accepted.

The court therefore finds based on the foregoing that the respondent has failed to establish his eligibility for adjustment of status pursuant to INA Section 245(a), and any application therefor is denied.

There being no other forms of relief for which the respondent appears to be statutorily eligible[4] or for which the respondent has applied, the court sees no alternative but to order his removal from the United States.

ORDERS

The following orders are hereby entered:

[4] The INA Section 212(a)(2)(C) "reason to believe" that the respondent has been involved in the illicit trafficking of a controlled substance on or about May 18th, 2012, deprives the respondent of the ability to demonstrate the requisite good moral character during the past five years, and he is consequently ineligible for post-conclusion voluntary departure pursuant to INA Sections 101(f)(3) and 240B(b)(1)(B).

It is hereby ordered that the respondent's application for adjustment of status pursuant to INA Section 245(a) be denied.

It is further ordered that the respondent be removed from the United States to Mexico.

Please see the next page for electronic signature

RICHARD A. PHELPS
Immigration Judge

//s//

Immigration Judge RICHARD A. PHELPS

phelpsr on June 16, 2016 at 7:18 PM GMT