**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Wiesinger, Benjamin Todd**
**Pope & Associates**
**320 E. McDowell Rd.**
**Suite 220**
**Phoenix, AZ 85004**

**DHS/ICE Office of Chief Counsel - PHO**
**2035 N. Central Ave.**
**Phoenix, AZ 85004**

**Name: DAVEY, JENNIFER ADASSA**

**A 087-248-748**

**Date of this notice: 1/9/2018**

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:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A087 248 748 – Phoenix, AZ

Date: JAN – 9 2018

In re: Jennifer Adassa DAVEY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin T. Wiesinger, Esquire

APPLICATION: Adjustment of status

In a decision dated November 30, 2016, an Immigration Judge found the respondent removable as charged and denied her application for adjustment of status, but granted her the privilege of voluntary departure. The respondent now appeals from the denial of her application for adjustment of status. The appeal will be sustained and the record will be remanded.

The respondent, a native and citizen of Jamaica, concedes removability for having overstayed her nonimmigrant visa. Thus, the only issue before us is whether she qualifies for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). To be eligible for such relief, the respondent must demonstrate (among other things) that she is "admissible to the United States for permanent residence." *See* section 245(a)(2) of the Act. According to the Immigration Judge, the respondent has not carried her burden of proof in that regard because she is inadmissible under section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i) (IJ at 10). The respondent challenges that determination on appeal.

Section 212(a)(2)(C)(i) of the Act provides in relevant part that "[a]ny alien who . . . the Attorney General knows or has reason to believe . . . is or has been an illicit trafficker in any controlled substance or in any listed chemical . . . or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any . . . controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible." Whether the Attorney General "knows or has reason to believe" that an alien has engaged in illicit drug trafficking activity is a question of judgment that we decide for ourselves, *see* 8 C.F.R. § 1003.1(d)(3)(ii), but any such judgment must be based on the Immigration Judge's factual findings, not our own, *see* 8 C.F.R. § 1003.1(d)(3)(iv). An Immigration Judge's factual findings are entitled to deference on appeal unless they are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).

The Attorney General has "reason to believe" that an alien has engaged in illicit drug trafficking activity only if the record contains "reasonable, substantial, and probative evidence" to support such a conclusion. *See Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977); *see also Alarcon-Serrano v. INS,* 220 F.3d 1116, 1119 (9th Cir. 2000) (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir. 1976)). As a practical matter, section 212(a)(2)(C)(i)'s "reason to believe" requirement embodies much the same test of reasonableness as the familiar "probable cause" standard. *Cf. Matter of A-H-*, 23 I&N Dec. 774, 789 (A.G. 2005) (noting that the statutory phrase

"reasonable ground to believe" is properly equated with "probable cause") (internal citations omitted).

Here, the Immigration Judge relied on four factors to support his conclusion that the respondent is inadmissible under section 212(a)(2)(C)(i): (1) the fact that her 2010 Arizona conviction for simple possession of marijuana resulted from an incident in which she was caught "holding a baggy of marijuana for a friend"; (2) the fact that the 2010 conviction resulted from an arrest in which she was found in a house containing a large amount of marijuana and supplies for sending marijuana through the mail; (3) the fact that the respondent told police at the time of her arrest that she had driven a friend to the post office to mail a parcel but did not know what the parcel contained; and (4) the fact that the respondent's husband was convicted and served 3 years in prison for his involvement in sending marijuana through the mail, an offense which he committed in conjunction with a woman whom he claimed to have met through the respondent (IJ at 10). Furthermore, although the respondent consistently testified that she was unaware of her husband's marijuana trafficking activity and of the presence of large quantities of marijuana in the house where she was arrested, the Immigration Judge gave that testimony limited weight because he found that her claims of ignorance "strain[ed] credulity" (IJ at 8-9).

We discern no clear error in the Immigration Judge's factual findings, and we agree that the respondent's association with marijuana traffickers naturally arouses suspicion that she had knowledge of their activities. Knowledge is not the same thing as collusion, however. Indeed, upon de novo review, we conclude that the facts found by the Immigration Judge are too speculative to constitute "reasonable, substantial, and probative evidence" that the respondent was herself an illicit drug trafficker or a colluder with traffickers. As the respondent correctly points out, she pled guilty to *simple possession* of marijuana, not marijuana trafficking, and the conviction-related documents in the record do not establish that she was personally engaged in trafficking activity. The respondent's presence at or near the scene of drug-related activity does not alone establish a "reason to believe" that she was a knowing colluder with traffickers. *Accord Sibron v. New York*, 392 U.S. 40, 62-63 (1968) (holding that a defendant's association with known drug addicts did not give rise to probable cause that he was engaged in drug trafficking); *United States v. Di Re*, 332 U.S. 581, 593-94 (1948) (holding that defendant's presence in a car with persons engaged in a crime was insufficient to establish probable cause to arrest him on suspicion of committing that crime). Moreover, although the respondent evidently testified on her husband's behalf at his trial (Exh. 17), there is no indication from the record that the authorities had probable cause to suspect her of being involved in his illegal activity.

In light of the foregoing, we conclude that the respondent is not inadmissible under section 212(a)(2)(C)(i) of the Act or ineligible for adjustment of status on that basis. Accordingly, we will vacate the Immigration Judge's decision in part and remand the record for further proceedings. We express no present opinion as to whether the respondent is otherwise eligible for (or deserving of) adjustment of status. Such matters are for the Immigration Judge to decide in the first instance.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated in part, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would affirm the Immigration Judge's determination that, taken together, the circumstances establish reasonable cause to believe the respondent was an illicit trafficker.

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**200 EAST MITCHELL DRIVE, SUITE 200**
**PHOENIX, ARIZONA 85012**

| | | |
|---|---|---|
| **IN THE MATTER OF** | ) | **IN REMOVAL PROCEEDINGS** |
| **DAVEY, Jennifer A.** | ) | **FILE NO.: A087-248-748** |
| **Respondent** | ) | **DATE:** NOV 30 2016 |

**CHARGE:** Section 237(a)(1)(B) of the Immigration and Nationality Act, in that after admission as a nonimmigrant under 101(a)(15) of the Act, the respondent remained in the United States for a time longer than permitted in violation of the Act or any other law of the United States

**APPLICATIONS:** Adjustment of Status under section 245(a) of the Act
Waiver under section 212(h) of the Act
Voluntary Departure under section 240B(b) of the Act

**On Behalf of the Respondent:**
John M. Pope, Esq.
Pope & Associates
320 E. McDowell Road
Suite 220
Phoenix, Arizona 85004

**On Behalf of the Government:**
Dominique J. Park, Esq.
Assistant Chief Counsel
Department of Homeland Security
2035 North Central Avenue
Phoenix, Arizona 85004

## DECISION AND ORDER OF THE IMMIGRATION COURT

### I. PROCEDURAL HISTORY

On March 31, 2010, the Department of Homeland Security ("DHS") served a Notice to Appear ("NTA") upon the respondent, charging her as removable pursuant to section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "the Act"), as amended, in that after admission as a nonimmigrant under section 101(a)(15) of the Act, the respondent remained in the United States for a time longer than permitted, in violation of the Act or any other law of the United States. Ex. 1. DHS also charged the respondent as removable pursuant to section 237(a)(1)(A) of the Act, in that at the time of entry or of adjustment of status, the respondent was within one or more of the classes of aliens inadmissible by the law existing at such time, to wit: an alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law, under section 212(a)(6)(E)(i) of the Act. *Id.*

In support of these charges, DHS alleged that the respondent: (1) is not a citizen or national of the United States; (2) is a native and citizen of Jamaica; (3) was admitted to the United States at New York on or about February 18, 2001, as a nonimmigrant B2 with authorization to remain in the United States for a temporary period not to exceed 180 days; (4) did on or about September 20, 2001, knowingly encourage, induce, assist, abet, or aid her sister, Maureen Davey, an alien, to enter or try to enter the United States at or near New York, in violation of the law; (5) on August 13, 2009, had her application for adjustment, I-485, denied; and (6) remained in the United States beyond 180 days without authorization from the Immigration and Naturalization Service or its successor the Department of Homeland Security. *Id.*

On June 1, 2010, DHS served a Form I-261, Additional Charges of Inadmissibility/Deportability, upon the respondent, charging her as removable pursuant to section 237(a)(2)(B)(i) of the Act, as an alien who at any time after being admitted has been convicted of a violation (or a conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. 802). Ex. 1A. In support of this charge, DHS alleged that the respondent: (7) was, on May 19, 2010, convicted in the Arizona Superior Court for the offense of Possession of Marijuana, Having a Weight of Less Than Two Pounds, under A.R.S. section 13-3405 and Possession of Drug Paraphernalia under A.R.S. section 13-3415. *Id.*

At master calendar proceedings held on July 26, 2010, the respondent, through counsel, admitted allegations (1), (2), (3), and (6) in the NTA; denied allegations (4), (5), and (7); conceded the charge pursuant to section 237(a)(1)(B) of the Act; and contested the charges of removability pursuant to sections 237(a)(1)(A) and 237(a)(2)(B)(i) of the Act. Based on the respondent's admissions and concession, the Court found that the DHS charge of removability under section 237(a)(1)(B) of the Act was sustained by clear and convincing evidence.

At master calendar proceedings on August 12, 2010, the Court found that, in regards to the charge pursuant to section 237(a)(2)(B)(i) of the Act, DHS had not met its burden to establish that the amount of marijuana involved was greater than 30 grams. The Court therefore found that the charge of removability pursuant to section 237(a)(2)(B)(i) of the Act was not sustained.[1] At that hearing, the Court also found that the charge of removability pursuant to section 237(a)(1)(A) of the Act, under section 212(a)(6)(E)(i), was not sustained.

At master calendar proceedings on October 14, 2010, the respondent filed Form I-485, Application to Register Permanent Residence or Adjust Status ("Adjustment Application"). Ex. 7. Her adjustment application was based on an approved Form I-130, Immigrant Petition for Relative, Fiance(e), or Orphan ("I-130"), filed with the United States Citizenship and Immigration Services ("USCIS") by the respondent's United States citizen husband on September 4, 2008, and approved on August 19, 2009. *Id.* The respondent also filed a Form I-601, Waiver of Grounds of Inadmissibility, with her Adjustment Application ("I-601 Waiver"). Ex. 8.

[1] Several subsequent master calendar hearings occurred where the Court continued to address this charge. Ultimately, the charge was not sustained for the same reasons given by the judge at the hearing of August 12, 2010.

At the master calendar proceedings on October 14, 2010, the respondent also filed a Form I-589, Application for Asylum and Withholding of Removal ("Asylum Application"). Ex. 6. This application was withdraw by the respondent with prejudice to refile at the individual hearing on May 23, 2016.

On December 20, 2010, DHS filed a Motion to Pretermit the respondent's Adjustment Application, arguing that she was not eligible for adjustment of status because she had violated section 212(a)(6)(E) of the Act. Ex. 10.[2]

The respondent testified in support of her application for relief at an individual hearing held on May 23, 2016, before this Court.

A number of documents relating to the respondent's case have been entered into the record as follows:

| | |
|---|---|
| Exhibit 1 | Notice to Appear, issued March 31, 2010 |
| Exhibit 1A | Form I-261, Additional Charges of Inadmissibility/Deportability, issued June 1, 2010 |
| Exhibit 2 | Motion to Change Venue, filed June 14, 2010 |
| Exhibit 3 | IJ Order granting Motion to Change Venue, issued June 18, 2010 |
| Exhibit 4 | DHS Submission of Exhibits, filed August 4, 2010 |
| Exhibit 5 | The respondent's Submission of Evidence, filed September 2, 2010 |
| Exhibit 6 | The respondent's Asylum Application, filed October 14, 2010 |
| Exhibit 7 | The respondent's Adjustment Application, filed October 14, 2010 |
| Exhibit 8 | The respondent's I-601 Waiver, filed October 14, 2010 |
| Exhibit 9 | The respondent's Memorandum of Law, filed November 15, 2010 |
| Exhibit 10 | DHS Motion to Pretermit the respondent's Adjustment Application, filed December 20, 2010 |
| Exhibit 11 | The respondent's Memorandum of Law (Second) and Submission of Evidence, filed January 14, 2011 |
| Exhibit 12 | The respondent's Application for Fee Waiver, filed January 14, 2011 |
| Exhibit 13 | DHS Proposed Exhibits, filed May 2, 2011 |
| Exhibit 14 | The respondent's updated Adjustment Application, filed November 7, 2013 |
| Exhibit 15 | The respondent's Supplement List & Documents for his Adjustment Application, filed April 1, 2015 |
| Exhibit 16 | The respondent's Supplement List & Documents for his I-601 Waiver, filed April 1, 2015 |
| Exhibit 17 | DHS Submission of Evidence, filed December 18, 2015 |
| Exhibit 18 | The respondent's Supplement List & Documents for his Adjustment Application, filed May 23, 2016 |
| Exhibit 19 | The respondent's Conviction Documents, filed May 23, 2016 |

[2] When this DHS Motion to Pretermit was filed, the Court had already found that the charge against the respondent involving section 237(a)(1)(A) of the Act, pursuant to section 212(a)(6)(E)(i), was not sustained.

## II. STATEMENT OF THE CASE

### A. The Respondent's Testimony

The respondent testified in support of her Adjustment Application at an individual hearing on May 23, 2016. Her testimony is summarized below.

The respondent testified that she last entered the United States on February 18, 2001, on a B-type visa. She has not left the United States since that time. The respondent is currently married to Huntley Hugh Brissett ("Mr. Brissett"); the two married on November 27, 2007. They currently live in Tucson, Arizona. She testified that her husband has one brother in Jamaica, three or four sisters living in New York, and a son living in Canada.

In regards to her Jamaican passport, the respondent testified that after she came to the United States in the company of her brother in 2001, she found that her passport had disappeared. She testified that she was unaware of what happened to it until her sister was stopped at the United States border attempting to use the respondent's passport to enter. The respondent testified that she found out that her brother had taken the passport and given it to her sister in order to allow her sister to enter the United States.

In regards to her criminal convictions, the respondent testified that she was arrested once, on May 12, 2005. She testified that at that time her then boyfriend, Barrington McDonald ("McDonald"), had arranged for her to live in the apartment of a friend of his in Tucson, Arizona. She testified that she had been living there since January or February 2005. She testified that two police came to her door to return a box of Jamaican food stuffs that McDonald had sent to her from Rochester, New York. The police officers asked if they could enter the apartment, and then asked the respondent if any drugs were present in the apartment. The respondent testified that she took the officers to the kitchen and gave them a small bag of marijuana from a kitchen drawer. She testified that after she gave the bag of marijuana to the police officers, they searched the house and found additional marijuana in a walk-in closet. She testified that she spent two weeks in jail and was then released.

After her release, the respondent testified that her attorney informed her that the charges had been dismissed. However, she testified that this was not actually the case, as a warrant was issued for her arrest. She testified that she ended up pleading guilty to the charges in 2008 and serving six months on probation. She testified that she refused to go to a drug treatment course, and instead did community service.

The respondent testified that when the police originally came to the door she told them that her name was Marian Walker. She testified that she presented them with a fake Connecticut identification card, but cannot remember if it was a driver's license or a state ID card. She testified that she obtained the document in Connecticut after her passport was taken from her, and that she used the false identification because she did not know what had become of her passport or how it was being used. The respondent testified that the ID was given to her; she did not pay for it. She also testified that she made up the name Marian Walker.

In regards to her connection with the marijuana, the respondent testified that she has never used marijuana and has never sold it. She testified that she knew the bag of marijuana was present in the kitchen and was concerned to be living in a house with drugs, but was living there in order to avoid being homeless. However, she testified that she was not aware of the marijuana in the closet, and that if she had known about the drugs in the closet she would have preferred to be homeless. She also testified that she never helped anyone to buy or sell marijuana. Finally, she testified that she witnessed McDonald use marijuana, but never saw him sell it.

In regards to her husband's criminal conviction, the respondent testified that she was aware he was accused of taking someone to the post office with a package in 2013. When asked, she testified that she was not aware if the package contained marijuana or if it was for sale. She did testify that at that time her husband was in the company of Penny Susan Spears ("Ms. Spears"), a mutual friend of theirs. She testified that she knew Mr. Brissett took Ms. Spears to the post office, and that event was the basis for Mr. Brissett's conviction.

In regards to her husband's health, the respondent testified that Mr. Brissett is sickly, and suffers from high blood pressure, blood clots, and prostate issues. She testified that Mr. Brissett has previously had prostate surgery, and that he is currently seeing a doctor at Saint Mary's hospital in Tucson, Arizona. She testified that he does not work, and that she currently takes care of him by cooking for him, cleaning him, and taking him to doctor's appointments.

In regards to returning to Jamaica, the respondent testified that she would be unable to obtain employment and survive in Jamaica because of the crime and because she has not been there in so long. She testified that her brother was murdered there and her two sons were almost killed as well. She testified that if Mr. Brissett were to return to Jamaica with her he would not be able to get the medical help he needs. The respondent testified that she attributes her father's death in Jamaica to lack of proper medical care for his cancer.

**B. Testimony of Huntley Brissett**

The respondent's husband, Huntley Hugh Brissett, testified in support of her Adjustment Application at the individual hearing on May 23, 2016. His testimony is summarized below.

Mr. Brissett testified in regards to his current medical conditions. He testified that beginning in 2011 be began to have problems with his left leg tightening up because of blood clots at certain times of the year. He is also taking medicine for his high blood pressure. He testified that the respondent currently provides him with everything he needs, to include preparing special meals for him on some occasions.

**C. Documentary Evidence**

The respondent has submitted several pieces of evidence for consideration by the Court. Whether or not they are specifically mentioned below, the Court has considered and evaluated each document submitted to the Court.

For purposes of identification, DHS submitted photocopies of the respondent's current Jamaican passport, her B1/B2 United States visa, and a photocopy of her cancelled Jamaican passport. Ex. 4, Tab C.

In regards to the respondent's criminal convictions, DHS submitted the state court conviction documents, including the indictment, the pre-sentence investigation report, minute entries for the respondent's change of plea and sentencing hearings, and the plea agreement. Ex. 4. The plea agreement indicates that the respondent pleaded to two amended counts: 1) Unlawful possession of marijuana having a weight of less than two pounds, a class six undesignated offense in violation of Arizona Revised Statutes ("A.R.S.") sections 13-3405(A)(1), (B)(1), (C), (D), 13-4301(36), 13-3418, 13-3420, 13-603, 13-701, 13-702, 13-702.01, 13-801, 13-804, and 13-811; and 2) Possession of drug paraphernalia, a class 6 undesignated offense in violation of A.R.S. sections 13-3415(A), 13-3418, 13-603, 13-701, 13-702, 13-702.01, 13-801, 13-804, and 13-811. Ex. 4, Tab A. The respondent submitted a copy of the plea transcript for the convictions. Ex. 5.

DHS also submitted a Detail Incident Report from the Counter Narcotics Alliance. Ex. 13, Tab B. The report indicates that two police officers arrived at the respondent's apartment to return a package that had been previously believed to contain illegal drugs, but instead contained rotting meat. The respondent gave the name "Mirian Walker" and showed the police officers a driver's license with that name.[3] The respondent gave the officers permission to enter the home, and when they asked about drugs or weapons she took them to the kitchen and produced a baggy with marijuana. She told them that no other drugs were in the house, and also gave them permission to search the house. Within the house, the officers found a large bag of marijuana and supplies for shipping marijuana through the mail. The respondent was then arrested. *Id.*

DHS also included in that submission a record of the police officers' questioning of the respondent. Ex. 13, Tab C. The report indicates that the police officers question her regarding a shipping receipt found in the apartment. The respondent informed the officers that she had given a friend a ride to the post office for purposes of mailing the package, but that she did not know what was in the package. When asked about Barrington McDonald ("McDonald"), who was listed as living with her, the respondent informed the officers that McDonald was living in Connecticut. After the respondent was read her Miranda rights, she admitted to the police officers that she was holding the baggy of marijuana from the kitchen for a friend. She also said that McDonald sends her money through Western Union, and that she used her "Mirian Walker" driver's license to get the money. She told the officers that the money she had in her wallet was from such a transaction, and told them that she had received funds from McDonald for "the past several months." *Id.*

In regards to the respondent's passport, DHS submitted a copy of the USCIS letter denying the respondent's request to reopen the denial of her Adjustment Application. Ex. 10, Tab A. The rejection letter indicates that the respondent's sister, Maureen Davey ("Maureen"), was stopped while attempting to enter the United States using the respondent's passport. It

[3] The name "Mirian Walker" also appears as "Marian Walker" and "Miriam Walker" within various submissions.

indicates that in a sworn statement to USCIS, Maureen "stated that her sister (you) gave her the documents to travel on so she could visit the United States." *Id.* The letter also indicates that Maureen specified that she did not steal the passport, but that the respondent gave it to her for the express purpose of entering the United States. *Id.*

DHS submitted conviction documents for the respondent's husband, Huntly Brissett ("Mr. Brissett"). Ex. 17. The documents indicate that Mr. Brissett was convicted of Possession of Marijuana for Sale Having a Weight of Four Pounds or More, a class 2 felony in violation of A.R.S. section 13-3405(A)(2), for which he was sentenced to a mitigated sentence of three years' incarceration. *Id.* The submission also included a presentence report, indicating that Mr. Brissett dropped another individual off at the post office to mail packages containing marijuana, and on one instance mailed a package containing marijuana himself. The report indicates that Mr. Brissett met his co-defendant, Ms. Spears, through his wife, the respondent. *Id.*

## III. ANALYSIS

### A. Credibility

As an initial matter in determining whether an applicant meets the statutory criteria for any of the forms of relief he or she may request, the Court must make a threshold determination regarding the credibility, persuasiveness, and factual basis of the applicant's testimony. INA § 240(c)(4)(B). If an applicant filed his or her application for relief from removal on or after the May 11, 2005, date of enactment of the REAL ID Act of 2005, this credibility determination is governed by the REAL ID Act provisions regarding credibility. Pub.L. No. 109-13, 119 Stat. 231. The INA provides that the credibility of a witness is assessed in the following manner:

> Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), 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.

INA § 240(c)(4)(C).

Relevant factors as to a witness's demeanor include his or her expressions, the way the witness sits or stands, nervousness, coloration, and modulation or pace of speech. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 686 (9th Cir. 2003). In addition, the following factors may support an adverse credibility finding: an applicant's inability to provide sufficiently

detailed testimony, *Unuakhaulu v. Gonzales*, 416 F.3d 931, 938 (9th Cir. 2005) (holding that the court properly considered the applicant's "'meager and nonspecific'" testimony); evasive testimony, *Wang v. INS*, 352 F.3d 1250, 1256 (9th Cir. 2003); and testimony that is implausible, *Don v. Gonzales*, 476 F.3d 738, 743 (9th Cir. 2007).

Under the REAL ID Act, even minor inconsistencies can support an adverse credibility finding. *Jibril v. Gonzales*, 423 F.3d 1129, 1138 n.1 (9th Cir. 2005). For purposes of an adverse credibility determination, the applicant must be given an opportunity to explain or deny any discrepancies or inconsistencies, and the Court must consider the applicant's reasonable and plausible explanations. *Chen v. Ashcroft*, 362 F.3d 611, 618 (9th Cir. 2004); *Singh v. Gonzales*, 439 F.3d 1100, 1105 (9th Cir. 2006); *Kaur v. Ashcroft*, 379 F.3d 876, 887 (9th Cir. 2004).

The respondent filed her initial application for adjustment of status under section 245(a) of the Act on October 14, 2010; therefore, her claim is governed by the REAL ID Act. *See* REAL ID Act (stating that the REAL ID Act applies to requests for relief filed on or after the May 11, 2005 date of enactment).

**1. The Respondent's Testimony**

The Court finds that the respondent's testimony was consistent internally, but finds that it was also highly improbable when compared with the documentary evidence submitted by DHS. First, the respondent testified that her passport was stolen by her brother and given to her sister in order for her sister to attempt to enter the United States. However, after being stopped at the border, her sister gave a sworn statement indicating that the respondent gave her the passport in order to allow her to visit the United States. When asked about the inconsistency, the respondent responded that the passport had been stolen and she had not given it to her sister.

The respondent also testified to the use of a fake identification card when dealing with police. She testified that she was given the fake identification by someone she met in Connecticut based on a name and a birth date that she herself came up with. Again, while the respondent testified that she got the fake identification because her passport went missing, it is noteworthy to this Court that the respondent elected to obtain and use fake identification, as opposed to obtaining a new passport from the Jamaican consulate or reporting it lost or stolen.

Next, the respondent testified that she has never used or sold marijuana. She also testified that she was unaware of the marijuana in the apartment in which she was staying. However, when the police searched the house they found a hidden gym bag containing marijuana, as well as supplies commonly used in sending marijuana through the mail. The Court finds it highly improbable that the respondent was actually unawares of the large quantity of marijuana in the house where she had been staying for three to four months.

Finally, the respondent's husband spent three years in prison in connection with sending packages containing marijuana through the mail. He was arrested along with Ms. Spears, who was a mutual friend of the respondent and her husband. Again, for the Court to believe that Mr. Brissett and Ms. Spears were involved in sending marijuana through the mail without the

knowledge of the respondent strains credulity. Therefore although the Court does not enter an adverse credibility finding against the respondent, it accords her testimony limited weight.

**2. Mr. Brissett's Testimony**

The Court finds that Mr. Brissett's testimony was consistent both internally and with the documentation provided in the respondent's application for relief. Overall, Mr. Brissett was responsive to questions, in that the respondent directly and clearly answered every question posed and responded to inquiries with adequate detail. The Court will, accordingly, find Mr. Brissett credible for purposes of this analysis.

**B. Adjustment of Status under Section 245(a) of the Act**

Section 245(a) of the Act provides for the adjustment of status of an alien who was inspected and admitted or paroled into the United States, on a discretionary basis, if: (1) the alien makes an application for adjustment; (2) an immigrant visa is immediately available to the alien at the time his or her application is filed; and (3) the alien is eligible to receive an immigrant visa and is admissible for permanent residence. INA § 245(a). If the alien has not been "inspected and admitted or paroled into the United States," the alien is not eligible for adjustment of status under 245(a) unless he or she qualifies for the special provisions under the Violence Against Women Act ("VAWA"). *Id.*

In determining whether a favorable exercise of discretion is warranted in granting adjustment of status, courts will look to a number of equitable factors. Such factors "include, but are not limited to, the existence of family ties in the United States; the length of the respondent's residence in the United States; the hardship of traveling abroad; and the respondent's immigration history, including any preconceived intent to immigrate at the time of entering as a nonimmigrant." *Matter of Hashmi*, 24 I&N Dec. 785, 793 (BIA 2009) (internal citations omitted). Additionally, a criminal history—or lack thereof—is relevant to the exercise of discretion. *Id.* Generally, without the presence of relevant adverse factors, discretion will ordinarily favor granting adjustment of status. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 300 (BIA 1996).

Section 245(a) of the Act therefore provides for the adjustment of status of an respondent inspected and admitted or paroled into the United States if the respondent: (1) has made an application for adjustment; (2) an immigrant visa is immediately available to the respondent; (3) the respondent has demonstrated eligibility to receive that visa and admissibility for permanent residence; and (4) the respondent warrants a favorable exercise of discretion.

In the present case, the respondent filed her Adjustment Application on October 14, 2010. This application was based on an approved I-130 Petition filed by the respondent's husband on September 4, 2008, and approved on August 19, 2009. The Court therefore finds that the respondent has made an application for adjustment and has an immigrant visa immediately available to her. The Court must therefore determine the whether the respondent is admissible to the United States, and if so whether she merits a favorable exercise of discretion.

**1. Eligibility**

The NTA does not charge the respondent with inadmissibility pursuant to section 212(a)(2)(C) of the Act, in that a consular or immigration officer knows or has reason to believe that the respondent is an alien who is or has been an illicit trafficker in any controlled substance or who is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance. Ex. 1. However, "due process does not require inclusion of charges in the NTA that are not grounds for removal but are grounds for denial of relief from removal." *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006). Thus, it is appropriate for the Court to assess all potential grounds of inadmissibility as they pertain to the respondent's application for adjustment of status, and to assess whether the respondent is eligible for any waivers to any such grounds of inadmissibility. *See id.*

For an individual to be inadmissible under section 212(a)(2)(C) of the Act, it is not required that she be convicted of a controlled substance offense. Instead, an immigration official must have "reason to believe" that the alien is or has been involved in illicit drug trafficking. *Gomez-Granillo v. Holder*, 654 F.3d 826, 834 (9th Cir. 2011). A finding of "reason to believe" requires the official to determine that "reasonable, substantial, and probative evidence" supports the "reason to believe" that a respondent was participating in drug trafficking. *Id.*

In the present case, DHS argues that the respondent is inadmissible to the United States and therefore ineligible for adjustment of status under section 245(a) of the Act because there is reason to believe she has been involved in drug trafficking pursuant to section 212(a)(2)(C) of the Act. Several facts exist within the respondent's case that give this Court reason to believe she had been involved in drug trafficking. First is the respondent's criminal conviction, in which she explains she was holding a baggy of marijuana for a friend. Second, the respondent was arrested in a house containing a large quantity of marijuana, along with supplies for sending marijuana through the mail. Third, at the time she was arrested the police questioned the respondent about a post office shipping receipt they found in the apartment. The respondent informed them that she had taken a friend to the post office to mail a package, but did not know what the package contained. Fourth, the respondent's husband, Mr. Brissett, served three years in prison for being involved in mailing several packages containing marijuana. He accomplished this alongside Ms. Spears, who the respondent claimed was a mutual friend of Mr. Brissett and hers. However, in the police report relating to Mr. Brissett's arrest, he informed the police that he had met Ms. Spears through the respondent.

When these facts are viewed in the aggregate, the Court finds in inconceivable that the respondent was not involved in drug trafficking activities involving, at different times, her roommate, her husband, and her friend. The respondent has been present in very close proximity to several drug trafficking operations, to include driving someone to the post office to mail a package while she was living in an apartment containing shipping materials and a large quantity of marijuana. This Court does not accept her explanation that she knew nothing of these operations and did not participate in them. The Court finds that there is reasonable, probative, and credible evidence that the respondent participated in the trafficking of illicit drugs, and concludes that she is inadmissible under section 212(a)(2)(C)(i) of the Act.

### 2. Waiver under Section 212(h) of the Act

The Court has found that the respondent is inadmissible pursuant to section 212(a)(2)(C) of the Act. Section 212(h) of the Act does not provide for a waiver under this section. Therefore the Court does not reach the question of whether the respondent would be eligible to receive a waiver of inadmissibility under section 212(h) of the Act.

## C. Voluntary Departure

Section 240B of the Act provides that, at the conclusion of removal proceedings, a court may permit an alien to voluntarily depart the United States, at the alien's own expense, if the alien: (1) has been physically present in the United States for a period of at least one year immediately preceding service of the notice to appear; (2) is and has been a person of good moral character for at least five years; (3) is not deportable under section 237(a)(2)(A)(iii) (as an aggravated felon) or 237(a)(4) (on security or related grounds); and (4) has established by clear and convincing evidence that he or she has the means to depart the United States and intends to do so. Under 8 C.F.R. § 1240.26(c)(2), "clear and convincing evidence of the means to depart shall include in all cases presentation by the alien of a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing." An alien permitted to depart voluntarily must post a voluntary departure bond "in an amount necessary to ensure that the alien will depart." INA § 240B(b)(3).

The court finds that the respondent is eligible for voluntary departure under section 240B of the Act, and concludes that she merits voluntary departure as a matter of discretion. The respondent must file a $500 bond with DHS's ICE Field Office Director within five (5) business days from the date of this order, and must depart the United States within sixty (60) days from the date of this order.

NOTICE: The respondent's failure to post the required voluntary departure bond within the time required does not terminate the respondent's obligation to depart within the period allowed, nor does it exempt the respondent from the consequences of failing to depart voluntarily during the period allowed. 8 C.F.R. § 1240.26(c)(4). If the respondent fails to depart the United States in accordance with these conditions, the respondent will be subject to a civil penalty of $3,000 and shall be ineligible, for a period of ten (10) years, to receive any further relief under sections 240A, 240B, 245, 248, and 249 of the Act. *See* INA § 240B(d); 8 C.F.R. § 1240.26(j). The respondent may choose to decline the Court's grant of voluntary departure if the respondent is unwilling to accept the amount of the bond or the other conditions. 8 C.F.R. § 1240.26(c)(3).

WARNING: Should the respondent choose to file an appeal of this Court's order with the Board of Immigration Appeals, the respondent must, within thirty (30) days of filing an appeal with the Board, submit sufficient proof of having posted the required voluntary departure bond. 8 C.F.R. § 1240.26(c)(3)(i). If the respondent does not provide timely proof to the Board that the required voluntary departure bond has been posted with DHS, the Board will not reinstate the period of voluntary departure in its final order. *Id.*

WARNING: If the respondent files with this Court a post-decision motion to reopen or reconsider during the period allowed for voluntary departure, the grant of voluntary departure will be automatically terminated, and the alternate order of removal will take effect immediately. 8 C.F.R. § 1240.26(b)(3)(iii). The penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply if the respondent has filed a post-decision motion to reopen or reconsider during the period allowed for voluntary departure. *Id.*

## IV. CONCLUSION

The Court finds that the respondent is not eligible for adjustment of status under section 245(a) of the Act, and therefore denies her application. The Court additionally finds that the respondent is eligible for voluntary departure under section 240B of the Act, and concludes that she merits voluntary departure as a matter of discretion.

Accordingly, the following orders shall be entered:

**ORDER:** **IT IS ORDERED THAT** the respondent's application for adjustment of status pursuant to section 245(a) of the Act is **DENIED**.

**IT IS FINALLY ORDERED THAT** the respondent be granted the privilege to voluntarily depart the United States within sixty (60) days from the date of this order. The respondent is required to file a $500 bond with the Department of Homeland Security within five (5) business days from the date of this order. Should the respondent fail to leave as and when ordered, this order shall automatically become an order of removal from the United States to Jamaica upon the charge contained in the NTA. Furthermore, the respondent will be subject to a civil penalty of $3,000, and shall be ineligible, for a period of ten (10) years, to receive any further relief under sections 240A, 240B, 245, 248, and 249 of the Act.

NOV 30 2016
**Date**

**LaMonte S. Freerks**
**United States Immigration Judge**

**CERTIFICATE OF SERVICE**
**SERVICE BY:** Mail (M) Personal Service (P)
**TO:** [ ] DHS [ ] Alien [ ] Alien's Attorney
**DATE:** NOV 30, 2016 By: (Court Staff)