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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

H2

[REDACTED]

Date: **JAN 20 2012** Office: TUCSON, ARIZONA FILE: [REDACTED]

IN RE: [REDACTED]

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

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 law was inappropriately applied by us 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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway
Perry Rhew
Chief, Administrative Appeals Office

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

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

In a decision, dated March 27, 2009, the acting field office director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), stating that a waiver was not available for inadmissibility under section 212(a)(2)(C) of the Act or under section 212(a)(2)(A)(i)(II) of the Act for crimes involving more than 30 grams of marijuana.

In her brief, on appeal and dated May 28, 2009, counsel states that the acting field office director erred in finding that there was "reason to believe" the applicant was a drug trafficker. She states that statements submitted by the applicant indicate that the applicant did not know that marijuana was in the car she was driving. Counsel also asserts that, although the applicant was charged with possession of 37.5 pounds of marijuana with the intent to distribute, she was convicted of simple possession of an unspecified amount of marijuana and the information from intent to distribute charge cannot be read into the applicant's conviction for simple possession of an unidentified amount of marijuana. Counsel cites to *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007), *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006), and *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) to support this assertion.

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

- (A) Conviction of certain crimes.-
 - (i) In general.-Except as provided in clause (ii), any 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 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 Substances Act (21 U.S.C. 802)), is inadmissible.

- (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.

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

- (h) The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if -

- (1) (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 [now the Secretary of Homeland Security (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 indicates that on October 15, 1991, the applicant was charged with knowingly and intentionally possessing with the intent to distribute approximately 37.5 pounds of marijuana, in violation of Title 21 of the U.S. Code, sections 841(a)(1) and 841(b)(1)(D) and with knowingly and intentionally possessing a quantity of marijuana in violation of Title 21 of the U.S. Code, section 844(a). On February 18, 1992, the applicant pled guilty to a violation of Title 21 of the U.S. Code, section 844(a), knowingly and intentionally possessing a quantity of marijuana.

The AAO finds that although the applicant was not convicted of intent to distribute marijuana, 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. In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only

requirement is that the adjudicator “knows or has reason to believe” that the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for the adjudicator to have sufficient “reason to believe” that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) of the Act, the conclusion must be supported by “reasonable, substantial, and probative evidence.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)).

In the present matter, the criminal complaint contained in the record presents reasonable, substantial, and probative evidence to show that the applicant knowingly attempted to transport 37.5 pounds of marijuana from Mexico to a ██████████ in Arizona. The applicant asserts, in her statement dated March 2, 2006, that she did not know the marijuana was in the vehicle she was driving and that her abusive spouse arranged for her to take this car to the United States in the hopes that she would be caught and he could have custody of her children. However, the criminal complaint, dated October 11, 1991 states that the applicant stated that she knew the car contained about thirty pounds of marijuana, and that she was to deliver the loaded vehicle to a ██████████. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO notes that an applicant may be deemed inadmissible under section 212(a)(2)(C)(i) of the Act even where there has been no admission and no conviction, so long as there is “reason to believe” that the applicant engaged in the proscribed conduct relating to trafficking in a controlled substance. In the present matter, there is reason to believe that the applicant knowingly aided, abetted, and assisted others in the illicit trafficking of a controlled substance. Specifically, there is reasonable, substantial, and probative evidence to support the belief that she knowingly aided an illicit trafficker in a controlled substance. *See Alarcon-Serrano v. I.N.S.* at 1119. The burden of proving that an applicant is not inadmissible as a drug trafficker remains with the applicant. *See* section 291 of the Act. The applicant has provided no credible evidence to overcome the evidence supporting the finding that she assisted in the illicit trafficking of a controlled substance.

Based on the foregoing, we find that there is sufficient reason to believe that the applicant aided an illicit trafficker in a controlled substance, and she is inadmissible under section 212(a)(2)(C)(i) of the Act. There is no provision under the Act that allows for waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.

Furthermore, the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having committed a crime involving a controlled substance. The AAO notes that although the applicant’s conviction was for simple possession of marijuana with no quantity specified, it is the applicant’s burden to prove eligibility for the section 212(h) waiver, which in her case means she

must show that her conviction involved simple possession of less than 30 grams of marijuana. *See* section 291 of the Act, 8 U.S.C. § 1361; 8 C.F.R. § 103.2(b).

As stated above, counsel asserts that although the applicant was charged with possession of 37.5 pounds of marijuana with the intent to distribute, she was convicted of simple possession of an unspecified amount of marijuana and the information from intent to distribute charge cannot be read into the applicant's conviction for simple possession of an unidentified amount of marijuana. Counsel cites to *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007), *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006), and *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) to support this assertion.

The AAO finds that counsel's assertions are not supported by the case law. Each case cited by counsel is drawn from the context of removal proceedings where the burden of proof was on the government. In this case, the burden of proving admissibility is with the applicant. *See* section 291 of the Act.

In *Ruiz-Vidal v. Gonzales*, the Ninth Circuit found that the record did not establish that the particular substance the applicant was convicted of possessing was a controlled substance as defined in the Controlled Substances Act and thus the applicant's conviction for possession of a controlled substance could not serve as a reason for his removal. This case does not support counsel's argument. In *Ruiz-Vidal*, the government was trying to determine whether the substance the applicant was convicted of possessing was defined in the Controlled Substances Act, which is not the same as trying to determine the amount of a controlled substance possessed.

In *Matter of Martinez Espinoza*, the BIA found that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorical inquiry is obviously insufficient. *25 I&N Dec. 118, 124 (BIA 2009)* (“[I]t is hard to imagine any offense—apart from a few inchoate offenses—that could ‘relate to’ it categorically without actually *being* a simple marijuana possession offense.”). The BIA determined that it was the intent of Congress to have “a factual inquiry into whether an alien's criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana that it should be treated with the same degree of forbearance under the immigration laws as the simple possession offense itself.” *Id.* at 124-25.

██████████ and ██████████ on the other hand, address whether a conviction was a crime involving moral turpitude, a different analysis.

Pursuant to ██████████, we look at the factual circumstances behind the applicant's conviction to determine whether it relates to simple possession of 30 grams or less of marijuana. In the applicant's case, the criminal complaint indicates that the amount associated with her conviction was 37.5 pounds of marijuana. If indeed the applicant possessed a different quantity of marijuana, she has failed to demonstrate that actual amount to contradict the factual information in the complaint. As such, she has not met her burden of proof in establishing eligibility for a waiver of inadmissibility under section 212(h). There is no provision under the Act that allows for waiver of

inadmissibility under section 212(a)(2)(A)(i)(II) for cases involving possession of more than 30 grams of marijuana.

The record also reflects that the applicant may be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as a result of falsely claiming United States citizenship to procure admission to the United States on April 24, 1983. The AAO acknowledges that the applicant contests this finding of inadmissibility. However, as there is no waiver available for the applicant's inadmissibilities under section 212(a)(2)(C)(i) and section 212(a)(2)(A)(i)(II) of the Act, no purpose would be served in discussing or adjudicating an application for a waiver of inadmissibility under section 212(i) of the Act.

In proceedings regarding a waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.