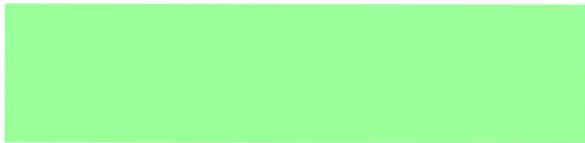


(b)(6)

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



U.S. Citizenship
and Immigration
Services



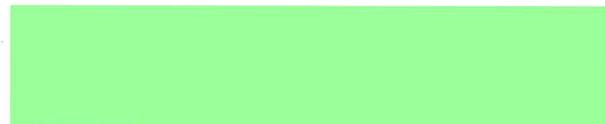
DATE: **AUG 01 2013** Office: MIAMI (WEST PALM BEACH)

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Miami, Florida, denied the waiver application. An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), concerning controlled substance traffickers. The applicant is married to a U.S. citizen and is the mother of a U.S. citizen. She seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to remain in the United States with her spouse and child.

On October 5, 2007, the District Director concluded that the applicant was inadmissible under section 212(a)(2)(C) of the Act and was not eligible for a waiver of inadmissibility. The waiver application was denied accordingly. The applicant, through counsel, filed a timely appeal of that decision and the AAO dismissed the applicant's appeal on March 16, 2011, also finding that the applicant was not eligible for a waiver of inadmissibility as a result of her inadmissibility under section 212(a)(2)(C) of the Act. The applicant, through counsel, filed a timely motion to reconsider; however, that motion did not reach the AAO until June 24, 2013.

On motion, counsel for the applicant states that the record does not contain substantial and probative evidence that the applicant was a "knowing, and conscious participant or conduit in the transfer, passage or delivery of narcotic drugs," citing *Garces v. U.S. Attorney General*, 611 F.3d 1337 (11th Cir. 2010), and as result the applicant should not be inadmissible under section 212(a)(2)(C) of the Act. For the reasons stated below, the motion is dismissed.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The applicant was found to be inadmissible under section 212(a)(2)(C) of the Act, which states in pertinent part that:

- (C) Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--
 - (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so ... is inadmissible.

On motion counsel states that the AAO erred in finding the applicant inadmissible under section 212(a)(2)(C) of the Act, as “there is no reasonable, substantial and probative evidence that the alien in this case was a ‘knowing and conscious participant’” to substantiate this ground of inadmissibility. Counsel further states that the applicant’s plea of *nolo contendere* to possession of 20 grams or less of marijuana in violation of Florida Statutes section 893.13(6)(b) and the police reports associated with that conviction carry little or no probative weight.

As stated in our previous decision, inadmissibility under section 212(a)(2)(C) of the Act applies when 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. *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977); *see also Garces v. U.S. Attorney General*, 611 F.3d at 1345-46; *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.” *Matter of Rico*, 16 I&N Dec. at 185. A conviction or a guilty plea is not necessary to find a “reason to believe.” *Castano v. INS*, 956 F.2d 236 (11th Cir. 1992); *Nunez-Payan v. INS*, 815 F.2d 384 (5th Cir. 1987); *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979). As such, the applicant’s plea of *nolo contendere* and Florida’s law that allows an applicant to plead guilty while maintaining their innocence, cited by counsel, are inapposite to the ultimate determination that there is “reason to believe” that the applicant has been an illicit trafficker in any controlled substance or has been a “knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance...” Moreover, counsel’s contention that the applicant’s conviction must “be designated as a felony in the Controlled Substances Act in order to be considered a drug trafficking offense under the INA,” is not supported by caselaw. *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), cited by counsel in support of his argument, relates to the determination of an aggravated felony, not illicit trafficking under the “reason to believe” standard of section 212(a)(2)(C).

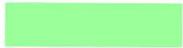
In regards to section 212(a)(2)(C) of the Act, a “reason to believe” may be established by “reasonable, substantial, and probative evidence,” which has been found to include police reports and the facts underlying even an expunged conviction. *See Lopez-Molina v. Ashcroft*, 368 F.3d 1206, 1209 (9th Cir. 2004); *Castano v. INS*, 956 F.2d at 238-39 (holding that the “facts underlying prior conviction for drug trafficking which has been expunged pursuant to the Federal Youth Corrections Act may provide basis for denying alien admission to the United States under provision of the Immigration and Nationality Act making inadmissible any alien whom immigration officer knows or has reason to believe is or has been illicit drug trafficker”). Whether a police report constitutes “reasonable, substantial, and probative” evidence in the context of an inadmissibility finding under section 212(a)(2)(C) is a determination that is made on a case by case basis. Counsel contends that police reports should be given “little weight,” and “may not be used as a basis to determine a conviction, citing *Matter of Arrequin*, 21 I&N Dec. 38 (BIA 1995) and *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988). The cases cited by counsel, however, do not exclude the use of police reports and arrest records in the “reason to believe” determination at hand. In *Matter of Arrequin*, which does not involve a determination of inadmissibility under section 212(a)(2)(C), but

rather involves another section of the Act, the court gave an “apprehension report” little weight where “prosecution was declined” and there was “no corroboration, from the applicant or otherwise.” 21 I&N Dec. at 42 (granting relief under section 212(c) of the Immigration and Nationality Act). In *Matter of Grijalva*, the Board found that the respondent did not explain how the consideration of police reports in his case was “fundamentally unfair.” 19 I&N Dec. at 722 (stating that “the admission into evidence of police reports concerning the circumstances of an alien's arrest is especially appropriate in cases involving discretionary relief from deportation, where all relevant factors regarding an alien's arrest and conviction should be considered”). Counsel also cites *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006), for the proposition that police reports that are not incorporated into the charging document or plea cannot be considered in determining whether an alien may be removed. The AAO notes that *Matter of Sanudo* involved the admissibility of police reports in the determination of whether a crime involved moral turpitude under section 237(a)(2)(A)(ii) of the Act and the legal reasoning in that case is inapplicable to the instant case. *Id.* at 978.

In the present matter, the applicant’s conviction for possession of marijuana, the police report stating that a bag of marijuana, baggies, and small scale were found in the applicant’s bedroom, the applicant’s affidavit stating that she resided at the residence where the evidence in the police report was found, along with the other facts in the police reports showing that large amounts of marijuana were delivered to the residence where the applicant states she resided constitutes reasonable, substantial, and probative evidence to show that the applicant has been an illicit trafficker in any controlled substance or has been a “knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance.” The applicant does not provide any contrary evidence to rebut the record. It is the applicant’s burden of proof in these proceedings, and she has offered no proof to call into question the evidence of record. Section 291 of the Act, 8 U.S.C. § 1361; *see also Garces v. U.S. Attorney General*, 611 F.3d at 1345-46 (stating that “we do not require every alien seeking admission to the United States to produce evidence proving clearly and beyond a doubt that he is not a drug trafficker, unless there is already some other evidence-some ‘reason to believe’- that he is one”). 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).

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 “has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking” in a controlled substance. *See Alarcon-Serrano v. I.N.S.* at 1119. The applicant has provided no credible evidence to overcome the evidence supporting the finding that she is inadmissible under section 212(a)(2)(C)(i) of the Act. The burden of proof resides with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. The present motion does establish that our prior decision was based on an incorrect application of law or policy and will be dismissed. 8 C.F.R. § 103.5(a)(4).

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Page 5

NON-PRECEDENT DECISION

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is dismissed.