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



U.S. Citizenship
and Immigration
Services

[REDACTED]

Date: **JUL 09 2013**

Office: HIALEAH, FL 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:

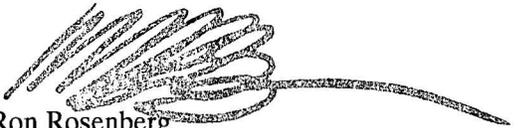
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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Hialeah, Florida. 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 granted and the underlying application will remain denied.

The applicant is a native and citizen of Cuba who 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 sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), to procure admission to the United States. In a decision dated September 29, 2011, the 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.

On appeal, counsel asserted that the field office director erred in finding that the applicant was inadmissible as a controlled substance trafficker. She stated that the record does not contain reasonable and substantial evidence to support this finding and that an arrest report, which eventually led to a dismissal, was not sufficient to support a reasonable suspicion in the absence of other corroborating evidence. Counsel stated that the field office director erred in finding a lack of rehabilitation on the basis of a dismissed arrest for simple possession in 2009 and that the case presented outstanding equities and merited a favorable exercise of discretion.

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

In order for an applicant to be inadmissible under section 212(a)(2)(C) of the Act, the only requirement is that an immigration officer "knows or has reason to believe" that the applicant is or has been an illicit trafficker in a controlled substance or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer 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)). Furthermore, it is noted 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 has been an illicit trafficker in a controlled substance. Specifically, there is reasonable, substantial, and probative evidence to support the belief that he has been an illicit trafficker in a controlled substance.

In our decision, dated March 9, 2013, we found that the Report and Recommendation and the Order on Review of the Report and Recommendation of the Magistrate from the U.S. District Court for the Southern District of Florida presented reasonable, substantial, and probative evidence to show that the applicant was an illicit trafficker in marijuana and/or assisted an illicit trafficker in marijuana. The initial Report and Recommendation, dated May 22, 1981, included findings of fact and conclusions of law following an evidentiary hearing that was held on April 10, 1982. The findings of fact included that the applicant was arrested after being found on a boat, hiding several bales of marijuana in its fishing box. The applicant and another man were the only two people on the boat at

the time it was searched by U.S. Customs Officers. The applicant's companion stated to a customs officer that he was being paid ten to fifteen thousand dollars to traffic the bales of marijuana into the United States. The applicant stated that the boat was registered to his female friend. The applicant was arrested, but not ultimately convicted because the search by customs officials was found to be illegal. Counsel's assertions that the record fails to contain reasonable and substantial evidence to support a finding under section 212(a)(2)(C) of the Act was found to be unpersuasive. We noted that our finding was not based on an arrest report, but a Report and Recommendation and an Order on Review of the Report and Recommendation of the Magistrate from the U.S. District Court for the Southern District of Florida, which made its findings of fact after an evidentiary hearing.

On motion, counsel asserts that in rendering its decision, the AAO failed to consider an Eleventh Circuit precedent case, *Garces v. Attorney General*, 611 F.3d 1337 (11th Cir. 2010). Counsel states that in *Garces v. Attorney General* the court found that although the applicant has the burden of establishing admissibility, this burden is not without parameters. *Id.* Counsel states that the Eleventh Circuit found in *Garces* that the reason to believe standard is more than mere suspicion and that there must exist a probability, supported by evidence, that the applicant engaged in trafficking. *Id.* at 1346.

Counsel compares the facts in the *Garces* case to the applicant's case. In *Garces*, the applicant pled guilty to trafficking in cocaine, but the record contained no evidence that he made a factual admission of guilt. His conviction was later vacated based on a procedural defect and the only evidence in the record of the alleged trafficking were arrest reports, which were found to be unreliable. The court overturned the finding of inadmissibility under section 212(a)(2)(C)(i) of the Act.

It is noted that the present case arises within the jurisdiction of the Sixth Circuit, not the Eleventh Circuit. Decisions of the Eleventh Circuit are not binding on the present matter, though the reasoning of other circuits may be instructive. Further, we find that our decision and the decision of the Eleventh Circuit in *Garces* are not contradictory. The facts and evidence presented in the applicant's case differ from *Garces*. As stated previously, the record in the applicant's case includes a Report and Recommendation, dated May 22, 1981, which included findings of fact and conclusions of law following an evidentiary hearing that was held on April 10, 1982. The findings of fact included that the applicant was arrested after being found on a boat, hiding several bales of marijuana in its fishing box. The applicant and another man were the only two people on the boat at the time it was searched by U.S. Customs Officers. As noted above, the applicant's companion stated to a customs officer that he was being paid ten to fifteen thousand dollars to traffic the bales of marijuana into the United States and the applicant stated that the boat was registered to his female friend. A finding by a judicial body of facts and conclusions of law cannot be equated to arrest reports, which was the evidence used in *Garces* to make a finding under section 212(a)(2)(C)(i) of the Act.

We note that counsel disputes the reliability of what she labels as an uncertified magistrate report. She states that she has a redacted version of the 1981 magistrate report, which is the full transcript of the proceedings and does not reflect that the applicant made any admissions nor that the boat where the marijuana was found was owned by the applicant. We note that counsel has not submitted the redacted report for the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do

not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). However, we acknowledge that there is no admission on the part of the applicant, but continue to find that there exists a probability, supported by the magistrate's findings of facts and the applicant's statement submitted with the record, that the applicant engaged in trafficking. Moreover, the facts in the applicant's case are very different than the facts in *Garces*. In *Garces*, it was not clear that the accused was ever in the same vehicle or room as the drugs in question. The applicant in that case drove a friend to a hotel for an alleged birthday party and was not in the room when the transaction took place. He testified that he allegedly had no idea that his friend was going to the hotel to complete a drug transaction. In the applicant's case, he was in a boat with one other person and several bales of marijuana. By his own admission in 2009, the applicant stated that he was coming from the Bahamas. His companion stated that he was being paid to transport the drugs into the United States and the applicant stated that the boat was registered to his friend.

Counsel asserts that in a statement, dated April 23, 2009, the applicant explains that he was unaware there were drugs on the boat, that he was paid \$350 to bring the boat from the Bahamas, and that the boat belonged to individuals that he did not know, but who approached him and his friend at a bar in the Bahamas. Counsel questions the reliability of the Report and Recommendation of the Magistrate from the U.S. District Court and emphasizes the reliability of the applicant's 2009 statement. We find counsel's assertions to be unpersuasive. The applicant's statement, being given 27 years after his arrest and after he became aware of the immigration consequences of his actions, is of little probative weight when compared to findings of facts, contemporaneous with the incident in question by a Magistrate of a U.S. District Court. Moreover, the statements given by the applicant at the time of his arrest and the statement made in 2009 include several contradictions, calling into question the applicant's recollection or credibility. The Report and Recommendation indicates that the applicant stated that he had been fishing for 15 hours "right outside shore" off the coast of Florida. He also stated that the woman the boat was registered to was his friend. In 2009 he asserts that on the night in question, he was with four friends fishing off the coast of the Bahamas and because of weather they docked in Bimini, Bahamas. We note that Bimini, Bahamas is approximately 50 miles off the coast of Florida and would contradict his earlier assertions regarding fishing "right outside shore". In 2009 he states further that he and his friends were approached by a man in the Bahamas who offered to pay them \$350 to take his boat back to Miami and deliver it to his home address. This statement contradicts the applicant's earlier statements that he knew the woman whom the boat was registered as a friend. 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).

Thus, based on the foregoing, we again find that there is sufficient reason to believe that the applicant has been an illicit trafficker in a controlled substance, and he 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.

On motion counsel notes that the AAO failed to review the applicant's eligibility for a waiver under section 212(h) of the Act in regards to his conviction for possession of marijuana, less than 30 grams and his resulting inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. We find that because the

applicant has been found inadmissible under 212(a)(2)(C)(i) of the Act, no purpose would be served in discussing his eligibility for a section 212(h) waiver.

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. The motion will be granted, but the underlying application will remain denied.

ORDER: The motion is granted and the underlying application remains denied.