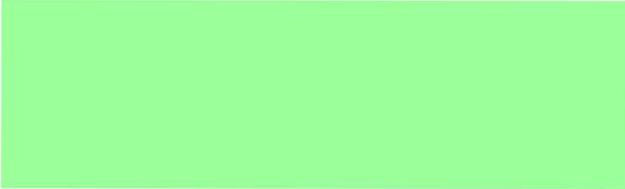


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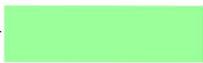


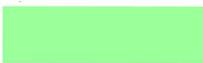
U.S. Citizenship
and Immigration
Services



Date: **MAR 18 2013**

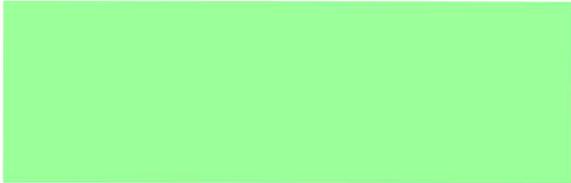
Office: TUCSON

FILE: 

IN RE: Applicant: 

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:



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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, 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 a 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 Acting Field Office Director, Tucson, Arizona, and the Administrative Appeals Office (AAO) dismissed the applicant's subsequent appeal. The matter is now before the AAO on motion to reconsider. The applicant's motion will be dismissed and the underlying application remains denied.

The applicant is a native and citizen of Mexico 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 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 been convicted of a crime relating to 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) after finding that the applicant was statutorily ineligible for a waiver, as no waiver is 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 a decision dated January 20, 2012, the AAO found that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of a crime related to a controlled substance and section 212(a)(2)(C) of the Act, for being involved in the illicit trafficking of a controlled substance, for which there is no waiver. Consequently, the applicant's appeal was dismissed.

On motion to reconsider, counsel for the applicant contends that the AAO erred in finding the applicant inadmissible for trafficking and for possessing more than 30 grams of marijuana. Counsel asserts that the only evidence referenced in the AAO decision is a "criminal indictment," which counsel asserts is insufficient to establish that the field office director had sufficient "reason to believe" the applicant was a controlled substance trafficker, or that the applicant's controlled substance conviction involved over 30 grams of marijuana. Counsel relies on Eleventh Circuit precedent to support this assertion. Furthermore, counsel contends that the record lacks reasonable, substantial, and probative evidence to show that the applicant attempted to transport 37.5 pounds of marijuana from Mexico to a K-Mart store in Arizona. In support of this assertion, counsel references a previously-submitted affidavit from the applicant to demonstrate that the applicant did not know the marijuana was inside the vehicle she was driving.

The regulation at 8 C.F.R. § 103.5(a) governs motions and states, in pertinent part:

(2) Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

(3) Requirements for motion to reconsider. 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 Service 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.

We will dismiss the applicant's motion to reconsider. In response to counsel's arguments regarding *Garces v. U.S. Att'y Gen.*, the AAO notes that *Garces* is not binding precedent these proceedings, which arise in the Ninth Circuit. We also observe that although Eleventh Circuit held that the vacated guilty plea along with police reports did not amount to reason to believe *Garces* trafficked in controlled substances, it reached its finding only after noting that the applicant's conviction for trafficking in cocaine had been vacated due to procedural defect, the record of conviction was unavailable, *Garces* offered a different account of the events that led to his arrest while denying any involvement in drug trafficking, and the conclusions in the police report did not amount to a reasonable probability that *Garces* was involved in drug trafficking. 611 F.3d 1337, 1345-50 (11th Cir. 2010). Importantly, the Eleventh Circuit noted that the police report reflected that no drugs were found on *Garces* or in his car, and that *Garces* "was not in the room when [the drug trafficker] handed the drugs to the undercover officer." *Id.* at 1349. The Eleventh Circuit recognized that the reason to believe charge does not require evidence that an alien actually handled a drug transaction; rather, all that is required is that there be some reasonable, substantial, and probative evidence that the alien is a knowing participant in a drug-related offense. *Id.* at 1350. Consequently, in the circumstances of that particular case, the act of driving a neighbor to a hotel in which he would sell cocaine to undercover agents was insufficient to establish "reason to believe" that *Garces* was a drug trafficker.

In the present case, however, the record of proceedings contains reasonable, substantive, and probative evidence demonstrating a reason to believe the applicant was involved in drug trafficking. Here, the applicant submitted the record of conviction related to the offense for which she pled guilty. The record of conviction includes the criminal complaint, which, contrary to the facts and circumstances in *Garces*, clearly indicates that the applicant was charged with attempting to transport 37.5 pounds of marijuana from Mexico to a K-Mart in Arizona. Thus, the complaint reflects that controlled substances were found in the car the applicant was driving. The criminal complaint reflects that the applicant stated to law enforcement officials that "a man whom she knew asked her to drive the vehicle into the United States and that she knew it contained about thirty pounds of marijuana." The applicant does not dispute the factual basis for the criminal complaint, nor does she specifically deny or contest ever stating to Customs Inspectors that she knew the automobile she drove across the Mexico-U.S. border contained thirty pounds of marijuana concealed under the rear seat of the vehicle.

The AAO notes that the applicant has offered a different version of the events that transpired that day. Any attempt to resolve or explain inconsistencies in the record will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The fact remains that the applicant was convicted of possession of marijuana on February 13, 1992. The criminal complaint suggests that the amount of marijuana the applicant possessed was 37.5 pounds, an amount well beyond that which could be characterized as intended merely for personal use. *See Matter of Rico*, 16 I&N Dec. 181, 186 (BIA

1977). The criminal complaint further suggests that the applicant transported the marijuana in an attempt to aid an illicit drug trafficker. The AAO acknowledges that the applicant was not convicted of possession with intent to distribute marijuana, as originally charged in the criminal complaint. However, and as noted in our January 20, 2012 decision, the only requirement for an applicant to be inadmissible under section 212(a)(2)(C) of the Act 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). Consequently, an applicant may be deemed inadmissible under section 212(a)(2)(C) of the Act even where there has been no admission and no conviction. Here, the AAO finds that the acting field office director relied on reasonable, substantive, and probative evidence to support the belief that the applicant aided in illicit trafficker in a controlled substance. Accordingly, after careful review of the record evidence, we determine that our prior decision was correct and the applicant remains inadmissible under section 212(a)(2)(C)(i) of the Act. There is no provision under the Act that allows for a waiver of inadmissibility under section 212(a)(2)(C)(i) of the Act.

Furthermore, even were the AAO not to concur that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act for aiding a controlled substance trafficker, the AAO notes the applicant would remain statutorily ineligible for a section 212(h) waiver based upon her inadmissibility under section 212(a)(2)(A)(i)(II) of the Act, as she has not demonstrated that her possession of marijuana conviction relates to “simple possession of 30 grams or less of marijuana.”

For purposes of a section 212(h) waiver of the applications of section 212(a)(2)(A)(i)(II) of the Act, the Board of Immigration Appeals (Board) has held that an adjudicator must engage in a “circumstance-specific” inquiry where the conviction record does not clearly specify that the crime is possession of 30 grams or less of marijuana:

We conclude that section 212(h) employs the term “offense” . . . to refer to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime. Our main reason for drawing this conclusion is that the “offense” in question is defined so narrowly, by reference to a specific type of conduct (simple possession) committed on a specific number of occasions (a “single” offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

Matter of Martinez-Espinoza, 25 I&N Dec. 118, 124 (BIA 2009) (citing *Nijhawan v. Holder*, 557 U.S. 28, 33-34, 129 S.Ct. 2294, 2298-2299 (2009)); cf. *Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a “circumstance-specific” inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a “single” offense of possession). Additionally, it has long been held by the Board that where the amount and type of a controlled substance that an alien has been convicted of possessing cannot be readily determined from the conviction record, “the alien who seeks relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved “30 grams or less or marihuana.” *Matter of Grijalva*, 19 I&N Dec. 713,

718 (BIA 1988). Therefore, the AAO is not limited by categorical considerations, but may inquire into the specific acts underlying the applicant's conviction.

Applying the foregoing standards to the case at hand, it is clear that the applicant was convicted in the United States District Court for the District of Arizona of possession of marijuana, which is a federal law relating to a controlled substance. Pursuant to *Matter of Grijalva*, if the type and/or amount of drug that an alien has been convicted of possessing cannot be ascertained from the conviction record, the alien has the burden of proof to come forward with evidence to meet his or her burden of proving that the conviction related to simple possession of 30 grams or less of marijuana. 19 I&N Dec. at 718. Otherwise, the alien will remain inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a conviction relating to a controlled substance without the possibility of applying for a section 212(h) waiver. *See id.* at 724. Here, the record conclusively demonstrates that the applicant was convicted of possessing an unspecified amount of marijuana. The applicant contends on appeal that the AAO may not rely on count 1 of the criminal complaint to determine that the amount of marijuana the applicant possessed at the time of her arrest was 37.5 pounds. However, the applicant has not asserted nor shown on motion that she was convicted for an offense relating to 30 grams or less of marijuana that would render her eligible for a waiver of inadmissibility under section 212(h) of the Act. Consequently, the applicant has not met her burden to show that she was erroneously deemed inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts. *See* 8 C.F.R. § 103.5(a)(2). As the applicant has not met her burden of showing that our prior decision was based on an incorrect application of law or policy, the motion must be dismissed.

ORDER: The motion is dismissed.