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

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: SAN DIEGO, CA Date: OCT 0 8 2010

[redacted]

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on March 23, 1996, appeared at the San Ysidro, California port of entry. The applicant presented a photo altered Mexican passport containing a U.S. nonimmigrant visa bearing the name [redacted] The applicant was referred to secondary inspection. The applicant admitted that she was not the true owner of the document and that she did not have valid documentation to enter the United States. The applicant failed to provide her true identity to immigration officers. On the same day, the applicant was placed into immigration proceedings. On March 28, 1996, the immigration judge ordered the applicant removed from the United States under the name [redacted] On March 28, 1996, the applicant was removed from the United States and returned to Mexico.

On February 12, 2000, the applicant married her U.S. citizen spouse in San Bernardino, California. On July 26, 2000, the applicant was arrested for possession of a controlled substance for sale, to wit methamphetamine. On October 24, 2000, the charges against the applicant were amended to reflect a violation of section 11366.5(a) of the California Health and Safety Code (CHSC). On the same day, the applicant pled guilty to and was convicted of rent/etc. for storage/sale/etc. of a controlled substance in violation of section 11366.5(a) of the CHSC. The charge of possession of a controlled substance for sale was dismissed. The applicant was sentenced to thirty-six months of probation and sixty days in jail.

On September 18, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on her behalf by her U.S. citizen spouse. On August 10, 2004, the Form I-485 was denied. On August 3, 2007, the applicant filed the Form I-212 indicating that she continued to reside in the United States. The applicant is inadmissible indefinitely pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant requests permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with her U.S. citizen spouse and two U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated May 13, 2009.

On appeal, prior counsel contended that the applicant was not convicted of an aggravated felony. Prior counsel contended that the district director should have granted the applicant's application for permission to reapply for admission due to the hardship to her U.S. citizen husband and U.S. citizen children, one of whom suffers greatly from anger outbursts and who is currently under medical and psychological therapy. *See Counsel's Brief,* dated June 10, 2009. In support of his contentions, prior counsel submitted the referenced brief, copies of medical and psychological documentation, copies of financial documentation and copies of documentation already in the record.

On December 3, 2009, the AAO dismissed the applicant's appeal because the applicant is inadmissible pursuant to sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C), for having been convicted of a crime relating to a controlled substance and for being involved in illicit trafficking of a controlled substance. *Decision of AAO,* dated December 3, 2009.

In her motion to reconsider, counsel contends that the applicant's conviction does not involve a controlled substance as defined in section 802 of Title 21. Counsel contends that, therefore, the applicant has not been convicted of a crime relating to a controlled substance or an aggravated felony. Counsel contends that the applicant is also, therefore, not inadmissible for having been involved in illicit trafficking of a controlled substance. *See Counsel's Brief,* dated February 2, 2010. In support of her contentions, counsel submits the referenced brief and copies of criminal records. The entire record was reviewed in rendering a decision in this case.

8 C.F.R. § 103.5(a) provides, in pertinent part:

> (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.

In her motion to reconsider, counsel contends that the applicant's conviction is not related to a controlled substance because the applicant pled guilty to an amended charge under section 11366.5(a) of the CHSC which involved an unidentified controlled substance. Counsel contends that, pursuant to relevant case law, since the applicant pled guilty to a crime relating to an *undesignated* controlled substance and the substances controlled by California include substances that are not controlled by section 802 of Title 21, the applicant cannot be found inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act. *See Counsel's Brief.* While counsel contends that the applicant pled guilty to an undesignated controlled substance, counsel has failed to provide evidence that the amended charge to which the applicant pled guilty was undesignated and was not methamphetamine, the original controlled substance with which she was charged. While the advisement of rights, waiver and plea form does not specify the exact wording of the charge to which the applicant pled, the record available to the applicant should consist of a presentencing report, a plea agreement and complete amended charges which would indicate the controlled substance involved in the charges to which the applicant pled. The applicant was provided with ample opportunity prior to and on appeal to submit evidence to establish that she was not inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act.

Counsel fails to cite any pertinent precedent decisions to establish that the AAO's findings based on the record before it at the time of the original decision was an incorrect application of law, since the burden of proof lies with the applicant to establish that she is, beyond doubt, not inadmissible to the United States.

In her motion to reconsider, counsel contends that the AAO erred in finding that the applicant had been convicted of an aggravated felony. *See Counsel's Brief.* The AAO finds that *Garcia v. Holder*, 360 Fed. Appx. 907 (9th Cir. 2009) and *Eudave-Mendez v. Keisler,* 249 Fed. Appx. 617 (9th Cir. 2007), cases to which counsel cites in her motion to reconsider, hold that a conviction under section 113665.5(a) of the CHSC is not *categorically* an aggravated felony due to the *mens rea* requirement of "intentionally," distinguishing it from 21 U.S.C. § 856(a)(2); however, as discussed in the AAO's original decision, whether the applicant has been convicted of an aggravated felony has no bearing on whether she is inadmissible to the United States since she is inadmissible pursuant to section 212(a)(2)(C) of the Act.

In her motion to reconsider, counsel contends that the AAO erred in finding that there was reason to believe that the applicant was involved in illicit trafficking of a controlled substance. Counsel does not cite to a specific case to support her argument, but rather relies upon her prior arguments in regard to whether the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. *See Counsel's Brief.* The AAO finds counsel's contentions unpersuasive. The AAO finds that the current evidence in the record is sufficient to find reason to believe that the applicant was involved in illicit trafficking of a controlled substance as defined under section 802 of Title 21, even if the applicant is later able to provide evidence sufficient to establish that the applicant did indeed plead guilty to an undesignated controlled substance, since, under section 212(a)(2)(C), the AAO is not limited by the requirements for finding that an applicant has been convicted of a particular crime. A conviction is not necessary for an applicant to be inadmissible under 212(a)(2)(C) of the Act if the evidence shows that the Secretary (or his or her designates) knows, or has "reason to believe" the applicant is or has been involved in illicit trafficking. *See Matter of Rico*, 16 I&N Dec. 181 (BIA 1977); *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979); *Hamid v. INS*, 538 F.2d 1389 (9th Cir. 1976). Although there is no controlling case law defining a "reason to believe," similar language in different statutes has generally been interpreted as a "probable cause" requirement. *See generally Ludecke v. United States Marshal*, 15 F.3d 496, 497 (5th Cir. 1994) (equating probable cause with a "reasonable ground" to believe the accused guilty); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990) (noting that a "reasonable belief" that the alien is involved in terrorist activity may be formed if the evidence linking the alien to terrorist violence is sufficient to justify a "reasonable person" in the belief that the alien falls within the proscribed category); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (equating probable cause to a "reasonable ground to believe the accused guilty" in an extradition case); *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984) (same); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (noting that in order to issue an order and warrant for commitment in international extradition cases, the "existence of probable cause or, in other words, the existence of a reasonable ground to believe the accused guilty of the crime charged" is essential). Furthermore, all of the evidence in a record of proceeding is admissible for the purpose of establishing an applicant's inadmissibility under section 212(a)(2)(C) of the Act. *See Lopez-Molina v. Ashcroft,* 368 F.3d 1206, 1211 (9th Cir. 2004); *Rojas-Garcia v. Ashcroft,* 339 F.3d 814, at 823-24 (9th Cir. 2003); *Matter of Wadud*, 19 I&N Dec. 182, 188 (BIA 1984). The AAO finds that there is reasonable, substantial, and probative evidence that the applicant has been involved in the illicit trafficking of methamphetamine, a controlled substance defined under section 802 of Title 21. Counsel fails to cite any pertinent precedent decisions that establish the AAO's findings based on the record before it at the time of the original decision to be an incorrect application of law.

In support of her motion to reconsider, while counsel contends that there was an incorrect application of law, as discussed above, counsel's contentions are unpersuasive or have no bearing on the outcome of the applicant's case. Accordingly, the AAO finds that counsel failed to state reasons for reconsideration that were supported by any pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law.

The petitioner's motion does not meet applicable requirements. The regulation at 8 C.F.R. § 103.3(a)(3) states that 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. Accordingly, the motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failing to meet applicable requirements.

ORDER: The motion is dismissed. The order dismissing the appeal will be affirmed.