



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: **JAN 31 2013**

Office: SAN DIEGO

FILE: [Redacted]

IN RE:

Applicant: [Redacted]

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

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 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 District Director, San Diego, California, denied the Application for Permission to Reapply for Admission (Form I-212) and the Administrative Appeals Office (AAO) dismissed the applicant's appeal, and three subsequent motions to reconsider. The applicant has requested that the most recent motion be re-adjudicated because of failure of the San Diego Field Office to forward the brief to the AAO. The AAO will withdraw its decision dated June 22, 2012, to be replaced by this decision. The applicant's motion will be dismissed and the underlying application remains denied.

The applicant is a native and citizen of Mexico who attempted to enter the United States on March 23, 1996, using a photo-substituted passport. On March 28, 1996, the applicant was removed from the United States. The applicant was found inadmissible under 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 seeks 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 husband and children.

In a decision dated December 7, 2011, 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. In the AAO's most recent decision, dated June 22, 2012, we found that the applicant failed to state the reasons for the motion, and that no brief or additional evidence was submitted in support of the motion to reconsider.

Counsel for the applicant asserts that the motion to reconsider was denied due to a United States Citizenship and Immigration Service (USCIS) error, as the San Diego Field Office failed to send the applicant's submitted brief to the AAO. Counsel has submitted evidence demonstrating the filing of a "Brief in Support of Motion to Reconsider AAO Appeal," received by the San Diego Field Office on February 8, 2012. We withdraw that decision to consider the brief submitted by counsel.

On motion, counsel argues that the AAO erred in concluding that the evidence submitted on appeal and on motion failed to establish the applicant's statutory eligibility for a waiver of inadmissibility. Specifically, counsel cites to the case of *Sandoval Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), in which it was held that an alien seeking to establish eligibility for an immigration benefit carries his burden of establishing that he is not inadmissible by producing an inconclusive record of conviction under the modified categorical approach. Counsel states that, since the applicant has submitted the complete record of conviction, and said record is inconclusive as to the controlled substance for which the applicant pled guilty, the applicant has met her burden of establishing that she is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Consequently, counsel contends that the AAO erred in finding that the applicant failed to meet her burden of proof by not identifying the controlled substance which led to her conviction for maintaining a place for narcotics in California.

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 *Sandoval Lua v. Gonzalez*, 499 F.3d 1121 (9th Cir. 2007), the AAO notes that this ruling has been overturned by the Ninth Circuit Court of Appeals' *en banc* decision in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012). In *Young*, the Ninth Circuit held that an alien cannot show eligibility for relief by merely establishing that the record of conviction is inconclusive. *Id.* at 989. As the Ninth Circuit stated in *Young*, "the party who bears the burden of proof does not get the benefit of the doubt" on an inconclusive record of conviction. *Id.* Consequently, when the burden rests on an alien to show that he or she is not inadmissible, an inconclusive record of conviction is insufficient to satisfy the alien's burden of proof.

Additionally, in *Sandoval Lua* the Ninth Circuit was reviewing whether the alien's conviction was an aggravated felony for illicit trafficking in a controlled substances under section 101(a)(43)(B) of the Act. 499 F.3d at 1127. Given that *Sandoval Lua* addressed an aggravated felony determination, it is not directly on point. The instant case requires us to consider controlled substance inadmissibility and its corresponding waiver, not whether the applicant's conviction constitutes an aggravated felony for purposes of statutory eligibility regarding an application for cancellation of removal. *See id.* at 1129 ("Because [Lua's] conviction is not categorically an aggravated felony under 8 U.S.C. § 1101(a)(43)(B), [his] conviction does not foreclose cancellation of removal."). Moreover, it is noted that though the Ninth Circuit in *Sandoval Lua* limited the evidence that can be reviewed when determining whether an applicant has been convicted of an aggravated felony under section 101(a)(43)(A) of the Act to the documents comprising the record of conviction under the modified categorical approach, such limitations do not necessarily adhere when interpreting inadmissibility under section 212(a)(2)(A)(i)(II) of the Act and the corresponding section 212(h) waiver relating to 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 of marijuana.” *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 has failed to meet her burden of demonstrating that her October 24, 2000 conviction for maintaining a place of narcotics under California Health and Safety Code section 11366.5(a) does not render her inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime related to a controlled substance listed in section 102 of the federal Controlled Substances Act. As noted in our December 7, 2011 decision, controlled substances under California law include substances that are not identified in section 102 of the Controlled Substances Act. It is therefore possible to be convicted of a controlled substance violation in California that does not lead to inadmissibility under section 212(a)(2)(A)(i)(II) of the Act. However, section 291 of the Act provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought.

In this case, it is clear that the applicant was convicted of a state law relating to a controlled substance; and the record reflects that the applicant was originally arrested for charges relating to methamphetamines. While the applicant suggests that the controlled substance was something other than methamphetamine, she has not indicated the specific substance. Nor has she provided any documentation to indicate for what substance she was convicted. Here, the record conclusively demonstrates that the applicant was convicted of maintaining a place for narcotics in violation of California Health and Safety Code section 11366.5(a), an offense relating to a controlled substance, and the only substance referenced in the record is methamphetamine. The applicant has not asserted nor shown 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. Therefore, 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.

As the applicant did not meet her burden, the AAO correctly dismissed the applicant’s appeal and subsequent motions to reconsider.

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ORDER: The motion is dismissed.