Synopsis: Petition to reopen and reconsider denial of adjustment on status of basis that applicant did not qualify for waiver due to single conviction of paraphernalia possession, where the paraphernalia consisted of a small pipe with burned out pot residue, and attacking absurdity of granting waiver for single possession of 30 grams or less of pot, a more serious offense than the paraphernalia possession. Filed in the Baltimore District on May 15, 2009, by Aldo Terrazas, Esq.

I. REOPENING AND RECONSIDERATION SHOULD BE GRANTED BECAUSE SEVERAL KEY FACTS HAVE BEEN OVERLOOKED OR MISSTATED AND APPLICABLE LAW FAVORS RECONSIDERATION.

A. *Possession of paraphernalia relates to a single offense of simple possession of 30 grams or less of marihuana, making applicant eligible for a waiver.*

The absurd and illogical result of denying waiver eligibility for an offense that is a lesser included offense and of lesser severity--possession of paraphernalia-- has been corrected and ruled as being related to a single offense of simple possession of 30 grams or less of marihuana, making an applicant eligible to apply for a waiver. *Escobar Barraza v. Mukasey,* ___ F. 3d ___ No. 07-2502, Slip op. (7th Cir. March 13, 2008) (copy attached). This is specially true where, as is the case here, the amount of marihuana is so small as to consist of only the burned residue left in a small pipe.

To appreciate the incredible injustice of denying waiver eligibility to the husband and father of U.S. citizens based on such a minimal infraction, let's put the matter into context. The facts giving rise to the paraphernalia case resulted from a speeding stop. (See Ex. A, Affidavit of Mr. Rodriguez, attached[1].) Mr. Rodriguez was in a pick up truck going to lunch with three other co-workers. When a police officer asked if the vehicle could be searched, Mr. Rodriguez readily consented, not knowing that there was a small pipe inside a pack of cigarets.

[1]All the facts pertinent to this issue and relied upon here are supported by the enclosed Affidavit of Mr. Rodriguez.

The pack was not his since he did not smoke. Mr. Rodriguez informed the officer that neither the pack nor the pipe were his and that the pick up truck was used frequently by people other than him. No marihuana was found other than burned residue stuck to the pipe. *Id.* The police officer told him that because the pick up was in his name, the citation had to be issued in his name. He was not arrested (the denial letter erroneously states that he was) but he was given a citation to appear in court. He went to court without legal representation and the prosecution offered to dismiss the more serious charge, possession of marihuana, if he pled to possession of paraphernalia and the judge went further by granting him unsupervised PBJ, or Probation Before Judgment. With legal representation the entire matter would have been dismissed outright; there is a mountain of reasonable doubt as to who was the owner of the pipe and the trace amount in the pipe was insufficient to be tested. It is no wonder that the prosecution rushed to offer a dismissal of the more serious charge to a person who was not even represented by an attorney. It is also significant to note that the judge, on his own, awarded a PBJ to an unrepresented person, showing that he considered the infraction a minor one.

In *Escobar Barraza v. Mukasey,* ___ F. 3d ___ No. 07-2502, Slip op. (7th Cir. March 13, 2008) (copy attached, Ex. B) the court ruled on a case of a person convicted of possession of paraphernalia where the only evidence was, as is the case here, a pipe with marihuana residue. The Court in *Escobar* found that "His conviction for possessing one pot pipe "relates to a single offense of simple possession of 30 grams or less of marihuana". He therefore is eligible for consideration under §1182(h) [or 212(h)]." Slip Op. at p.9. The court recognized the fact that under INA §212(h), the Attorney General may, under certain circumstances, waive inadmissibility under INA §212(a)(2)(A)(i)(II) "insofar as it relates to a single offense of simple

possession of 30 grams or less of marihuana…." Slip Op. at p. 6. The IJ and the BIA in *Escobar* had read §212(h) to mean that the conviction itself must be for simple possession of marihuana in order to qualify for a waiver. However, the court pointed out that if possession of drug paraphernalia relates to a controlled substance for purposes of inadmissibility under INA §212(a)(2)(A)(i)(II), why would it not also qualify for purposes of a waiver under INA §212(h)? *Id.* Section 212(h) is not limited to a conviction for simple possession of less than 30 grams of marihuana, but is rather open to waiving inadmissibility under such subsection "insofar as it relates to" such an offense. *Id*. The court stated, "the pipe must be "related to" possession of marihuana; that relation is why possessing the pipe was illegal." *Id*. at p. 7. The court then considered whether the paraphernalia conviction related to "simple possession" of 30 grams or less of marihuana. Because Escobar was caught with the pipe and no marihuana (as is the case here) the court found the obvious answer to be "yes." The court said "The is no logical problem in treating a pot pipe as related to marihuana, whether or not the pipe and the marihuana are found together in a pouch. " *Id*. However, recognizing the potential argument that a Petitioner's stash could have easily exceeded 30 grams, but that the police failed to locate it, the court concluded: "Pipes, roach clips, and other paraphernalia designed for use with personal-possession quantities of marihuana come within §1182(h) [§212(h)] because the paraphernalia relates to the drug and the implied quantity is under 30 grams. Scales, bagging gear, trays and lamps for growing whole plants, and other apparatus for use with larger quantities or distribution do not relate to "simple possession" and so fall outside the waiver." *Id.* at p. 8. Accordingly, the Court held that a conviction for paraphernalia possession, where the amount of marihuana found is less than 30 grams relates to a single offense of simple possession of 30 grams or less of

marihuana and that the Petitioner in that case was therefore, eligible to apply for a waiver. *Id.* at p. 9.

It is an absurd result to have a lesser included offense (paraphernalia possession) to be more punitive and damaging than the offense it relates to (marihuana possession) and without which it would not exist. Especially where, as here, the marihuana was nothing more than residue contained in the paraphernalia. The *Escobar* Court has recognized this absurdity and articulated a logical ruling that is just and fair. The facts of *Escobar* are identical to the case at hand. Mr. Rodriguez' case merits reconsideration. He should be ruled eligible to apply for waiver.

B. ***The District omitted the fact that the paraphernalia charge was dismissed and that no conviction was entered against the applicant.***

Mr. Rodriguez was never convicted of possession of paraphernalia. The effect of a successful PBJ is that a conviction is not entered. The law clearly states that there is no conviction. "Discharge of a defendant [pursuant to a PBJ] shall be without judgment of conviction and **it is not a conviction** for the purpose of any disqualification or disability imposed by law because of a conviction of a crime." (Emphasis added), Maryland Criminal Procedure, § 6-220(e)(3). The District states that the Maryland Judiciary Case Search "reflect" that Mr. Rodriguez was "found" guilty of possession of paraphernalia (Denial Letter, p. 5). That is incorrect. The Maryland Judiciary Case Search does not show that a finding of guilt was made. (Ex. C, copy of Maryland Judiciary Case Search document, attached.) The record in question states the following: "DISPOSITION: PBJ UNSUPERVISED". *Id.* It is possible that a finding of guilt was never made in this case. It is not unheard of a judge to defer a finding.

The District Director never even mentioned the PBJ nor did it address the significance of the fact that there is no conviction for paraphernalia possession. Moreover, the District misstates the record by saying that the Maryland Judiciary Case Search reflects that Mr. Rodriguez was found guilty when no such finding is reflected in the record.

Reopening the application can address these issues by examining the facts giving rise to the paraphernalia charge, the minute amount that was involved, the fact that the pipe did not belong to Mr. Rodriguez, the fact that there is no conviction and possibility that the finding of guilt was deferred and never made[2].

C. ***Charging the applicant with willful misrepresentation for alleged failure to disclose the paraphernalia charge is a misreading and misinterpretation of the facts that merits reopening and re-evaluation.***

The District Director acknowledges that Mr. Rodriguez disclosed the possession of marihuana charge and its dismissal. (Denial Letter at p. 5.) But charges him with lying for not disclosing the paraphernalia charge[3]. This curious conclusion would have Mr. Rodriguez disclosing the more serious charge but hiding the lesser one and for some unexplained reason hiding the favorable fact that the lesser charge was dismissed pursuant to a PBJ. The more plausible conclusion is that Mr. Rodriguez, as any other reasonable person would, considered the marihuana matter (marihuana and paraphernalia) as one because the only thing that the police

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[2]Reopening can also address the falsity of the assertion that Mr. Rodriguez was "convicted" of both possession of marihuana and paraphernalia (at p. 6 Denial Letter) while acknowledging the pot possession was dismissed, i.e., no conviction (at p. 5), and ignoring the fact that there is no conviction for paraphernalia possession.

[3]Mr. Rodriguez insists that he provided copies of both, the marihuana and the paraphernalia possession, records. (Ex. A, Affidavit, Ex. D pertinent copies of the record submitted).

found was the pipe. In essence, the paraphernalia is the marihuana. It is clear that the District is unaware of the fact that there was no other pot. In fact, there was no pot, only burned residue stuck to a pipe. It is unreasonable to charge Mr. Rodriguez with willful misrepresentation under these facts when the District itself is unaware of the fact that the paraphernalia and the pot are one and the same. The District is splitting hairs to find every way possible to deny the application.

Mr. Rodriguez did not willfully misrepresent anything. He and his wife made the application themselves without consulting a lawyer and they did not know how to answer questions in the application or during the interview. (See Affidavit.) They even left some items of the application blank naively thinking that the immigration interviewers would help them with the answers. *Id.* Instead, the District has chosen to charge Mr. Rodriguez with lying to interviewers. A review of the taped interview should be done.

A grant to reopen the application will resolve many of the now negative issues into positive ones for Mr. Rodriguez. In items that are doubtful or not clear the District has chosen to construe them against him rather than giving him an opportunity to clarify or explain. A reopening of the application is the fair remedy for Mr. Rodriguez whose U.S. Citizens wife and children depend on him. He should be given the opportunity to show why his application merits favorable consideration.

CONCLUSION

For the reasons stated herein it is respectfully requested that Mr. Rodriguez' application be reopened and the decision to deny be reconsidered.

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