Greg Boos, WSBA #8331
EOIR ID #DO705317
Cascadia Cross-Border Law
1305 11th Street, Suite 301
Bellingham, WA, 98225

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of: [redacted]	)	**File Nos.:** [redacted]
Appeal of DHS decision regarding waivers of inadmissibility for nonimmigrants under §212(d)(3)(A)(ii) of the Immigration and Nationality Act	)	

APPLICANT'S APPEAL OF DHS' DECISION REGARDING INADMISSIBILTY UNDER INA §212(d)(3)(A)(ii)

BRIEF IN SUPPORT OF [redacted]'S APPEAL OF DHS DECISION REGARDING WAIVERS OF INADMISSIBILITY FOR NONIMMIGRANTS UNDER INA §212(D)(3)(A)(II)

Applicant, [redacted], through her representative Greg Boos, Esq. submits this brief in support of her application under section 212(D)(3)(A)(II) of the Immigration and Nationality Act. Ms. [redacted] asks that the question of her inadmissibility be reviewed as a matter of law.

Ms. [redacted] has not been convicted of an offense that would make her inadmissible to the United States, nor admitted to the essential elements of an offense that would make her inadmissible to the United States.

I. Statement of Facts and Procedural History

The following is copied directly from CBP materials received via the Freedom of Information Act [*redactions included in materials received*]:

> *On 07/22/2015, at approximately 1943 hours, subject [redacted] (DOB [redacted]) applied for admission via lane three ([redacted]) at the Point Roberts, [redacted] POE as a citizen of CANADA utilizing [redacted] was the driver of a British Columbia plated vehicle bearing the plate number [redacted] gave a negative verbal declaration to primary CBPO [redacted] Trunk check on primary was positive for a clear plastic baggy containing a green leafy substance. [redacted] was placed in handcuffs and escorted to secondary by CBPO [redacted].*

While in secondary, a patdown for merchandise was requested and approved by SCBPO [redacted]. CBPO [redacted] conducted a patdown with CBSA [redacted] as a witness. The patdown was conducted at 1948 Hrs and ended at 1950Hrs. The vehicle was driven by CBPO [redacted] to CBP Secondary. CBPO'S [redacted] and [redacted] inspected the vehicle which ended in negative results.

The green leafy substance was field tested [redacted] which tested positive for the properties of marijuana at 1950 hours. The marijuana had weight of .84 grams and was placed in Bag# [redacted] and documented on CBP form 6051S# 3409632.

The Command Center was notified at 2110 hours and asked to make all notifications. [redacted] was assessed a $500.00 failure to declare penalty receipt # [redacted], FP F # ([redacted] Seizure # [redacted]

[redacted] was deemed inadmissible to the United States under section 212(a)(2)(A)(i)(II) and allowed to withdraw her application. SIGMA# [redacted], [redacted] was given I-160A/waiver instructions and departed the POE for Canada at 2135 hrs.

Exhibit A: Department of Homeland Security: Customs and Border Protection Primary Query History for [redacted] obtained via FOIA

Ms. [redacted]'s $500 civil fine has been paid in full. No additional fine or citation was levied. Please see:

Exhibit B: U.S. Customs and Border Protection Citation Receipt for $500

Ms. [redacted] was questioned by CBP, but did not make a voluntary admission to the essential elements of a controlled substance offense. *FOIA, Exh. A*. Further, the matter was not forwarded for prosecution, so there was no trial or conviction which could make her inadmissible.

In December of 2015, Ms. [redacted] petitioned the Admissibility Review Office (ARO) to review the question of her inadmissibility. Alternatively she requested that if she was deemed inadmissible by the ARO, that she be granted an I-192 non-immigrant waiver. On February 8, 2016, Ms. [redacted] received a waiver valid for one year. There was no indication that the ARO reviewed the question of her inadmissibility. Please see:

Exhibit C: Waiver Approval Notice Dated February 8, 2016

In July 2016, Ms. [redacted] again petitioned the ARO to review the question of her inadmissibility. She requested that if she was deemed inadmissible by the ARO, that she be granted an I-192 non-immigrant waiver. On November 21, 2016, Ms. [redacted] received a waiver valid for five years. There was no indication that the ARO reviewed the question of her inadmissibility.

Exhibit D: Waiver Approval Notice Dated November 21, 2016

[redacted]

II. Statement of the Issues Presented

Ms. [redacted] now files this appeal to the Board of Immigration Appeals to review the question of whether payment of a $500.00 failure to declare penalty civil fine for possession of a small amount of marijuana found in the car she was driving renders her inadmissible to the U.S. despite never being convicted of a controlled substance violation nor voluntarily admitting the essential elements of a controlled substance violation.

III. Standard of Review

The Board applies a de novo standard to all appeals of DHS officer decisions. 8 C.F.R. § 1003.1(d)(3)(iii).

IV. Summary of the Argument

In this case, there is no basis in law to find Ms. [redacted] inadmissible and require her to complete waiver applications for the rest of her life. A finding of inadmissibility requires either a conviction, an admission to the essential elements of controlled substance offense, or some other basis. Based on the facts stated by DHS in its FOIA response, there is no basis to find Ms. [redacted] inadmissible as Ms. [redacted] was assessed a $500.00 "failure to declare penalty."

V. Argument

Ms. [redacted] is not inadmissible to the United States as a result of paying a civil fine related to the seizure of a small amount of Marijuana found in her car; as she has never been convicted of a controlled substance violation nor voluntarily admitted the essential elements of a controlled substance violation.

Persons arriving in the United States must "present themselves, and all articles accompanying them for inspection" to a Customs officer. 19 U.S.C. § 1459. Likewise for those arriving in a vehicle. 19 U.S.C. § 1433. Penalties may apply for violation of reporting requirements under 19 U.S.C. § 1459 and § 1433. A failure to present *any* item for Customs inspection could be the basis for the penalty. 19 U.S.C. § 1459 and § 1433.

In the 1990's, the Legacy United States Customs Service instituted a "Zero Tolerance Program," in which fines were levied for the possession of small amounts of marijuana in lieu of criminal prosecution. A high ranking Legacy INS policymaker subsequently issued a memorandum to officers in the field instructing that an alien's signing of an "Agreement to Pay Monetary Penalty" in conjunction with the "Zero Tolerance Program" was sufficient to make the alien subject to exclusion as an alien who has admitted a violation of a law regulating controlled substances. After reviewing the matter, the INS General Counsel himself issued a legal opinion stating such position to be wrong as a matter of law. The General Counsel advised that INS could not exclude persons solely on the collection of a civil fine for a marijuana seizure. The legal opinion explicitly states **"an alien who agrees to pay the penalty does not by doing so 'admits having committed or admits committing acts which constitute the essential elements of a controlled substance violation.'"**

Exhibit E: Opinion from T. Alexander Aleinikoff, General Counsel at the INS to the Office of the General Counsel, re: LEGAL OPINION: Your CO 235-C Memorandum of October 25, 1991: Excludability under Customs Zero Tolerance Fines (January 20, 1995) ***available at***

[redacted]

http://static1.1.sqspcdn.com/static/f/260661/3519133/1246891377910/Excludability+Under+Zero+Tolerance+Program.pdf?token=k3eTQEvaeG0PovkjI9XjvsA8HD4%3D

The INS General Counsel's legal opinion states that the fines did not create a ground of inadmissibility because "the penalty is actually imposed for violating the requirement to present for Customs inspection items brought to the United States." *Id.* The legal opinion further states "the reporting provisions are not limited to the reporting of controlled substances. A failure to present for Customs inspection *any* item brought to the United States could be the basis for the penalty." *Id.* Therefore despite the seizure documentation under the "Zero Tolerance Program," expressly stating that the seizure was related to a controlled substance the Agency "may not rest an exclusion charge under section 212(a)(2)(A)(i)(II) solely on an alien's having signed this Agreement." *Id.*

The INS General Counsel's opinion has not been superseded or withdrawn. The ARO has recognized the General Counsel's opinion and has stated "…it has been deemed that the signing of the Agreement to Pay Monetary Penalty does not constitute a controlled substance violation."

Exhibit F: May 2, 2008 Letter From ARO Recognizing That Signing Agreement To Pay Monetary Penalty Does Not Constitute A Controlled Substance Violation

In this case, although Ms. [redacted] was found with what may have been a small amount of marijuana in her possession at a Port of Entry, the INS General Counsel's opinion provides

[redacted]

precedent for finding that Ms[redacted] is not inadmissible. *FOIA, Exh. A*. Ms.[redacted] was (1) never convicted nor (2) voluntarily admitted to the essential elements of violating a specific controlled substances law. Ms.[redacted] paid a civil fine related to the seizure, but this does not amount to a conviction nor does it constitute an admission to violating a specific controlled substance law. *FOIA, Exh. A*

Ms.[redacted]s payment of a civil fine, identical to the civil fines in the "Zero Tolerance" program referenced by the INS in the Legal Opinion at *Exh. E*, does not create a basis for inadmissibility. The authority to assess the penalty is not based specifically on any law or regulation specifically relating to a controlled substance, but on a failure to comply with the reporting requirements. According to the DHS FOIA response documentation Ms.[redacted] was assessed a $500.00 "failure to declare penalty." *FOIA, Exh. A*

The law of inadmissibility to the United States is stringent, covering a broad range of convictions and non-convictions. Still, in this matter, there is no conviction, or a voluntary admission to the essential elements of a controlled substance violation. Nor is there a conviction for a crime involving moral turpitude. Therefore, the "Service may not seek an alien's exclusion as an alien who has admitted a controlled substance violation, based solely on the alien's having signed the 'Agreement to Pay Monetary Penalty.'" *Aleinikoff Legal Opinion (January 1991), Exh. E.*

[redacted]

VI. Conclusion

There is not a sufficient basis in law to find Ms. [redacted] inadmissible and require her to complete waiver petitions for the rest of her life. There must be a basis to be found inadmissible; either through a conviction, an admission to the essential elements of controlled substance offense, or some other basis. Based on the facts found in Ms. [redacted]s FOIA response from the DHS, Ms. [redacted] was assessed a $500.00 "failure to declare penalty." This is a civil fine and the authority to assess the penalty is not based on any law or regulation specifically relating to a controlled substance.

Therefore, we ask that Ms. [redacted] be found not inadmissible to the United States by virtue of the July 22, 2015 border incident.

Respectfully Submitted:

DATED this 19th day of December, 2016.

Greg Boos, WSBA #8331
EOIR ID #D0705317
Cascadia Cross Border Law
1305 11th Street, Suite 301
Bellingham, WA 98225
(360) 671-5945

[redacted]

On 07/22/2015, at approximately 1943 hours, subject [redacted] (DOB [redacted]) applied for admission via lane three ([redacted]) at the [redacted] POE as a citizen of CANADA utilizing [redacted] card# [redacted]. [redacted] was the driver of a British Columbia plated vehicle bearing the plate number (b)(6)(b)(7)(C). [redacted] gave a negative verbal declaration to primary CBPO (b)(6)(b)(7)(C) Trunk check on primary was positive for a clear plastic baggy containing a green leafy substance. [redacted] was placed in handcuffs and escorted to secondary by CBPO (b)(6)(b)(7)(C).

While in secondary, a patdown for merchandise was requested and approved by SCBPO (b)(6)(b)(7)(C). CBPO (b)(6)(b)(7)(C) conducted a patdown with CBSA (b)(6)(b)(7)(C) as a witness. The patdown was conducted at 1948 Hrs and ended at 1950Hrs. The vehicle was driven by CBPO (b)(6)(b)(7)(C) to CBP Secondary. CBPO'S (b)(6)(b)(7)(C) and (b)(6)(b)(7)(C) inspected the vehicle which ended in negative results.

The green leafy substance was field tested (b)(7)(E) [redacted] which tested positive for the properties of marijuana at 1950 hours. The marijuana had a weight of .84 grams and was placed in Bag# [redacted] and documented on CBP form 6051S# 3409632.

The Command Center was notified at 2110 hours and asked to make all notifications.

[redacted] was assessed a $500.00 failure to declare penalty receipt # (b)(7)(E) [redacted] EBF # (b)(7)(E) [redacted] Seizure # (b)(7)(E) [redacted]

[redacted] was deemed inadmissible to the United States under section 212(a)(2)(A)(i)(II) and allowed to withdraw her application. SIGMA# (b)(7)(E) [redacted]. [redacted] was given an I-160A/waiver instructions and departed the POE for Canada at 2135 hrs.

U.S. Customs and
Border Protection
[redacted]

Port# [redacted]

** Contact Number **
** [redacted]-945-5211 **
****

875-MitigateSeiz $500.00
REF NUM. [redacted]

TOTAL $500.00
CRDB CRD $500.00
METHOD: SWIPED
CARD TYPE: VISA
CARD #: [redacted]
EXP. DATE: XXXX
AUTH CODE: 035060
REF NUM: [redacted]
AUTHORIZE: 500.00

CLS CNT: 1

I agree to pursue all disputes with USCBP.

FINAL SALE, NO REFUND

Sign Here...

CUSTOMER COPY

USER [redacted] Wright
4547 9:13PM 07/22/15 0006-001

U.S. Customs and Border Protection
Admissibility Review Office
7799 Leesburg Pike, 6th Floor
Falls Church, VA 20598 - 1234

[redacted]

February 08, 2016

[redacted]

Dear Ms. [redacted]:

Your Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, has been approved. Enclosed is a copy of your Form I-194, Notice of Approval of Advance Permission to Enter as a Nonimmigrant. The terms and conditions of the approval are:

> You are granted multiple entries into the United States at various ports of entry as a visitor for business and pleasure (B1/B2) for a period of stay to be determined by the admitting officer, provided that you are not inadmissible to the United States under any other section of the law other than Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended.
>
> VALID ONE YEAR FROM THE DATE OF APPROVAL

This letter and the Form I-194 must be presented to the Customs and Border Protection Officer when you make an application for admission into the United States.

Sincerely,

Michael Olszak
Director
Admissibility Review Office

U.S. Customs and Border Protection
Admissibility Review Office
7799 Leesburg Pike, 6th Floor
Falls Church, VA 20598 - 1234

FILE: [redacted]
IN RE: [redacted]

DATE: February 08, 2016

APPLICATION: Temporary admission to the United States pursuant to Section 212(d)(3)(A)(ii) of the Immigration and Nationality Act.

The applicant has been found to be ineligible to receive a nonimmigrant visa under Section 212(a)(2)(A)(i)(II) of the Act.

Nationality:	Date and Country of Birth:	Country of Residence:
CANADA	[redacted] CANADA	CANADA
Occupation: [redacted]	Employer: [redacted]	
Purpose in seeking entry into the United States and destination: Business and Pleasure (B1/B2)		
Plans regarding travel to the United States and period of temporary stay: Will enter at various ports-of-entry to various destinations in the U.S.		
Basis of favorable action: Humanitarian		

ORDER: It is ordered that the application be granted for the above indicated purpose, subject to revocation at any time, valid as set forth below.

ENTRY: Multiple entries as a visitor for business and pleasure (B1/B2) for a period of time not to exceed that authorized at entry.

PERIOD OF TEMPORARY STAY: To be determined by the admitting officer.

VALID ONE YEAR FROM THE DATE OF APPROVAL

Michael Olszak
Director
Admissibility Review Office

Form I-194
(Rev. 1-2-82) Y

U.S. Customs and Border Protection
Admissibility Review Office
7799 Leesburg Pike, 6th Floor
Falls Church, VA 20598 - 1234

[redacted]

November 21, 2016

[redacted]

Dear Mrs. [redacted]:

Your Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, has been approved. Enclosed is a copy of your Form I-194, Notice of Approval of Advance Permission to Enter as a Nonimmigrant. The terms and conditions of the approval are:

> You are granted multiple entries into the United States at various ports of entry as a visitor for business and pleasure (B1/B2) for a period of stay to be determined by the admitting officer, provided that you are not inadmissible to the United States under any other section of the law other than Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended.
>
> VALID FIVE YEARS FROM THE DATE OF APPROVAL

This letter and the Form I-194 must be presented to the Customs and Border Protection Officer when you make an application for admission into the United States.

Sincerely,

COPY

Timothy S. Andrews
Director (a)
Admissibility Review Office
cc: Gregory Donald Boos

U.S. Customs and Border Protection
Admissibility Review Office
7799 Leesburg Pike, 6th Floor
Falls Church, VA 20598 - 1234

FILE: [redacted]
IN RE: [redacted]

DATE: November 21, 2016

APPLICATION: Temporary admission to the United States pursuant to Section 212(d)(3)(A)(ii) of the Immigration and Nationality Act.

The applicant has been found to be ineligible to receive a nonimmigrant visa under Section 212(a)(2)(A)(i)(II) of the Act.

Nationality:	Date and Country of Birth:	Country of Residence:
CANADA	[redacted], CANADA	CANADA
Occupation: [redacted]	Employer: [redacted]	
Purpose in seeking entry into the United States and destination: Business and Pleasure (B1/B2)		
Plans regarding travel to the United States and period of temporary stay: Will enter at various ports-of-entry to various destinations in the U.S.		
Basis of favorable action: Humanitarian		

ORDER: **It is ordered that the application be granted for the above indicated purpose, subject to revocation at any time, valid as set forth below.**

ENTRY: Multiple entries as a visitor for business and pleasure (B1/B2) for a period of time not to exceed that authorized at entry.

PERIOD OF TEMPORARY STAY: To be determined by the admitting officer.

VALID FIVE YEARS FROM THE DATE OF APPROVAL

COPY

Timothy S. Andrews
Director (a)
Admissibility Review Office
cc: Gregory Donald Boos

Form I-194
(Rev. 1-2-82) Y

Excludability under "Zero Tolerance Program"

20 Jan 95

HQ 235-P

LEGAL OPINION: Your CO 235-C Memorandum of October 25, 1991: Excludability under Customs Zero Tolerance Fines

Michael D. Cronin
Assistant Commissioner
HQINS

ATTN: Donna Kay Barnes
Assistant Chief Inspector
Office of the General Counsel

QUESTION

In the subject memorandum, you instructed Service officers that an alien's signing of a United Sates Customs Service "Agreement to Pay Monetary Penalty" in conjunction with the Customs Service "Zero Tolerance Program" is sufficient to make the alien subject to exclusion as an alien who has admitted a violation of a law regulating controlled substances. James W. Grable, district counsel, Buffalo, has questioned whether the subject memorandum is a correct statement of the law. This legal opinion addresses the following question:

> May the Service charge an alien with exclusion for having admitted a controlled substance violation, based solely on the alien's having signed the Customs Service "Agreement to Pay Monetary Penalty?"

SUMMARY CONCLUSION

The subject memorandum is an incorrect statement of the law. The Service may not seek an alien's exclusion as an alien who has admitted a controlled substance violation, based solely on the alien's having signed the "Agreement to Pay Monetary Penalty."

ANALYSIS

Since June 1,1991, the Immigration and Nationality Act has provided for the exclusion of an alien who, although not convicted of a crime, "admits having committed, or... admits committing acts which constitute the essential elements of" a controlled substance violation under Federal, State, or foreign law. INA § 212(a)(2)(A)(i)(*18 U.S.C. § 1182(a)(2)(A)(i)(II)*. The Customs Service uses an "Agreement to Pay Monetary Penalty" ("Agreement") in disposing of some cases involving an

individual who is found to have a controlled substance in his or her possession at the time of a Customs inspection. If the individual agrees to pay the penalty, the Customs officer may release the individual and the conveyance and baggage that the individual brought to the United States. If the individual does not pay the penalty within the fixed period, the Agreement provides that the Customs Service may sue to collect the unpaid amount.

The Agreement expressly states that the penalty is based upon seizure of one or more controlled substances. The authority to assess the penalty, however, is not based specifically on "any law or regulation... relating to a controlled substance." *Id.* A person arriving in the United States must present himself or herself to a Customs officer for inspection. *19 U.S.C. § 1459.* The person must also present for inspection any items that the person brought to the United States. *Id.* The penalty that an individual agrees to pay by signing the Agreement is the penalty fixed by *19 U.S.C. § 1459* for violating the Customs reporting requirements under section 1459 or under *19 U.S.C. § 1433* or *1436.* These reporting provisions are not limited to the reporting of controlled substances. A failure to present for Customs inspection *any* item brought to the United States could be the basis for the penalty. *Id.* § 1459.

In order for a drug offense to form the basis of an alien's exclusion or deportation, "guilty knowledge" must be an essential element of the drug offense. *See Lennon v. INS, 527 F.2d 187 (2d Cir.1975).* But that the item that an individual did not present for inspection be a controlled substance is not an essential element of *19 U.S.C. § 1433,1436*, or *1459.* Still less does it appear from these Customs statutes that the alien had to know that the item that he or she failed to present for Customs inspection was a controlled substance.

Although the Agreement indicates that the item that was not presented was a controlled substance, the penalty is actually imposed for violating the requirement to present for Customs inspection items brought to the United States. An alien who agrees to pay the penalty does not by doing so "admits having committed, or. .. admits committing acts which constitute the essential elements of' a controlled substance violation. INA § 212(a)(2)(A)(i)(II), *8 U.S.C. § 1182(a)(2)(A)(i)(II).* The Service may not rest an exclusion charge under section 212(a)(2)(A)(i)(II) solely on an alien's having signed this Agreement.

/s/ TAA
T. Alexander Aleinikoff
General Counsel

U.S. Customs and Border Protection
Admissibility Review Office
12825 Worldgate Drive
Herndon, VA 20170

COPY

A75 103 164

May 2, 2008

[redacted]
Vancouver, British Columbia, Canada [redacted]

Dear Mr. [redacted]

This correspondence is in reference to your Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, submitted by you on November 20, 2007, because you may be inadmissible to the United States under Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (INA), as amended, as an alien who has been convicted of a controlled substance violation.

A review of the record of proceedings establishes that you were assessed a $500.00 administrative penalty by Customs and Border Protection (CBP) on November 6, 1996, at the Preclearance Station at the Vancouver International Airport in Vancouver, British Colombia, Canada, after CBP officers discovered three marijuana cigarettes on your person.

While the incident at the Vancouver International Airport on November 6, 1996, is serious, it has been deemed that the act of signing the Agreement to Pay Monetary Penalty does not constitute a controlled substance violation. Therefore, there is no record of a conviction nor does the record contain a sworn statement or other evidence of an admission of any controlled substance law violations. It is the determination of this office that you are not inadmissible to the United States pursuant to Section 212(a)(2)(A)(i)(II) of the INA based on the above incident.

It is the determination of this office that you are eligible for travel to the United States. Your inspection, upon applying for admission to the United States, will be conducted in the normal process accorded to an applicant seeking admission into this country. To help facilitate future travel, it is recommended that you carry this letter for presentation to the inspecting officer.

Sincerely,

Michael D. Olszak
Director
Admissibility Review Office

cc: W. Scott Railton Esq.