U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28767525

Date: NOV. 17, 2023

Appeal of Las Vegas, Nevada Field Office Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of Canada currently residing in the United States, has applied to adjust status to that of a lawful permanent resident (LPR). A noncitizen seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a controlled substance violation and filed Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application) seeking a waiver of that inadmissibility. See section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Las Vegas, Nevada Field Office denied the waiver application, concluding that the Applicant had not established his eligibility for a waiver, as the record did not evidence that his controlled substance violation involved 30 grams or less of marijuana. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's*, Inc., 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 212(a)(2)(A) of the Act renders inadmissible any noncitizen who is convicted or admits having committed acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (CSA), 21 U.S.C. § 802). Individuals found inadmissible under section 212(a)(2)(A) of the Act for a controlled substance violation related to a single offense of simple possession of 30 grams or less of marijuana may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, an applicant may qualify for a rehabilitation waiver if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. Section 212(h)(1)(A) of the Act. A waiver is also available if denial of admission would

result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act. The applicant bears the burden of establishing admissibility clearly and beyond doubt. Matter of Bett, 26 I&N Dec. 437, 440 (BIA 2014).

II. ANALYSIS

A. Relevant Background and Procedural History

Government records indicate that the Applicant was previously arrested for forgery and possession of narcotics in Canada. He filed for adjustment of status to that of LPR (adjustment application) and submitted documents relating to the convictions. The submitted law enforcement documents evidence the Applicant was convicted of two charges of forgery in 1978[1] and possession of narcotics in 1985. The documents do not include a statutory citation to the narcotics conviction but reflect a disposition of "60 days intermittent & probation for 2 years." The Applicant also included documentation reflecting that the Canadian National Parole Board approved his application for a pardon in 1996 and vacated the above-mentioned convictions because the Applicant remained free from any convictions since completing his sentencing. In connection with his adjustment application, the Applicant was interviewed, questioned about his convictions, read parts of Title 21 of the U.S.C. section 844, titled, "Penalties for simple possession,"[2] and the definitions for controlled substance, marijuana, hashish, and possession under United States law. The Applicant admitted committing acts in violation of laws relating to a controlled substance, testifying to having 10 grams of hashish in his pocket when arrested in [redacted] Canada, being aware that hashish is a form of marijuana and that marijuana meets the definition of a controlled substance. The Applicant further testified to serving a sentence of six months for the narcotics conviction. The Director issued a notice of intent to deny (NOID), determining the Applicant was inadmissible under section 212(a)(2)(A)(i)(ii) of the Act. The Director further determined that because the Applicant's convictions were pardoned for rehabilitative purposes, they remain convictions for immigration purposes, citing to Matter of Pickering, 23 I&N Dec. 621, 624 (BIA 2003).[3]

The Applicant responded to the NOID by filing a waiver application, additional supporting documentation, and a brief. The Applicant included letters from [redacted] Canada court staff and police stating they are unable to locate the Applicant's records or to determine the amount of narcotics the Applicant possessed, but they would continue to search. The Applicant also provided a 1996 letter from the Pardon Services Canada indicating that his application for a pardon was granted, and his criminal records were sealed. According to the Applicant's brief, his narcotics charge was brought under the Narcotic Control Act, which was repealed in 1996. The Applicant argued that the Narcotic Control Act defines narcotic, without differentiation, as marijuana, cocaine, or heroine and is

[1] The Applicant asserts in the record below and on appeal that the forgery charges fall under the exception described in section 212(a)(2)(A)(ii)(II) of the Act. Section 212(a)(2)(A)(ii)(II) of the Act provides an exception for one crime involving moral turpitude if the crime meets certain requirements. The Applicant was convicted of two forgery charges. The Director did not determine these were crimes involving moral turpitude and did not make an inadmissibility determination under section 212(a)(2)(A)(i)(I) of the Act. We therefore do not need to address whether section 212(a)(2)(A)(ii)(II) of the Act applies to the Applicant. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (noting that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision).

[2] The interviewing officer did not identify the statute read to the Applicant.

[3] The Applicant does not contest this determination on appeal.

overbroad because it includes possession of a substance that is not punished under federal law, i.e., mature stalks of marijuana or hemp that contain no more than "0.3% of THC." The Applicant also asserted that due to his severe lapses in memory, partially due to the medication he had been taking and his previous personal use of hashish, and the Court's inability to provide a complete record of his conviction, he cannot confirm or deny with absolute certainty that he was charged and convicted of being in possession of 10 grams of hashish.

The Director denied the waiver application, explaining that the Applicant provided sworn testimony that he was not taking any medication that may interfere with his answering questions and admitted to charges of forgery and narcotic possession. The Director determined that the Applicant was inadmissible. With respect to the Applicant's arguments that the Narcotic Control Act was overbroad, the Director concluded that a conviction under the Narcotic Control Act is not necessary to determine the Applicant was inadmissible to the United States. The Director explained that the conviction simply supports the Applicant's testimony indicating he was in possession of hashish, a marijuana concentrate. The Director stated that the Applicant had not met his burden in establishing that he qualifies for a waiver of inadmissibility because the record reflects that he admitted he was in possession of 10 grams of hashish, the equivalent of 50 grams of marijuana,[4] and there is no waiver for simple possession of marijuana for an amount over 30 grams.

On appeal, the Applicant filed another letter by [redacted] Canada court staff stating the court conducted a search of its databases and could find no record of the Applicant's criminal convictions. The Applicant argues that his conviction was pardoned and cannot be used for immigration purposes, that his admission to disposed of charges should be deemed ineffective, and the Director erred in using the United States Sentencing Commission's Drug Conversion Calculator.

B. The Applicant Is Inadmissible Under Section 212(A)(2)(A) of the Act

The Applicant asserts that the Director erred in determining his confession to a narcotics charge makes him inadmissible because he was already convicted on these facts and the charge was pardoned. We disagree.

We first discuss the Applicant's burden. It is the Applicant's burden to prove eligibility for adjustment of status. Section 291 of the Act, 8 U.S.C. § 1361. Inadmissibility to the United States is a "ground for mandatory denial" of adjustment of status, and the noncitizen bears the burden by a preponderance of the evidence to resolve any issue as to whether a ground for mandatory denial "may apply." Matter of Espinoza, 25 I&N Dec. 118, 121 (BIA 2009) (quoting and citing 8 C.F.R. § 1240.8(d)). Inadmissibility under section 212(A)(2)(A) of the Act may be established by a conviction for a controlled substance violation, the admission of the commission of such an offense, or the admission to acts that constitute the essential elements of a controlled substance offense. Matter of Perez, 22 I&N Dec. 689, 698 (BIA 1999). This ground of inadmissibility applies to the controlled substances that are defined in section 102 of the CSA, 21 U.S.C. § 802.

[4] According to the Director, a review of the United States Sentencing Commission's Drug Conversion Calculator indicates that 10 grams of cannabis resin or hashish is equivalent to 50 grams of marijuana/cannabis.

With respect to the Applicant's conviction, in determining whether an applicant is inadmissible for a controlled substance violation, we must conduct a categorical inquiry into whether the law violated relates to a controlled substance on the schedules listed in section 802 of the CSA. See Mellouli v. Lynch, 575 U.S. 798 (2015). If the statutory language encompasses any substance not found on the section 802 schedules, then it is not categorically a violation that renders an individual inadmissible under section 212(a)(2)(A)(i)(II) of the Act. Id. To show that a statute is not categorically a violation and prohibits conduct outside the generic definition of an offense in a federal statute, a noncitizen must establish that there is "a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime." Matter of Navarro Guadarrama, 27 I&N Dec. 560, 562 (BIA 2019) (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007); Moncrieffe v. Holder, 569 U.S. 184, 191 (2013)).

The Applicant provided law enforcement documents establishing that in 1985 he was convicted in Canada of possessing a narcotic. The documents do not state what statute he was convicted under, what narcotic was involved, or what amount of the narcotic was in his possession. However, the Applicant asserts in the record below that he was convicted of the Narcotic Control Act.[5] The Applicant further asserts that the Narcotic Control Act defines marijuana to include mature stalks[6] which is not a substance contained in the section 802 schedules and therefore the Narcotic Control Act is not a categorical match to section 212(a)(2)(A)(i)(II) of the Act. As a result, he contends he has not been convicted of a controlled substance violation within the meaning of the Act. The Applicant, however, has not established whether he was convicted under federal, provincial, or some other Canadian law that may have been in existence. The documentation he provided identified the most important drug laws and does not discuss other drug laws in effect at the time. For this reason, we are unable to analyze whether the law the Applicant was convicted of relates to a controlled substance on the schedules listed in section 802 of the CSA. Moreover, even if we assume the Applicant was convicted under the Narcotic Control Act and proceed to analyze whether the statute was overbroad, the Applicant would still need to meet his burden by a preponderance of the evidence that that there is a realistic probability that Canada would apply its statute to prosecute possession of mature stalks of marijuana, which he has not done.[7] The Applicant has therefore not met his burden by a

[5] In support, the Applicant included printouts from Canada's Department of Justice. We independently reviewed the website which explained that prior to 1997, the two most important federal statutes dealing with illicit drugs were the Narcotic Control Act and the Food and Drugs Act. Department of Justice Canada, Canada's System of Justice: Drug Use and Offending (2022), http://www.justice.gc.ca. The Narcotic Control Act governed over 120 different types of drugs such as cocaine, heroin, opium, and cannabis but did not distinguish one drug from another. Id. The Food and Drugs Act governed the regulation of pharmaceutical drugs, food, cosmetics, and medical devices and two parts, specifically Part III governed "controlled drugs" (such as amphetamines, barbiturates, testosterone) and Part IV governed "restricted drugs" (such as LSD, and other hallucinogenic drugs). Id.

[6] The Applicant also asserts that the Narcotic Control Act is overbroad because it includes hemp, a substance excluded from the section 802 schedules. Hemp is defined in 7 U.S.C. § 16390 as a plant Cannabis sativa L. with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. Pursuant to section 802 of the CSA, hemp as defined in 7 U.S.C. § 16390 is not included in the term marijuana. However, the definition became effective in December 2018 and hemp was not excluded when the Applicant was convicted of narcotics possession in 1985.

[7] The Applicant cited to Gonzalez v. Wilkinson, 990 F.3d 654, 661 (8th Cir. 2021) which held, in the context of removal proceedings, that the Board relied on a misinterpretation of the realistic probability inquiry and that all the noncitizen was required to show was the state statute is unambiguously broader than federal law. The Applicant has not met his burden under this Eight Circuit guidance; most relevant he has not identified the foreign law under which he was convicted. Further, he has not provided authority on how the Fourth Circuit, controlling here, applies the realistic probability analysis, particularly with respect to foreign law.

preponderance of the evidence to resolve any issue as to whether a ground for mandatory denial "may apply." Matter of Espinoza, 25 I&N Dec. at 121.

The Applicant also contends that his controlled substance offense was for simple possession and would be expunged under Ninth Circuit law. The United States Court of Appeals for the Ninth Circuit previously held that a noncitizen whose controlled substance offense would have qualified for treatment under the Federal First Offender Act (FFOA), but who was convicted and had his or her conviction expunged under state or foreign law, does not have a conviction for immigration purposes. See Dillingham v. INS, 267 F.3d 996 (9th Cir. 2001); Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000).[8] We note that Lujan-Armendariz v. INS was overruled in Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (en banc); however, the ruling in Nunez-Reyes applies only prospectively to convictions occurring after July 14, 2011. Id. at 687. However, as the Applicant resides within the jurisdiction of the Fourth Circuit, there is no basis for applying a now overruled decision outside the Ninth Circuit. See Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (explaining that since their decision in Lujan–Armendariz, the Board of Immigration Appeals (Board) and every sister circuit to have addressed the issue have rejected the holding). Further, foreign pardons of criminal convictions are ineffective for immigration purposes. See, e.g., Matter of Marino, 15 I&N Dec. 284, 285 (BIA 1975) (citing Palermo v. Smith, 17 F.2d 534, 535 (2d Cir. 1975); Matter of Adamo, 10 I&N Dec. 593 (BIA 1964); Matter of B-, 7 I&N Dec. 155 (BIA 1956); Matter of M-, 9 I&N Dec. 132, 134 (BIA 1960); Matter of G-, 5 I&N Dec. 129 (BIA 1953)).

With respect to the Applicant's admission during his adjustment interview, he admitted acts constituting the essential elements of a controlled substance offense. There are three requirements which must be met for an admission to qualify as having been validly obtained: the admitted conduct must constitute the essential elements of a crime in the jurisdiction where it occurred; the applicant for admission must have been provided with the definition and essential elements of the crime, in understandable terms, prior to his admission; his admission must have been voluntary. Matter of K, 7 I&N Dec. 594, 597 (BIA 1957). The definition need only be substantially similar to the particular statutory definition of the offense and contain all the necessary elements of the crime, but need not be identical to the law of the jurisdiction in which the crime was committed in order to satisfy a valid admission. Matter of P-, 4 I&N Dec. 252, 254 (BIA 1951). In 1985, the Narcotic Control Act provided, "[e]xcept as authorized by this act or the regulations, no person shall have a narcotic in his possession." Narcotic Control Act, R.S.C. 1985, c N–1, § 3(1) (Can.). "'Narcotic' means any substance included in the schedule or anything that contains any substance included in the schedule[.]" Id. at § 2. Cannabis saliva is listed on the schedule. Narcotic Control Act, R.S.C. 1985, c N–1 (Can.). Under the Canadian Criminal Code, a person has anything in possession when he has it in his personal possession or knowingly has it in the actual possession or custody of another person, or has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person. Criminal Code, R.S.C. 1985, c C-34, §3.1(a) (Can.).

[8] In order to qualify for treatment under the FFOA, the defendant must have been found guilty of an offense described in section 404 of the CSA, 21 U.S.C. § 844; have not been convicted of violating a federal or state law relating to controlled substances prior to the commission of such an offense; and have not previously been accorded first offender treatment under any law. See 18 U.S.C. § 3607(a); Cardenas-Uriarte v. INS, 227 F.3d 1132, 1136 (9th Cir. 2000). Section 404 of the CSA provides that it is "unlawful for any person knowingly or intentionally to possess a controlled substance . . . ." 21 U.S.C. § 844(a).

At his interview, the Applicant stated he was willing to answer the officer's questions and was asked about his arrests. While the Narcotic Control Act was not read to him, he was provided with the elements of the crime and confessed to each element: being aware that hashish was a concentrate of marijuana, that marijuana was on the schedules as an unlawful controlled substance, and that he had hashish in his pocket when arrested. We therefore conclude that the Applicant's admission established his inadmissibility under 212(a)(2)(A)(i)(II) of the Act and was validly obtained. With respect to his contentions that we should not consider an admission that may arise from the same facts as a disposed of charge, the Applicant has not established his charge was disposed of for immigration purposes and has not provided binding authority supporting his assertion for when the record on conviction is ambiguous.

B. The Applicant Is Ineligible for a Waiver Under Section 212(h) of the Act

An applicant has the burden of proving eligibility for a waiver of inadmissibility. Section 291 of the Act, 8 U.S.C. § 1361. A section 212(h) waiver applies to a controlled substance conviction "in so far as it relates to a single offense of possession of 30 grams or less of marijuana." Where the amount of marijuana cannot be readily determined from the statute or record of conviction, applicants must provide credible and convincing evidence to meet their burden of showing that it was 30 grams or less. Matter of Martinez Espinoza, 25 I&N Dec. at 125; Matter of Grijalva, 19 I&N Dec. 713, 718 (BIA 1988). For example, police reports are considered probative evidence of the circumstances surrounding an arrest and conviction for possession of marijuana. Matter of Grijalva, 19 I&N Dec. at 722. Here, the precise amount of marijuana that the Applicant was convicted of possessing cannot be determined from the police records or the records pardoning the Applicant. While the Applicant provided sworn testimony that he was convicted of possessing 10 grams of hashish, he provided a statement describing his memory issues and explains that he cannot confirm or deny with absolute certainty that he was charged and convicted of being in possession of 10 grams of hashish. The Applicant does not recant his admission but rather challenges the amount he testified to possessing. As a result, the Applicant has not provided credible and convincing evidence to meet his burden of showing that his controlled substance violation related to simple possession of 30 grams or less of marijuana.

Because the Applicant has not established that his controlled substance violation relates to a single offense of simple possession of 30 grams or less of marijuana, a waiver of inadmissibility is not available to him. Consequently, the Applicant has not demonstrated his eligibility to seek a section 212(h) waiver. Because the Applicant is statutorily ineligible for relief, no purpose would be served in addressing whether he is eligible for a rehabilitation waiver or established extreme hardship to his U.S. citizen wife and that he merits a waiver as a matter of discretion.

III. CONCLUSION

The Applicant is inadmissible under section 212(A)(2)(A) of the Act and has not met his burden in establishing his eligibility for a waiver under section 212(h) of the Act.

ORDER: The appeal is dismissed.