U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16287790

Date: FEB. 2, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant[1] has applied for an immigrant visa and seeks a waiver of inadmissibility under Section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Nebraska Service Center concluded that the Applicant was inadmissible under Section 212(a)(2)(A)(i)(II) of the Act because he was twice convicted of the offense of possession of heroin, once in 2007, and once in 2009. In addition, the Director determined that the Applicant was inadmissible under Section 212(a)(2)(B) of the Act because he was convicted of two or more offenses (other than purely political offenses), for which the aggregate sentences to confinement were five years or more.

The record includes court documents from Turkmenistan, entitled "Sentence" and "Court Verdict." The documents indicate the following: (2) the Applicant purchased 0.04 grams of heroin "to use . . . by smoking" and was sentenced to three years of imprisonment in 2007; and (2) the Applicant purchased 0.2 grams of heroin for personal use and was sentenced to seven years of imprisonment in 2009. The court record regarding the 2009 conviction explains that the Applicant did not fully serve his three-year sentence for his 2007 conviction. Instead, he was "discharged" on [redacted] 2007, pursuant to a "Decree of the President of Turkmenistan on Clemency." This court document, however, specifies that "the previous [2007] conviction is not cancelled."

The Director concluded that because the Applicant had been convicted of two controlled substance offenses that did not involve one single offense of simple possession of 30 grams or less of marijuana, he was ineligible to seek a waiver of his inadmissibility under Section 212(a)(2)(A)(i)(II) of the Act. The Director then denied the Applicant's Form I-601 waiver application based on discretion,

[1] While the Applicant claims to be represented by an attorney, on appeal, he has not submitted a new, properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative. As explained in our January 22, 2021 correspondence, which was sent to both the Applicant and the individual he identified as his attorney, we consider the Applicant to be self-represented, because the record lacks a new, properly executed Form G-28.

explaining that the Applicant "would remain inadmissible even if a waiver [was] granted" for his inadmissibility under Section 212(a)(2)(B) of the Act. *See* Section 212(h) of the Act.

On appeal, the Applicant argues that his "convictions were pardoned by the President of Turkmenistan" and "his convictions were nullified and could not be a ground of inadmissibility." He contends that he "was convicted for possession rather than trafficking, so his pardon must be effective to nullify his convictions." As we explain below, the record does not support the Applicant's contentions.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Any noncitizen convicted of a violation of 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, 21 U.S.C. § 802, is inadmissible to the United States. Section 212(a)(2)(A)(i)(II) of the Act. Under 21 U.S.C. § 802(6), "controlled substance" is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." Under schedule I, heroin is identified as a controlled substance. *See* 21 U.S.C. § 812(b)(1). An individual inadmissible under Section 212(a)(2)(A)(i)(II) of the Act because of a controlled substance violation may seek a discretionary waiver of inadmissibility under Section 212(h) of the Act, only if the violation related to a single offense of simple possession of 30 grams or less of marijuana.

Any noncitizen convicted of two or more offenses, other than purely political offenses, for which the aggregate sentences to confinement were five years or more is inadmissible to the United States. Section 212(a)(2)(B) of the Act. Under certain circumstances, an individual inadmissible under Section 212(a)(2)(B) of the Act may seek a discretionary waiver of inadmissibility. *See* Section 212(h) of the Act.

Additionally, we cannot go behind a conviction to assess an applicant's guilt or innocence. *See Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). Unless the conviction was expunged or vacated because a court found a procedural or substantive defect in the underlying criminal proceeding, the conviction remains for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

II. ANALYSIS

As discussed, the record shows that the Applicant was twice convicted of possession of heroin, first in 2007 and then in 2009. These were not crimes related to a single offense of simple possession of 30 grams or less of marijuana. As such, he is ineligible to seek a waiver under Section 212(h) of the Act, and he remains inadmissible to the United States under Section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a controlled substance offense.

On appeal, the Applicant argues that his convictions have been "pardoned." The record includes a June 2018 document from the court that convicted him in 2009. Discussing his 2009 conviction and a "verdict

of imprisonment of 7 years," the document states: "in accordance with [A]rticle 293 [P]art 2 of the Criminal Code of Turkmenistan, and released under amnesty, under the Order of President of Turkmenistan on release and removal of a criminal record, [the court] informs You [the Applicant] that, according to the Article 81 of Criminal Code of Turkmenistan, the charge of conviction has been removed." The Applicant also provides a July 2018 document from the Ministry of Internal Affairs of Turkmenistan, stating that the Applicant "has no criminal record." Neither these documents nor other materials in the record explain the circumstances surrounding the purported expungement of his convictions. Without evidence that the convictions were expunged or vacated because a court found a procedural or substantive defect in the underlying criminal proceedings, the Applicant's convictions remain for immigration purposes. *See Pickering*, 23 I&N Dec. at 624.

Moreover, as noted, the court document concerning the Applicant's 2009 conviction, explains that while he did not serve his full three-year sentence for his 2007 conviction, because of "the Decree of the President of Turkmenistan on Clemency," "the [Applicant's 2007] previous conviction is not cancelled." This evidence does not support the Applicant's contention that his 2007 conviction has been "pardoned," vacated or expunged. His 2007 conviction for possession of heroin alone renders him ineligible to seek a waiver under Section 212(h) of the Act for his inadmissibility based on a controlled substance conviction. *See* Section 212(a)(2)(A)(i)(II) of the Act.

In a June 2019 statement, the Applicant declared that "[t]o this day, I believe that the [controlled substance] charges were fabricated, so the police could take hold of my car, which was common practice at that time in [Turkmenistan]." We, however, cannot go behind a conviction to assess the Applicant's guilt or innocence. *See Madrigal-Calvo*, 21 I&N Dec. at 327. His unsubstantiated statement concerning his culpability in the two offenses thus does not establish his eligibility for the Form I-601 waiver application.

Finally, we acknowledge that the Applicant has presents letters and other documents from family members and other individuals, attesting to his character and discussing in detail the hardship – including emotional, psychological, and financial difficulties – caused by his separation from his family. While we recognize the negative impacts that his situation has had on him and his family, based on the relevant law, because of his possession of heroin convictions, there is no waiver that he can seek to waive his inadmissibility under Section 212(a)(2)(A)(i)(II) of the Act. *See* Section 212(h) of the Act.

III. CONCLUSION

Based on the reasons we have discussed above, we conclude that the Director did not err in denying the Applicant's Form I-601 waiver application based on discretion, because even if granted and it waived his inadmissibility under Section 212(a)(2)(B) of the Act, it would not waive his inadmissibility under Section 212(a)(2)(A)(i)(II) of the Act. Accordingly, his Form I-601 waiver application remains denied.

In visa petition proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act. Here, that burden has not been met.

ORDER: The appeal is dismissed.