U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10091293

Date: MAY 26, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant 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 Nebraska Service Center denied the application, noting the Applicant's inadmissibility as a controlled substance violator and concluding that the Applicant was not eligible for a waiver of inadmissibility. On motion to reopen and reconsider, the Director affirmed the decision to deny the application. On appeal, the Applicant submits additional documentation and asserts that he is not inadmissible as a controlled substance violator.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). This office reviews the questions in this matter *de novo*. *See 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

Any individual convicted of, or who admits having committed, or who 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 (21 U.S.C. 802)), is inadmissible. Section 212(a)(2)(A)(i)(II) of the Act. 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.

II. ANALYSIS

The issues presented on appeal is whether the Applicant is inadmissible as a controlled substance violator, and if so, if he has established that he is statutorily eligible for a waiver under section 212(h) of the Act. Because the Applicant is residing abroad and applying for an immigrant visa, the U.S. Department of State makes the final determination concerning admissibility and eligibility for a visa.

Here, a consular officer has determined that the Applicant is inadmissible as a controlled substance violator, and the Applicant has not established that he is not inadmissible as a controlled substance violator or that he is eligible for a waiver under section 212(h) of the Act.

The Applicant was convicted in [redacted] 1998 for possession of a controlled dangerous substance within 1,000 feet of a school under section 2C:35-7 of the New Jersey Statutes.[1] He applied for an immigrant visa in 2018 and was refused a visa based on a finding that he was inadmissible under section 212(a)(2)(A) of the Act for a conviction related to a controlled substance.

The Director of the Nebraska Service Center noted the Applicant's inadmissibility as a controlled substance violator and determined that as the Applicant's conviction involved cocaine, he was not eligible for a waiver of inadmissibility because his inadmissibility was not related to a single offense for simple possession of 30 grams or less of marijuana.

In response to the Applicant's motion to reopen and reconsider, the Director affirmed the decision to deny the waiver application, concluding that the grounds of denial had not been overcome. The Director specifically noted that even though the Applicant's conviction had been changed to a disorderly persons offense of Use of Paraphernalia in 2016, the Applicant had still been convicted of a controlled substance violation for immigration purposes.

On appeal, the Applicant again contests the finding that he is inadmissible to the United States. The Applicant states that due to his resentencing in [redacted] 2016, he is not inadmissible as a controlled substance violator because a "disorderly persons guilty plea was not a conviction under the laws of the State of New Jersey." The U.S. Department of State determined that irrespective of his resentencing in 2016, almost two decades after his controlled substance conviction, the Applicant had been convicted for immigration purposes[2] of a controlled substance violation in 1998 and that finding will not be disturbed on appeal. As noted above, because the Applicant is residing abroad and applying for an immigrant visa, the U.S. Department of State makes the final determination concerning admissibility.

Alternatively, the Applicant maintains that the statute for which he was originally convicted is overbroad and indivisible and thus, he is not inadmissible as a controlled substance violator. In support, the Applicant submits a court transcript, a 2015 court disposition, an [redacted] 2016 immigration judge decision, evidence of hardship, and unpublished and non-precedent decisions from the Board of Immigration Appeals.[3]

An applicant is inadmissible for a controlled substance violation if the law violated relates to a controlled substance on the schedules listed in section 102 of the Controlled Substance Act, 21 U.S.C.

1 Section 2C:35-7 of the New Jersey Statutes, as in effect in 1998, made it unlawful to distribute, dispense, or possess with intent to distribute a controlled dangerous substance or controlled substance analog while in, on or within 500 feet of the real property comprising a public housing facility, a public park, or a public building.

2 *See* section 101(48)(a) of the Act.

3 Unpublished Board decisions are not binding precedents. *Matter of Echeverria*, 25 I&N Dec. 512, 519 (BIA 2011).

§ 802. *See Mellouli v. Lynch*, 135 S.Ct. 1980, 1981 (U.S. 2015).[4] If the statutory language under state law 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.* The analysis must then turn to whether the statute is divisible – where "each statutory alternative defines an independent 'element' of the offense, as opposed to . . . various means or methods by which the offense can be committed." *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (citing *Mathis v. United States,* 136 S. Ct. 2243, 2248 (2016)). "Elements" are what the prosecution must prove to sustain a conviction: at trial, they are what the jury must find beyond a reasonable doubt to convict, and at a plea hearing, they are what the defendant necessarily admits when pleading guilty. *Mathis*, 136 S. Ct. at 2248. If the statute is determined to be divisible, the modified categorical approach is employed, and the record of conviction may be reviewed to determine which of the alternative elements formed the basis of the conviction. *Descamps v. United States*, 133 S. Ct. 2276, 2283-85 (2013).

At the time of the Applicant's conviction, section 2C:35-2 of the New Jersey Statutes defined a controlled substance as a drug, substance, or immediate precursor in Schedules I through V. It made no reference to the Controlled Substance Act or any other federal law, and, like the Kansas statute considered in *Mellouli*, included at least one substance that is not a controlled substance as defined in 21 U.S.C. § 802.[5] As a result, the statute under which the Applicant was convicted is not, categorically, a violation of law relating to a controlled substance under the Controlled Substance Act. We note that a jury in a case concerning an alleged violation of section 2C:35-7 of the New Jersey Statutes would need to agree on the controlled dangerous substance involved, thereby making the statute divisible so as to warrant a modified categorical inquiry.[6]

Under the modified categorical approach, we may review the Applicant's record of conviction to determine whether the controlled dangerous substances listed in section 2C:35-10(a)(1) are "element[s] of the offense." *Mathis*, 136 S. Ct. at 2256-57 (second alteration in original) (citation omitted). The indictment document in the Applicant's case indicates that he was charged with possessing the controlled dangerous substance of cocaine. The Judgement of Conviction document

---

4 In *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the Supreme Court addressed whether a noncitizen convicted under Kansas state law for possession of drug paraphernalia was removable under section 237(a)(2)(B)(i) of the Act for a conviction related to a controlled substance. In its decision, the Court found that the Kansas drug schedules then in effect listed substances not listed on the federal drug schedules, and as a result, Mellouli's offense was not categorically a violation relating to a controlled substance defined in 21 U.S.C. § 802. The Court applied the modified categorical approach and, finding that the record of conviction did not identify the substance involved, concluded that his Kansas drug paraphernalia conviction did not provide a basis for his removal under section 237(a)(2)(B)(i) of the Act.

5 The substance Dextrorphan was listed in Schedule I of N.J. Stat. Ann. § 24:21-5 at the time of the Applicant's conviction, but it was not a controlled substance under federal law, as it had been removed from the schedules of federally controlled substances on October 1, 1976. See 41 FR 43401.

6 The New Jersey Model Criminal Jury Charges state, in pertinent part, that in order to find an individual guilty of possession with intent to distribute controlled dangerous substances near or on school property, the "elements of possession with intent to distribute are:

. S_____ in evidence is (insert appropriate CDS or CDS analog.)

2. The defendant possessed or had under his/her control S_____.

3. The defendant had the intent to distribute S_____ when he/she possessed it or had it under his/her control.1

4. That the defendant acted knowingly or purposely in doing so."

also specifies that that the drug involved was cocaine.

The Applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance violation, namely, cocaine. As the record establishes that the Applicant's conviction was not for a single offense of simple possession of 30 grams or less of marijuana, he is ineligible for a section 212(h) waiver of his inadmissibility. Accordingly, the waiver application remains denied.

III. CONCLUSION

The Applicant is inadmissible as a controlled substance violator and is not eligible for a waiver.

ORDER: The appeal is dismissed.