U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21819472

Date: SEP. 22, 2022

Appeal of Los Angeles, California Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied to adjust his status to that of a lawful permanent resident and seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). He challenges a finding that his 1985 criminal offense constitutes a controlled substance conviction. *See* section 212(a)(2)(A)(i)(II) of the Act.

The Director of the Los Angeles, California Field Office denied the waiver application. On appeal, the Applicant submits additional evidence and argues that the Superior Court of California, [redacted] vacated his conviction, removing the inadmissibility ground against him.

The Applicant bears the burden of establishing admissibility to the United States by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we find that the criminal court's vacatur eliminates the 1985 offense as a basis of inadmissibility. The record, however, indicates the Applicant's conviction for another controlled substance violation that could affect his admissibility. We will therefore withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.[1]

I. LAW

Noncitizens who violate or admit violating laws "relating to a controlled substance," as defined in the federal Controlled Substances Act, generally cannot gain admission to the United States. Section 212(a)(2)(A)(i)(II) of the Act. Noncitizens can only waive this inadmissibility ground if their violations are single offenses "of simple possession of 30 grams or less of marijuana." Section 212(h) of the Act.

Under this exception, controlled substance violators may receive waivers by demonstrating that: their criminal activities occurred more than 15 years before their applications for adjustment or immigrant visas; their admissions would not undermine U.S. welfare, safety, or security; and they have been rehabilitated. Section 212(h)(1)(A) of the Act. Alternatively, these applicants must show that refusals

[1] The Applicant also appealed the denial of his application for permission to reapply for admission after deportation. *See* section 212(a)(9)(C)(ii) of the Act. We address that appeal in a separate decision.

of their admission would cause their U.S. citizen or lawful permanent resident spouses, parents, sons, or daughters "extreme hardship." Section 212(h)(1)(B) of the Act. Both waiver alternatives also require applicants to demonstrate that they merit favorable exercises of discretion. Section 212(h)(2) of the Act.

II. THE 1985 CONVICTION

A. Controlled Substance Violation

To determine whether the Applicant's 1985 offense constitutes a controlled substance violation rendering him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, USCIS must use the "categorical" approach. *See Pereida v. Wilkinson*, 592 U.S. -, 141 S.Ct. 754, 762 (2021); *Matter of Laguerre*, 28 I&N Dec. 437, 438 (BIA 2022). Under this method, USCIS does not consider the facts of the Applicant's crime. Rather, the Agency examines the statute of conviction to determine whether the crime necessarily - or categorically - rendered the Applicant inadmissible.

The Applicant, a national and citizen of Mexico, concedes that, when he was 20 years old in 1985, he was convicted under section 11550(b) of the California Health and Safety Code. At that time, the section increased the potential jail time of certain people convicted under section 11550(a) of the code. Section 11550(a) criminalized the use, or being under the influence, of specified drugs dispensed without authorization by licensed people. Thus, to prevail under the categorical approach, the Applicant must show that his drug offense did not involve a federally defined controlled substance.

The federal definition of a controlled substance excludes some of the drugs specified in section 11550(a) of the California Health and Safety Code. *Tejada v. Barr*, 960 F.3d 1184, 1186 (9th Cir. 2020). Thus, the Applicant's conviction did not necessarily involve a federal controlled substance. The Applicant's burden of proof, however, includes demonstrating the identity of the drug he was convicted of using or being under the influence of. *See Pereida*, 141 S.Ct. at 762 (stating that an adjudicator "must have some idea what [the defendant's] *actual* offense was in the first place") (emphasis in original).

The Applicant's statute of conviction is "divisible," meaning that it states elements of the offense in the alternative. *Tejada*, 960 F.3d at 1186-87. The identity of the drug is an element of the statute, and the provision listed qualifying drugs in the alternative. *Id.* Thus, USCIS may use the "modified categorical" approach in an attempt to discover which alternate drug related to the Applicant's conviction. *See Pereida*, 141 S.Ct. at 762-63; *Matter of Laguerre*, 28 I&N Dec. at 438. Under this modified approach, the Agency can look beyond the criminal statute to documents in the record of conviction to determine the applicable element. *Id.* These documents are generally limited to the charging document, written plea agreement, transcript of plea colloquy, factual findings by a trial judge to which a defendant assented, and documents of equal reliability. *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (*en banc*), *abrogated on other grounds by Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

The record lacks documentation regarding the Applicant's 1985 conviction. A certificate from the criminal court states that, in 1988, case information was destroyed. The Applicant submits copies of minute orders indicating the court's vacatur of the Applicant's conviction in 2018. But these orders

do not identify the controlled substance involved in the offense. The Applicant's file contains a copy of a 1986 report from a court probation officer identifying the purported substance. But the modified categorical approach does not permit reliance on a pre-sentence report to establish the Applicant's inadmissibility. *See United States v. Vidal*, 504 F.3d 1072, 1087 n.25 (9th Cir. 2007 (*en banc*), *abrogated on other grounds as recognized in Cardozo-Arias v. Holder*, 495 F.App'x 790, 792 n.1 (9th Cir. 2012) (citation omitted). Thus, under the modified categorical approach, the record is inconclusive as to whether the Applicant's 1985 conviction constitutes a controlled substance violation.

An applicant cannot establish eligibility for a benefit if a conviction record is inconclusive as to which elements of a divisible statute formed the offense. *Pereida*, 141 S.Ct. at 758, 766. The Applicant did not establish that his offense excluded a federal controlled substance. Thus, as the Director found, the Applicant appears to be inadmissible under section 212(a)(2)(A)(i)(II).

B. Waiver Eligibility

When determining a noncitizen's eligibility for a waiver under section 212(h) of the Act, USCIS is not limited to the statute and record of conviction. Rather, the Agency may make a circumstance-specific inquiry. *Bogle v. Garland*, 21 F.4th 637, 645-47 (9th Cir. 2021); *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124 (BIA 2009). Thus, we may consider circumstances that the criminal court did not determine and that the Applicant may not have had an opportunity to dispute. *Id.*

The 1986 probation report and a 1987 Form I-213, Record of Deportable Alien, indicate that the Applicant's 1985 conviction stemmed from his use, or being under the influence, of phencyclidine (PCP). Both the statute of conviction and the federal Controlled Substances Act define PCP as a prohibited controlled substance. *See* Cal. Health & Safety Code § 11550(a) (1985) (referring to § 11055(e) of the code); 21 U.S.C. § 812(c), Sched. III(b)(7). Thus, as the Director found, the Applicant's 1985 conviction did not appear to involve possession of 30 grams or less of marijuana, rendering him ineligible for the requested waiver under section 212(h) of the Act.

C. The Conviction's Vacatur

Despite the indications of the Applicant's inadmissibility and ineligibility for a waiver, he contends that the criminal court's vacatur of his 1985 conviction eliminates the inadmissibility ground against him. If a court vacates a conviction "on the basis of a defect in the underlying criminal proceedings," the vacatur cancels the conviction for immigration purposes. *Ballinas-Lucero v. Garland*, 44 F.4th -, 2022 WL 3350587, *8 (9th Cir. Aug. 15, 2022) (quoting *Matter of Pickering*, 23 I&N Dec. 621, 625 (BIA 2003)). But, if a court vacates a conviction "solely for immigration purposes" or for other reasons "unrelated to the merits of the underlying criminal proceedings," the conviction retains immigration consequences. *Id.* (citing *Pickering*, 23 I&N Dec. at 624-25). To determine the reasons for a vacatur, adjudicators consider: the law under which the court issued its order; the order's language; and the noncitizen's reasons for requesting the order. *Id.* (citations omitted).

As previously indicated, the Applicant submitted a copy of a certified minute order from the criminal court regarding his 1985 offense. The minute order indicates that, in 2018, the court granted the

Applicant's motion to withdraw his "no contest" plea and change it to "not guilty."[2] The minute order also indicates that the judge then granted the prosecutor's motion to dismiss the matter.

The Applicant claims that the court vacated his 1985 conviction under section 1016.5 of the California Penal Code. That provision requires a vacatur if a noncitizen: pleaded guilty or *nolo contendere* to the crime; demonstrates that the court did not warn them that their conviction may lead to their deportation, exclusion, or denial of their naturalization; and shows that their conviction may lead to one of those three results. Cal. Penal Code § 1016.5(b). The minute order, however, did not specify the vacatur's issuance under section 1016.5 or because of a defect in the criminal proceedings. The Director therefore found that the Applicant's conviction retained immigration consequences and that the requested waiver could not excuse his offense.

On appeal, however, the Applicant submits a copy of the court's 2021 order, amending the prior minute order. The amendment states the vacatur's grant "pursuant to Penal Code § 1016.5." Because that provision indicates the court's failure to inform the Applicant of the potential immigration consequences of his plea, the order indicates that the vacatur stems from a defect in the criminal proceedings. The record lacks evidence that the court issued the vacatur solely for immigration purposes or for other reasons unrelated to the criminal proceedings. Thus, the criminal court's vacatur cancels the Applicant's 1985 conviction and the inadmissibility stemming from it. We will therefore withdraw the Director's contrary decision.

III. THE 1986 CONVICTION

As the Director noted, the record indicates that the Applicant has another, unvacated criminal conviction related to a controlled substance violation. The Applicant states that, in 1986, he was convicted for possession of marijuana and sentenced to three days in jail.

The Applicant's immigration file contains an abstract of judgment in the incident from the Superior Court of California, [redacted] indicating his initial conviction for transporting, importing, selling, furnishing, administering, or giving away marijuana. *See* Cal. Health & Safety Code § 11360(a) (1985). The probation report states that police saw the Applicant and another male making "hand to mouth gestures to passing motorists." When a car stopped, the Applicant and his co-defendant reportedly ran to it, yelling "Ten dollars. Ten dollars." They then reportedly placed their hands in the vehicle's window, each holding "a baggie containing some marijuana." The abstract indicates that the Applicant and his companion were each sentenced to two years in prison.

The Applicant submitted a minute order indicating that, in 2017, the criminal court vacated the Applicant's conviction. The Director found that the vacatur stemmed from a defect in the criminal proceedings, erasing the conviction's immigration consequences. But the order also indicates the Applicant's pleading of *nolo contendere* in the matter to an additional charge of possession of marijuana. The order states that the charge relates to "possession of less than an ounce [about 28.5 grams] of marijuana." The order lists the statute of conviction as section 11357(b) of the California

[2] No contest pleas, also known as *nolo contendere* pleas, waive defendants' rights to trials and allow courts to treat them as guilty. *U.S. v. Nguyen*, 465 F.3d 1128, 1130-31 (9th Cir. 2006). The pleas, however, are not admissions of factual guilt. *Id.*

Health and Safety Code. At the time of the Applicant's pleading, however, that section stated its application to people "who possess *more than* 28.5 grams of cannabis." Cal. Health & Safety Code § 11357(b) (2017) (emphasis added).

The Director found that the Applicant was convicted of possessing less than an ounce of marijuana and, thus, that the offense "could be waived." But the Director did not consider the contrary terms of the statute of conviction listed on the minute order. Section 11357(b) of the California Health and Safety Code applied to people "who possess *more than* 28.5 grams of cannabis." (emphasis added). Because of the discrepancy between the terms of the minute order and the listed statute's provisions, the record does not demonstrate the Applicant's conviction for possession of less than an ounce of marijuana. We will therefore withdraw the Director's contrary finding.

Also, the Director did not formally find whether the Applicant's additional conviction renders him inadmissible and, if so, whether he qualifies for or merits a waiver. Because the Director did not fully address the immigration consequences of the Applicant's additional conviction, we will remand the matter.

On remand, the Director should notify the Applicant of the discrepancies regarding the amount of marijuana listed in the statute to which he pleaded *nolo contendere* and afford him a reasonable period to respond. Upon receipt of a timely response, the Director should review the entire record and enter a new decision, determining the Applicant's inadmissibility under section 212(a)(2)(A)(i)(II) of the Act and whether he qualifies for and warrants a waiver under section 212(h) of the Act.

IV. CONCLUSION

The criminal court's vacatur erases the Applicant's inadmissibility based on his 1985 conviction. The record, however, contains evidence of a controlled substance violation that jeopardizes his admissibility to the United States.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.