



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 24572330

Date: FEB. 16, 2023

Appeal of Jacksonville, Florida Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident (LPR) and seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h), for a controlled substance violation.

The Director of the Jacksonville, Florida Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application). The Applicant filed a motion to reopen and to reconsider with the Director. The Director dismissed the motion finding the Applicant was inadmissible for controlled substance violations pursuant to section 212(a)(2)(A)(i)(II) of the Act and had not established eligibility for a discretionary waiver. The matter is now before us on appeal.

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 (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. 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 Factual and Procedural Background

The Applicant entered the United States on a student visa in 2007. In [] 2012, the Applicant was arrested and charged with violating New Jersey Statutes Annotated (N.J. Stat. Ann.) sections 2C:35-10a, Possession [of a Controlled Dangerous Substance], 2C:36-2, Use or Possession with Intent to Use Paraphernalia, and 39:3-66, Maintenance of Lamps. The associated police reports identified the property found in the Applicant's car: a bag of marijuana containing less than five grams of marijuana, a partially smoked cigarette containing less than a gram of marijuana, and a marijuana grinder containing traces of marijuana. According to the transcript of proceedings from the [] Municipal Court (Court) in [] New Jersey, the Applicant requested a conditional discharge of his criminal charges and pled guilty to the traffic violation. The judge overseeing the Court proceedings stated the paraphernalia charges under N.J. Stat. Ann. section 2C:36-2 would be dismissed on the condition that the Applicant satisfactorily completed the conditional discharge program. The judge further stated he would grant the Applicant's conditional discharge request regarding the possession of a controlled substance charge under N.J. Stat. Ann. section 2C:35-10a. The details of the conditional discharge were not read into the record but the Applicant's acknowledgement of and agreement with the terms of the conditional discharge were contained in the transcript. The Applicant did not provide a copy of the conditional discharge to USCIS. In the disposition documents, coded next to "plea" was "no bill" for both charges.¹ Coded next to "finding" for the paraphernalia charge was "dismissed - plea agreement" and for the possession of a controlled substance charge was "dismissed - conditional discharge."

In [] 2014, the Applicant was arrested for Possession of Marijuana, N.J. Stat. Ann. section 2C:35-10a(4) and pled guilty to this charge in [] 2014. The associated "complaint warrant" identified the amount of marijuana as three grams.

In August 2019, the Applicant's U.S. citizen spouse filed Form I-130, Petition for Alien Relative, on his behalf and it was approved in January 2020. The Applicant contemporaneously filed Form I-485, Application for Adjustment of Status, and a waiver application. In an affidavit dated January 2020, the Applicant explained the circumstances around his 2012 arrest. He stated, in relevant part:

Police officer proceeded to stop me and when he came to talk to me, he smelled marijuana coming from the inside of my car. . . . He did indeed [sic] a small amount of marijuana inside my car. I was then, arrested with 2 offenses charged. I paid all the fine of [] that I had to pay due to my mistake of having a controlled substance under my possession.

¹ The disposition documents contain numbers next to plea and finding. A sheet was provided by the Applicant to clarify the codes.

The Director denied the Applicant's waiver determining that the 2012 and 2014 incidents in aggregate render him inadmissible, and, because he did not provide USCIS with the relevant criminal documents, he did not meet his burden in establishing his eligibility for a waiver.

The Applicant filed a motion to reopen and to reconsider with the Director and submitted new documents, including a document entitled "complaint detail" printed from a New Jersey Court's website. The printout for the possession of a controlled substance charge under N.J. Stat. Ann. section 2C:35-10a provides: "plea: no plea" and "finding: conditional discharge." A similar printout was not provided for N.J. Stat. Ann. section 2C:36-2, the paraphernalia charge.² Also submitted was a copy of a letter, dated August 2012, authored by the Applicant's attorney representing him on his criminal charges. The letter is addressed to the Court, indicating the Applicant "will be pleading 'not guilty' to the charge." The reference line is to a summons number. The summons was included in the file and is for the two 2012 criminal charges. The Director denied the Applicant's motion after analyzing N.J. Stat. Ann. section 2C:36A-1, Conditional discharge for certain first offenses; expunging of records, and explaining how the Applicant did not meet his burden in establishing his eligibility for a discretionary waiver.

On appeal the Applicant includes a brief, previously submitted evidence, and new documents indicating that he tried to obtain a copy of his 2012 criminal documents from the New Jersey Division of Archives and Records Management and was told they were destroyed and directed to the relevant police department record keepers for copies. He refers to an email by the Court clerk, contained in the underlying record, saying, in relevant part, that she would mail out the certified disposition, which is the only information she "would be able to provide" and added, "All I can tell you about the Conditional Discharge agreement is[.]" The sentence is incomplete. The next line reads, "Whether or not it was completed. That information is contained in the Certified Disposition." The Applicant also included a second letter by counsel representing the Applicant in 2012 with his criminal proceedings. The letter is dated November 2020 and states, in relevant part, "[a] copy of all documents in my possession relating to this matter has been forwarded to [the Applicant's] immigration attorney"³ The Applicant asserts on appeal that he has established that documents pertaining to his conditional discharge agreement are unavailable pursuant to 8 C.F.R. § 103.2 and that he has submitted sufficient evidence to establish that he did not enter a plea to the charge.

² The previously submitted disposition records similarly coded the paraphernalia charge and the possession of a controlled substance charge under "plea" as "no bill." Despite indicating there was no bill, the paraphernalia charge had a finding of "dismissed – plea agreement," indicating the code under "plea" was not the final finding by the Court and did not mean a plea was not entered. Without more, the printout indicating "no plea" does not establish that the final finding by the Court did not include a plea or amounted to suspended proceedings.

³ The Applicant's counsel asserts that this letter is an attestation that the conditional discharge agreement was unavailable. The letter by the Applicant's former counsel does not make this attestation. In any event, unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1998).

B. The Applicant is inadmissible to the United States

The Applicant asserts that the violations from 2012 resulted in a conditional discharge, which was not a conviction. As a result, he claims he is eligible for a discretionary waiver under section 212(h) of the Act because his inadmissibility is related only to a single 2014 offense of simple possession of 30 grams or less of marijuana.

Section 101(a)(48) of the Act defines conviction as a formal judgment of guilt entered by a court, or, if adjudication of guilt has been withheld, where a judge or jury has found the person guilty or the person has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the person's liberty. The part of the definition contested on appeal is whether the Applicant entered a plea of guilty for his 2012 charge.

The conditional discharge statute provides, in relevant part, that persons not previously convicted of certain offenses,

. . . may on motion of the defendant or the court: . (1) Suspend further proceedings and with the consent of the person . . . place him under supervisory treatment upon such reasonable terms and conditions as it may require; or (2) After plea of guilty or finding of guilty, and without entering a judgment of conviction, and with the consent of the person . . . place him on supervisory treatment upon reasonable terms and conditions as it may require, or as otherwise provided by law.

N.J. Stat. Ann. § 2C:36A-1 (2012) (emphasis added).

In order to be placed in the program, the judge may either suspend proceedings or accept a plea. The disposition documents for the possession of a controlled substance charge under N.J. Stat. Ann. section 2C:35-10a do not state whether the Court suspended proceedings or accepted a guilty plea. The email from the Court administrator appears incomplete and does not provide information on the conditional discharge agreement. The transcript and other documents in the record also do not clarify whether proceedings were suspended or a guilty plea was entered for the possession of a controlled substance charge. Further, while the letter by the Applicant's 2012 counsel to the Court stated the Applicant intended to plea "not guilty to the charge," it does not specify which charge and the Applicant did plea to the traffic violation and the paraphernalia charge. We acknowledge the Applicant's statements that he has made all efforts to obtain a copy of the certified disposition. However, the issue here is not whether he has complied with 8 C.F.R. § 103.2,⁴ but whether he has provided sufficient evidence to establish that he was not convicted of a controlled substance offense, which he has not done. As a result, the Applicant has not established clearly and beyond doubt that proceedings were suspended, and the conditional discharge agreement does not amount to a conviction rendering him inadmissible. See *Matter of Bett*, 26 I&N Dec. at 440 ("The applicant bears the burden of establishing admissibility clearly and beyond doubt.").

⁴ The regulation, in relevant part, requires an applicant to demonstrate a record is unavailable. 8 C.F.R. § 103.2(b)(2)(ii).

While not raised by the Applicant or the Director but relevant to this analysis is whether the Applicant's convictions under N.J. Stat. Ann. section 2C:35-10a relate to a controlled substance as defined in the Controlled Substance Act. See section 212(a)(2)(A)(i)(II) (providing, in relevant part, any noncitizen convicted of committing acts violating any law or regulation relating to a controlled substance, as defined in the Controlled Substance Act, 21 U.S.C. § 802, is inadmissible). 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. See *Mellouli v. Lynch*, 135 S. Ct. 1980, 1981 (2015). At the time of the Applicant's conviction, N.J. Stat. Ann. section 2C:35-2 defined a controlled substance as a drug, substance, or immediate precursor in Schedules I through V. The statute made no reference to the Controlled Substance Act or any other federal law and included at least one substance that is not a controlled substance as defined in section 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.

The analysis now turns to whether N.J. Stat. Ann. section 2C:35-10a 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). N.J. Stat. Ann. section 2C:35-10(a)(1) is divisible with respect to the identity of the specific substance possessed, and we may examine the respondent's record of conviction under a modified categorical analysis to determine whether that substance is a controlled substance under Federal law. See *Matter of Laguerre*, 28 I&N Dec. 437, 447 (BIA 2022) (analyzing New Jersey case law and statutory language in coming to its determination that the identity of the specific controlled dangerous substance possessed is an “element” of the offense) (internal citations omitted). The conviction record reflects that the respondent was convicted of possessing marijuana, which is a federally controlled substance. 21 U.S.C. § 812, Schedule I(c)(10) (2012).

As a consequence, the Applicant's 2012 conviction for possession of a controlled dangerous substance under N.J. Stat. Ann. section 2C:35-10(a) is a conviction for a controlled substance violation that renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance violation, namely, marijuana. As the record establishes, this 2012 conviction combined with his 2014 conviction for a controlled substance violation makes him ineligible for a section 212(h) waiver. Accordingly, the waiver application remains denied.⁶

⁵ The substance Dextrorphan was listed in Schedule I of N.J. Stat. Ann. section 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 While not addressed in the record below, section 212(a)(2)(A) of the Act renders inadmissible any noncitizen who admits having committed prohibited acts and does not require a conviction. In addition, section 101(A)(48) of the Act defines

III. CONCLUSION

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

ORDER: The appeal is dismissed.

conviction to include the admission of sufficient facts to warrant a finding of guilt. Separate, but of equal consequence, we also note that the disposition documents establish that the Applicant pled to N.J. Stat. Ann. section 2C:36-2, the paraphernalia charge. The associated laboratory report confirmed marijuana residue in the grinder. While we need not address whether the Applicant admitted to the controlled substance violations, or whether N.J. Stat. Ann. section 2C:36-2 also renders him inadmissible, we note the Applicant may need to address admissions and his guilty plea for the paraphernalia charge should he establish that his 2012 charge for possession of a controlled substance did not result in a conviction, the dispositive issue here. See *INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (“[C]ourts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.”); see also *Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).