U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22316896

Date: AUG. 26, 2022

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), for unlawful presence, and under section 212(h) of the Act, 8 U.S.C. § 1182(h), for a controlled substance violation.

The Director of the Nebraska Service Center denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), and we dismissed the Applicant's subsequent appeal. On motion to reopen and reconsider, the Applicant submits additional evidence and reasserts his eligibility. Upon review, we will grant the motion to reopen and remand the matter to the Director for the issuance of a new decision. The motion to reconsider is moot.

I. LAW

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies the above requirements and demonstrates eligibility for the requested immigration benefit.

A noncitizen who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act. There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the noncitizen. Section 212(a)(9)(B)(v) of the Act.

Furthermore, any noncitizen convicted of or who admits committing 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) of the Act. Individuals found inadmissible under section 212(a)(2)(A)(i)(II) 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. Section 212(h)(1)(B) of the Act provides for a waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

II. ANALYSIS

The record reflects that the Applicant entered the United States without admission or parole in March 1998 and remained until his departure in January 2018. The record also reflects that the Applicant was convicted of possession of marijuana of less than one ounce in Georgia in 2001 and 2007. As a result, the Applicant is inadmissible under section 212(a)(9)(B)(i)(II), for unlawful presence, and section 212(a)(2)(A)(i)(II), for a controlled substance violation. The Director acknowledged the Applicant's immigration violation and criminal history and denied the waiver application, concluding that he was not eligible for a waiver because his two convictions for possession of one ounce of marijuana were not related to a single offense.

On appeal, we acknowledged evidence that the Applicant's 2007 conviction for possession of marijuana was vacated in [redacted] 2019, including a letter from the Chief Judge from the [redacted] Municipal Court indicating that he heard arguments regarding the *Defendant's Motion to Vacate Plea* and "determined that it [wa]s appropriate to dispose of the pending matter by approving the Consent Order having been previously presented to the court." We further acknowledged a copy of an *Order* from the same court stating that, "the judgment, plea, and sentence imposed in [the Applicant's] case, for the offense of Possession of Marijuana Less Than One Ounce, is hereby vacated as void. . ." We noted however, that the Applicant did not provide evidence that his conviction was vacated due to a procedural or substantive defect in the underlying criminal proceeding. *See Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). As a result, we concluded that his 2007 conviction remained for immigration purposes, and he was ineligible for a waiver under section 212(h) of the Act.

On motion, the Applicant contends that he is eligible for a waiver under section 212(h) of the Act. He argues that he only has one conviction for possession of marijuana of less than one ounce as his 2007 conviction for the same was vacated due to a substantive defect in the underlying criminal proceedings. In support of his contention, the Applicant submits a copy of the *Defendant's Motion to Vacate Plea* (motion) dated in [redacted] 2019, which states, in pertinent part that, "[t]here is no record of the plea proceeding in this case. It is not clear whether [the] client was adequately advised of his constitutional rights, or if he was advised that there would be an adverse effect on his immigration status. These are justifiable grounds to vacate his conviction." The record indicates that, based on this motion, the Chief Judge issued the aforementioned [redacted] 2019 letter and *Order* vacating the Applicant's 2007 conviction.[1]

The record, as supplemented on appeal and subsequent motion, includes additional evidence directly related to the issues that significantly informed the Director's grounds for denial of the waiver application. Accordingly, we will remand the matter to the Director for the consideration of this

[1] The Applicant also asserts that "[we] incorrectly concluded that as a matter of law that the Order vacating [the Applicant's] conviction was not in compliance with *Pickering* and *Thomas* and *Thompson*." However, since we are granting the Applicant's motion to reopen, we will not address this argument regarding a motion to reconsider.

evidence in the first instance and to determine whether the Applicant has met his burden of establishing his eligibility for a waiver of admissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act.

III. CONCLUSION

ORDER: The motion to reopen is granted, and the matter is remanded for the entry of a new decision consistent with the foregoing analysis.