U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-K-M-

DATE: OCT. 30, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of New Zealand currently residing in New Zealand, has applied for an immigrant visa. A foreign national seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a controlled substance violation and seeks a waiver of that inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). U.S. Citizenship and Immigration Services may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives or, where the activities for which the foreign national is inadmissible occurred at least 15 years ago, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated.

The Director of the Nebraska Service Center denied the application. The Applicant was found inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for a controlled substance violation. The Director then determined that the Applicant was ineligible for a waiver because her conviction was not related to a single offense of simple possession of 30 grams or less or marijuana. We dismissed a subsequent appeal, also finding the Applicant had not established that her conviction related to a single offense of simple possession of 30 grams or less of marijuana.

The matter is now before us on a motion to reopen and reconsider. On motion, the Applicant submits additional evidence and asserts that the new evidence establishes that her conviction relates to a single offense of simple possession of 30 grams or less of marijuana.

Upon review, we will deny the motions.

I. LAW

Any foreign national convicted of, or who admits having committed, 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, 8 U.S.C. § 1182(a)(2)(A).

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, 8 U.S.C. § 1182(h). Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. Section 212(h)(1)(A) of the Act.

II. ANALYSIS

The issue on motion is whether the Applicant's controlled substance violation relates to a single offense of simple possession of 30 grams or less of marijuana and whether she is eligible for a waiver under section 212(h)(1)(A) of the Act. In support of the application, the Applicant submitted news articles regarding her conviction, declarations from herself and her children, letters of support, court documentation, financial records, medical records, and an expert opinion from a New Zealand criminal defense attorney. We have considered all the evidence in the record. We find that the Applicant is inadmissible for a controlled substance violation and has not established that she is eligible for a waiver.

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for a controlled substance violation, specifically for a 1979 conviction for importing cannabis leaf in violation of sections 6(1)(a) and 6(3)(c) of New Zealand's Misuse of Drugs Act of 1975. The record reflects that the Applicant was fined $200. The Applicant claims that her criminal record was expunged pursuant to the New Zealand Criminal Records (Clean Slate) Act of 2004, a rehabilitative statute, and she thus no longer has a conviction.

Foreign expungements pursuant to rehabilitative statutes are generally not given effect under federal immigration law. *See Matter of Adamo*, 10 I&N Dec. 593, 596 (BIA 1964). A foreign national remains inadmissible for a violation of a foreign country's law relating to a controlled substance even if the conviction is subsequently expunged pursuant to a foreign rehabilitative statute. *Matter of Dillingham*, 21 I&N Dec. 1001, 1005 (BIA 1997), *rev'd, Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001), *overruled by Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011). The Applicant claims that the decision of the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), should apply to her case and that her drug offense should not be considered a conviction for immigration purposes.[1] The rule set forth in *Lujan*, regarding first-time simple possession of controlled substance offenses, is applicable only in the Ninth Circuit and is a limited exception to the

[1] The Ninth Circuit Court of Appeals stated in *Lujan-Armendariz v. INS* that "if (a) person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Id.* at 738.

generally recognized rule that an expunged conviction qualifies as a "conviction" under the Act. The Applicant in the present case does not reside in the jurisdiction of the Ninth Circuit, and the exception in *Lujan* to the general rule that foreign expungements pursuant to rehabilitative statutes are not given effect under federal immigration law does not apply in her case.

The waiver for a controlled substance violation under section 212(h) of the Act is only applicable to a violation related to a single offense of simple possession of 30 grams or less of marijuana. Although determining inadmissibility under section 212(a)(2)(A)(i)(II) for a controlled substance violation requires a categorical approach, for purposes of waiving that inadmissibility under section 212(h) of the Act, we conduct a "circumstance-specific" inquiry into whether the violation related to a single offense of simple possession of 30 grams or less of marijuana. *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 124 (BIA 2009), *abrogated on other grounds by Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (U.S. 2015)); *see also Matter of Grijalva*, 19 I&N Dec. 713, 718 (BIA 1988); *cf. Matter of Davey*, 26 I&N Dec. 37, 38-39 (BIA 2012) (applying a "circumstance-specific" inquiry to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), to find that convictions for two offenses – possession of marijuana and possession of drug paraphernalia – may be considered a "single" offense of possession). Thus, where the amount of marijuana cannot be readily determined from the statute or record of conviction, the applicant must provide credible and convincing evidence to meet his or her burden of showing that it was 30 grams or less. *Martinez Espinoza*, 25 I&N Dec. at 125; *Grijalva*, 19 I&N Dec. at 718.

In the present case, the Applicant asserts that while living in the United States, a friend asked her to send him two marijuana cigarettes that he had left in his home in California to his residence in New Zealand. She states that the letter containing the cigarettes was intercepted by the New Zealand customs police and she was arrested when she subsequently visited New Zealand. The Applicant asserts that the complete record of conviction is unavailable due to the age of the conviction. The record also contains a letter from the New Zealand Ministry of Justice indicating that the Applicant does not have a history of conviction.

With respect to the amount of marijuana involved in the Applicant's conviction, on motion, the Applicant submits a news article regarding her arrest that states that the Applicant sent a letter to New Zealand that contained five grams of cannabis leaf. We find that, based upon information in the news article and the unavailability of additional court or police records, the Applicant has met her burden of showing that her conviction related to less than 30 grams of marijuana.

With respect to whether the Applicant's violation relates to simple possession of marijuana, the record contains a letter from a New Zealand litigation firm stating that the Applicant's offence was more akin to minor possession than trafficking or importing due to the small amount of cannabis involved and because the Applicant did not receive remuneration. Citing *Matter of Aruna*, 24 I&N Dec. 453 (BIA 2008) and *Wilson v. Ashcroft*, 250 F.3d 377, 382 (3d Cir. 2003), the Applicant asserts that numerous court decisions have emphasized that the casual sharing of small amounts of marijuana is distinct from drug trafficking and that the evidence submitted on motion demonstrates she acted solely to facilitate the personal use of marijuana by her friend, who was the owner of the cigarettes. The Applicant also states that the Ninth circuit in *Perez-Hernandez v. Holder*, No. 12–

71095 (9th Cir. 2014) notes that an offense relates to simple possession of marijuana for personal use if the particular acts that led to the conviction were closely related to such conduct. She maintains that the acts that led to her offense are closely related to simple possession because of the amount of marijuana involved. Citing *Esquivel v. Lynch*, 803 F.3d 699 (5th Cir. 2015), the Applicant further asserts that personal use by a distributor or transporter is not a necessary element for a close relationship to possession. In addition, the Applicant states that U.S. federal law punishes individuals who distribute a small amount of marijuana for no remuneration as possessors of marijuana under the misdemeanor provisions of 21 U.S.C. § 844 rather than under the felony provisions for distributors of controlled substances.

Matter of Aruna and *Wilson v. Ashcroft* as well as 21 U.S.C. § 844 address whether an offense involving the sharing or distribution of marijuana constitutes a misdemeanor versus a felony, but do not provide that such an offense constitutes simple possession when the amount involved is small. Likewise, *Perez-Hernandez v. Holder* can be distinguished from the present case as it involved a defendant who was charged with offering to transport 30 grams or less of marijuana for his own use whereas the Applicant transported marijuana for the personal use of her friend. With respect to *Esquivel v. Lynch*, while the Fifth Circuit held in that case that possession of marijuana in a drug-free school zone related to simple possession, the court also reiterated that the personal-use exception only applies if four elements are met — the offense must be (1) a single offense; (2) involving possession for one's own use; (3) of 30 grams or less; (4) of marijuana.

Here, the record establishes that the Applicant was convicted for importing/transporting marijuana that was intended to be used by her friend. As we noted in our previous decision, simple possession, as that term is used in section 212(h) of the Act, has been defined as possessing marijuana for personal use. *See Martinez-Espinoza*, *supra*, at 125 (stating that simple possession "denotes the exercise of dominion or control over marijuana with an eye to its use by the possessor."). We find that the Applicant has not established that her conviction was for an offense relating to simple possession because the marijuana was not intended for her personal use. She is therefore ineligible for a section 212(h) waiver of her inadmissibility, and, as she is statutorily ineligible for relief, no purpose would be served in addressing whether she merits a waiver as a matter of discretion.

III. CONCLUSION

The Applicant is inadmissible for a controlled substance violation and has not established that she is eligible for a waiver. Accordingly, the motions are denied.

Cite as *Matter of L-K-M-*, ID# 562025 (AAO Oct. 30, 2017)