U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 8999725

Date: MAY 06, 2021

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant requested 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 the Nebraska Service Center denied the request, concluding that the Applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance violation. An individual who is inadmissible under section 212(a)(2)(A)(i)(II) of the Act may qualify for a waiver of inadmissibility under section 212(h) of the Act if that offense "relates to a single offense of simple possession of 30 grams or less of marijuana."

In denying the waiver application, the Director concluded that records show a 2001 search of the Applicant's car found a glass pipe with a copper mesh and white pasty residue commonly used for smoking cocaine, and that the Applicant was convicted of possession of paraphernalia. The Director then determined that the Applicant was not eligible for a waiver because his inadmissibility was not related to a single offense of simple possession of 30 grams or less of marijuana, but rather the conviction record shows it involved cocaine.

On appeal the Applicant argues that the Director erred because nothing in the record indicates that his offense involved cocaine. Upon *de novo* review, we will remand the matter to the Director for the entry of a new decision.

The record reflects that in 2001 the Applicant pled no contest to charges in violation of California Health & Safety (CA H&S) Code § 11364 Opium pipes; instruments for injecting or smoking controlled substances. In 2006, the Applicant was ordered removed from the United States under section 237(a)(2)(B)(i) of the Act as an alien who after admission has been convicted of a violation related to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana. The Applicant departed the United States in 2007. In 2016, he applied for an immigrant visa based on his current marriage to a U.S. citizen. However, the U.S. Department of State refused his visa request, finding that he was inadmissible under 212(a)(2)(A)(i)(II) of the Act for a conviction related to a controlled substance.

The Applicant was convicted of unlawful possession of paraphernalia used for unlawfully injecting or smoking a controlled substance, but the statute under which he was convicted makes no reference to the Controlled Substance Act or any other federal law and it punishes activity in connection with at least one substance that is not a controlled substance as defined in 21 U.S.C. § 802. As a result, conviction under this statute is not categorically a violation of law relating to a controlled substance under the Controlled Substance Act.[1]

Review of the Applicant's record of conviction under a modified categorical analysis indicates that the controlled substance involved is not identified, precluding a finding that the Applicant has been convicted of an offense relating to a controlled substance as defined in 21 U.S.C. § 802. While a police department incident report created at the time of the Applicant's arrest includes a narrative indicating that a search of Applicant's vehicle uncovered a glass pipe "commonly used for smoking cocaine," this document is not part of the record of conviction. Rather, the record of conviction includes the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment for the purpose of determining which alternative element formed the basis of the conviction (thus effectuating the categorical analysis for divisible statutes). *See Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1300-02 (9th Cir. 2014).

Upon our request, the U.S. Department of State, Bureau of Consular Affairs has removed this inadmissibility in its records. The Applicant's conviction under H&S Code § 11364 does not render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act and he does not require a waiver of inadmissibility.

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

[1] *See Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).