U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-G-C-D-

DATE: SEPT. 3, 2015

APPEAL OF LOS ANGELES FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Guatemala, was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a law involving a controlled substance. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his family. *See* section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h). The Field Office Director, Los Angeles Field Office, denied the Form I-601, Application for Waiver of Grounds of Inadmissibility. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the applicant had been convicted of a violation of a law involving a controlled substance and that he was placed on deferred entry of judgment. The Director noted that on two occasions, the applicant's deferred entry of judgment was terminated due to probation violations. The Director concluded the applicant was not entitled to relief pursuant to the Federal First Offenders Act and that no waiver was available. He denied the application accordingly. *Decision of Field Office Director,* dated June 27, 2014.

On appeal, the applicant asserts that the criminal trial court did not find that he had violated probation and therefore he is entitled to relief under the Federal First Offenders Act. He further asserts that his qualifying spouse would suffer extreme hardship if the application was denied. *Statement accompanying Form I-290B, Notice of Appeal or Motion,* dated July 25, 2014.

The record contains, but is not limited to: a statement from the applicant's qualifying spouse; identity and relationship documents; arrest records; court records; financial documents; school records of the applicant's child and step-children; and photographs. The entire record was reviewed and considered in rendering a decision on appeal.

Section 212(a)(2) of the Act states in pertinent part:

> Criminal and related grounds. –
>
> (A) Conviction of certain crimes. -
> (i) In general. - Except as provided in clause (ii), any alien convicted of, or

> who admits having committed, or who admits committing acts which constitute the essential elements of -
>
> ...
>
> (II) 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.

On , 2008, in the Superior Court of the State of California, , the applicant was charged with possession of a narcotic controlled substance, methamphetamine, in violation of section 11377(a) of the Health and Safety Code. On 2008, the applicant, pursuant to section 1000.1(a)(3) of the California Penal Code, pled guilty to the charge, was placed on deferred entry of judgment, and was placed on probation for 24 months. On , 2009, after finding that the applicant had violated probation, the court terminated deferred entry of judgment, reinstated criminal proceedings, and entered a disposition of convicted. On , 2009, the applicant appeared in court and his deferred entry of judgment was reinstated. The applicant was ordered to appear again on , 2010. On this date, the applicant failed to appear, the court again terminated his deferred entry of judgement, reinstated criminal proceedings, and entered a disposition of convicted. On , 2010, the applicant appeared in court and the court again reinstated deferred entry of judgment. On 2010, the applicant completed the deferred entry of judgment program and the court dismissed the case pursuant to section 1000.3 of the California Penal Code.

The applicant asserts that his drug conviction was dismissed by the state criminal court, he is eligible for relief under the Federal First Offenders Act (FFOA), and, as a result, he has not been convicted for immigration purposes. For convictions occurring on or before July 14, 2011, and arising with the jurisdiction of the Ninth Circuit Court of Appeals, those whose controlled substance offense would have qualified for treatment under the FFOA, but who were convicted and had their convictions expunged under state or foreign law, do not have a conviction for immigration purposes. *See Dillingham v. INS*, 267 F.3d 996 (9th Cir. 2001); *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

The question before us is whether an applicant whose state conviction for possession of a controlled substance was dismissed pursuant to deferred entry of judgment, but who violated the terms of his probation before dismissal, would have been eligible for relief under the FFOA, 18 U.S.C. § 3607(a).

As stated above, the FFOA relieves certain first-time offenders convicted on drug possession charges of what would otherwise be the immigration consequences of the conviction. However, FFOA relief is unavailable when an offender has violated a condition of probation. *See* 18 U.S.C. § 3607(a). *See Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009). The applicant was convicted for possession of a narcotic controlled substance, methamphetamine, in violation of California Health and Safety Code § 11377(a) and was placed on deferred entry of judgment for two years. The state court twice found that he violated the terms and conditions of his probation. Therefore, he is ineligible for relief

under FFOA and has been convicted for immigration purposes,

Section 212(h) of the Act provides, in pertinent part, that:

> The [Secretary] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana ....

Because the applicant was not convicted of a single offense of simple possession of 30 grams or less of marijuana, his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act cannot be waived under section 212(h) of the Act. There is no waiver for the applicant's inadmissibility.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of E-G-C-D-*, ID# 12256 (AAO Sept. 3, 2015)