



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 01 2008

IN RE:

Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT;

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the Form I-601 application will be denied.

The applicant is a native and citizen of Canada who 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 on January 22, 1985, and on October 4, 1985, of Possession of a Narcotic (Marijuana), in violation of the Canadian Narcotic Control Act. The director determined that the applicant failed to establish that his wife and two children would suffer extreme hardship if he were denied admission into the United States. The applicant's Form I-601 was denied accordingly.

Through counsel, the applicant asserts that his wife would suffer extreme hardship if the applicant were denied admission into the United States.

Section 212(a)(2)(A) of the Act provides in pertinent part that:

(i) [A]ny 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.

Marijuana is listed as a Schedule I, controlled substance in the Controlled Substance Act. The record reflects that on January 22, 1985, the applicant was convicted of Possession of a Narcotic (Marijuana), in violation of section 3(1) of the Canadian Narcotic Control Act. The applicant received a conditional discharge and 6 months probation. The applicant was subsequently issued a pardon from the National Parole Board of Canada on May 19, 1994. The applicant was again convicted of Possession of a Narcotic (Marijuana) in violation of section 3(1) of the Canadian Narcotic Control Act on October 4, 1985. He was fined \$150.00, or alternatively sentenced to 30 days in a correctional institution if the fine was not paid.

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

The Attorney General [Secretary] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of 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

....

(1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial

of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

Section 212(h) of the Act does not provide for the possibility of a waiver under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance offense which is not a single offense of simple possession of 30 grams or less of marijuana. A finding of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for two convictions of possession of marijuana is therefore not within the scope of relief under section 212(h) of the Act.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term, “conviction” for immigration purposes as:

A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

In the present matter, the applicant pled guilty, on January 22, 1985, to Possession of a Narcotic (Marijuana), in violation of section 3(1) of the Canadian Narcotic Control Act. The applicant received a conditional discharge and 6 months probation. On October 4, 1985, the applicant was found guilty of Possession of a Narcotic (Marijuana) in violation of section 3(1) of the Canadian Narcotic Control Act. He was fined \$150.00, or sentenced to 30 days in a correctional institution if the fine was not paid. The AAO finds that the evidence in the record establishes the applicant was convicted of both crimes for immigration purposes.

It is noted that the fact that one of the applicant’s convictions was pardoned and vacated by the Canadian government, does not alter its effect for U.S. immigration purposes. “For purposes of U.S. immigration laws, a foreign pardon, in itself, does not wipe out an alien’s foreign conviction or relieve him from the disabilities which flow therefrom.” *Marino v. INS*, 537 F.2d 686, 691 (2nd Cir. 1976) (citations omitted); *see also, Mercer v. Lence*, 96 F.2d 122 (10th Cir. 1938); *United States ex rel. Palermo v. Smith*, 17 F.2d 534 (2nd Cir. 1927).

The Board of Immigration Appeals stated in *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) that:

As a general rule, we give full faith and credit to State court actions that purport to vacate an alien’s criminal conviction. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Nonetheless, if a court vacates an alien’s criminal conviction solely on the basis of immigration hardships or rehabilitation, rather than on the basis of a substantive or

procedural defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its vacatur. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *see also Ali v. Ashcroft*, 395 F.3d 722, 728-29 (7th Cir. 2005.)

In the present matter, the record reflects that the applicant's January 22, 1985, conviction for Possession of a Narcotic was pardoned and vacated because the applicant remained free from any conviction since completing his sentence. Because the applicant's conviction was pardoned for rehabilitative purposes, it remains a conviction for immigration purposes.

The applicant has therefore been convicted of two controlled substance related crimes. As indicated above, a section 212(h) waiver of grounds of inadmissibility is generally not available in cases involving controlled substance crimes. Indeed, the Act clearly reflects that a section 212(h) waiver applies only to cases involving a single offense of possession of 30 grams or less of marijuana. In this case, the applicant was convicted of two controlled substance crimes. The applicant is therefore statutorily ineligible to be considered for a section 212(h) waiver.

Because the applicant is statutorily ineligible for relief, no purpose would be served in discussing whether he has established extreme hardship to his U.S. citizen wife and children, or whether he merits the waiver as a matter of discretion. The applicant's appeal will therefore be dismissed, and his Form I-601 application will be denied.

ORDER: The appeal is dismissed. The application is denied.