U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Navarro, Carlos
Stowell, Crayk & Bown, PLLC
2225 S. State Street
Salt Lake City, UT 84115

DHS/ICE Office of Chief Counsel - SLC
2975 Decker Lake Dr. Stop C
West Valley City, UT 84119

Name: GONZALEZ, JORGE ADRIAN **A 089-466-492**

Date of this notice: 7/1/2019

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Morris, Daniel
Kelly, Edward F.
Liebmann, Beth S.

Userteam: Docket

File: A089-466-492[1] – West Valley, UT Date: JUL 0 1 2019

In re: Jorge Adrian GONZALEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carlos Navarro, Esquire

ON BEHALF OF DHS: John K. West
Assistant Chief Counsel

APPLICATION: Adjustment of status; section 212(h) waiver

This case was last before the Board on November 24, 2017, when we dismissed the respondent's appeal from an Immigration Judge's March 15, 2017, decision that denied his application for adjustment of status in conjunction with a waiver of inadmissibility.

Following the Board's decision, the United States Court of Appeals for the Tenth Circuit granted the Department of Homeland Security's (DHS') unopposed motion to remand for consideration of the respondent's argument that his conviction under Utah Code Annotated section 58-37A-5(1)(a) does not render him inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and therefore ineligible for adjustment. The respondent had argued that the statute is overbroad because Utah's schedule of controlled substances includes substances not listed in the federal schedules of controlled substances, and is indivisible because a particular controlled substance need not be identified to obtain a conviction.[2] The motion also requested consideration of the applicability of the Board's decision in *Matter of Ferreria*, 26 I&N Dec. 415 (BIA 2014) (holding that an alien must show a realistic probability that a state would prosecute cases involving substances listed on state drug schedules that are not listed in the federal schedules). Additionally, the DHS requested that the Board consider whether it would be appropriate to utilize a circumstance-specific approach under

[1] Removal proceedings were initiated against the respondent under alien registration number A086-585-723. However, the Board's internal records reflect that the proceedings are now associated with alien registration number A089-466-492. An interim Board decision dated June 8, 2017, addresses this.

[2] An overbroad statute that is indivisible would not support a removal charge based on inadmissibility. *See Descamps v. United States*, 570 U.S. 254, 264 (2013) (explaining that under the categorical/modified categorical approach to statutory interpretation, an indivisible statute cannot serve as a predicate offense in an analogous sentencing enhancement context under the Armed Career Criminal Act, 18 U.S.C. § 924(e)).

the Board's decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009), to evaluate the respondent's eligibility for a waiver of inadmissibility under section 212(h) of the Act.

The Immigration Judge had found that the respondent was convicted of possession of drug paraphernalia, raising the possibility that he might be ineligible for adjustment of status due to inadmissibility under section 212(a)(2)(A)(i)(II) of the Act (IJ at 4). The respondent, citing the decision of the United States Supreme Court in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (holding that a conviction for a drug paraphernalia offense will not support a finding of removability unless the evidence shows a direct link to a particular federally controlled drug), argued on appeal that his drug paraphernalia conviction could not serve as a bar to a section 212(h) waiver unless the DHS first established that the conviction is connected to a federally controlled substance. We rejected that argument, noting that it is the respondent's burden to prove he would not be inadmissible, and therefore ineligible for adjustment, citing the Tenth Circuit's decision in *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009) (holding that the alien has the burden to show eligibility for relief from removal, regardless of ambiguities in the record of conviction). *See also Lucio-Rayos v. Sessions*, 875 F.3d 573, 583-84 (10th Cir. 2017).

Our adoption of the Tenth's Circuit's position that an alien who applies for relief from removal must resolve any ambiguities in the record of conviction was in error because the line of cases on which we relied involved statutes of conviction that were found to be divisible. Moreover, those cases employed an analytical approach which found divisibility if a statute merely set forth alternative means of committing an offense, rather than different elements delineating separate crimes. The Tenth Circuit subsequently issued its precedent decision in *Jimenez v. Sessions*, 893 F.3d 704, 710-11 (10th Cir. 2018), which recognized that the divisibility standard it employed had been over-ruled. The court also clarified that an alien is not barred from relief where a conviction for a potentially disqualifying offense is pursuant to a statute that is determined to be indivisible.

In the present case, there appears to be no dispute that the drug paraphernalia statute under which the respondent was convicted is overbroad, as the Utah schedules of controlled substances include substances not found in the federal schedules. The statute is also indivisible because the identity of the controlled substance associated with drug paraphernalia is not required to obtain a conviction. *See* CR1206, Utah Model Jury Instructions, 2d Ed.; *Descamps v. United States*, 570 U.S. at 272-73 (explaining that a criminal statute is indivisible if a jury need not identify which of several alternative means was employed to commit a crime). Inasmuch as the respondent could not be found inadmissible under the indivisible statute, he is not barred from adjustment of status on the basis of his drug paraphernalia conviction, and he does not require a waiver of inadmissibility. Accordingly, we will return the record to the Immigration Judge to consider whether the respondent is otherwise eligible for adjustment, and deserving of that relief in the exercise of discretion.

The following orders will be entered.

ORDER: The Board decision of November 24, 2017, is vacated.

FURTHER ORDER: The respondent's appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD