Offense Relating To a Controlled Substance

Section 212(a)(2)(A)(i)(II) of the Act provides that "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or 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." INA § 212(a)(2)(A)(i)(II).

Section 237(a)(2)(B)(i) of the Act similarly provides that "[a]ny alien who at time after admission has been convicted 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), other than a single offense involving possession for one's own use of thirty grams or less of marijuana is deportable." INA § 237(a)(2)(B)(i).

A. "Controlled Substance" as Defined in the Controlled Substances Act

Section 802(6) of Title 21 defines the term "controlled substance" as a "drug or other substance, or immediate precursor" included in the schedules attached to the subchapter. See 21 U.S.C. § 802(6). The Ninth Circuit has recognized that "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA [Controlled Substances Act]." Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1078 (9th Cir. 2007). For example, whereas the California drug schedules include both optical and geometrical isomers, the CSA schedules list only optical isomers. Id.

The Ninth Circuit Court of Appeals recently concluded in Ruiz-Vidal that "the plain language of the statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the CSA." See id. at 1076. See also Matter of Hernandez-Ponce, 19 I&N Dec. 613, 616 (BIA 1988); Matter of Mena, 17 I&N Dec. 38, 39 (BIA 1979); Matter of Paulus, 11 I&N Dec. 274, 275-76 (BIA 1965). Accordingly, the Government must show that the controlled substance at issue "is not only listed under California law, but also contained in the federal schedules of the CSA." Ruiz-Vidal, 473 F.3d at 1077-78.

Ruiz-Vidal did not necessarily upset the Ninth Circuit's prior holding in Luu-Le v. INS, 224 F.3d 911 (9th Cir. 2000). Despite noting in Luu-Le that Arizona's statutory definition of drug "does not map perfectly the definition of 'controlled substance'" under federal law, the Ninth Circuit reasoned that Arizona's drug paraphernalia statute "is plainly intended to criminalize behaviour involving the production or use of drugs—at least some of which are also covered by the federal schedules of controlled substances as printed in 21 U.S.C. § 812(c)—through focusing on 'drug paraphernalia.'" Id. at 915. It further emphasized the fourteen factors that must be considered by the state criminal court in determining whether an object qualifies as drug paraphernalia under Arizona law. Id. The Ninth Circuit distinguished Luu-Le in a footnote in Ruiz-Vidal by stating that, unlike Arizona's drug paraphernalia statute, a particular controlled substance was at issue in California's possession of a controlled substance statute. See Ruiz-Vidal, 473 F.3d at 1078 n.5.

B. "Relating To"

A law relates to a controlled substance if it is "specifically aimed at the regulation or prohibition of controlled substances." Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997). See, e.g., Flores-Arellano v. INS, 5 F.3d 360 (9th Cir. 1993) (use or being under the influence of amphetamine and methamphetamine is a controlled substance offense). The "relating to" language is construed broadly. See Luu-Le v. INS, 224 F.3d 911, 915 (9th Cir. 2000), abrogated on other grounds by INS v. St. Cyr, 533 U.S. 289 (2001). The Ninth Circuit has recognized its limits, however, where "to read it broadly would render meaningless other words in the statutory language;" and where "the conviction itself had nothing to do with controlled substances, although the underlying conduct clearly did." Id. at 916 (citing Matter of Carrillo, 16 I&N Dec. 625, 626 (BIA 1978)); Lara-Chacon v. Ashcroft, 345 F.3d 1148, 1154-55 (9th Cir. 2003).

1. Generic Offenses in General

The Ninth Circuit held in Lara-Chacon, 345 F.3d at 1154-55, that Arizona's money laundering statute was not a law relating to a controlled substance. The statute made no mention of controlled substances, but did refer to another statute defining racketeering proceeds as money derived from a number of sources, including "prohibited drugs." Id. at 1154. The Ninth Circuit considered that Arizona's money laundering offense "is a distinct crime from the underlying crime and does not require proof of the underlying crime." Id. at 1155. Additionally, it reasoned that the petitioner's conviction "could have concerned proceeds from a number of illegal activities unrelated to controlled substances," due to the statute's breadth. Id. at 1155.

Similarly, in Matter of Carrillo, 16 I&N Dec. 625, 626-27 (BIA 1978), the Board of Immigration Appeals found that the respondent's conviction under federal law of unlawful carrying of a firearm during the commission of a felony did not qualify as a violation of a law related to a controlled substance, even though possession with intent to distribute heroin was the underlying felony. See also Matter of Batista-Hernandez, 21 I&N Dec. 955, 959-60 (BIA 1997) (accessory after the fact is not a controlled substance offense); Matter of Velasco, 16 I&N Dec. 281, 282-83 (BIA 1977) (misprision of a felony is not a controlled substance offense).

2. Generic Solicitation Offenses

The Ninth Circuit has also concluded that a conviction under Arizona's general solicitation statute is not a violation of a law relating to controlled substances. See Coronado-Durazo v. INS, 123 F.3d 1322, 1325-26 (9th Cir. 1997); Leyva-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999). The petitioner in Coronado-Durazo, 123 F.3d at 1325, had been found guilty of solicitation to possess or use a narcotic drug, but had only been convicted of violating Arizona's general solicitation statute. The Ninth Circuit considered that this statute "specifies a general offense applicable to a range of underlying offenses, including but not limited to controlled substances" and that solicitation under Arizona law "is a separate and distinct offense from the underlying crime because it requires a different mental state and different acts." See id. Based on these considerations, it determined that solicitation is a generic offense under Arizona law. See id. The Ninth Circuit further reasoned that the ground of deportability limited convictions for generic crimes that may result in deportation to conspiracy and attempt to the exclusion of solicitation. See id.

Subsequently, in Leyva-Licea, 187 F.3d at 1149, the Ninth Circuit addressed whether a petitioner's conviction for soliciting possession of marijuana for sale under both Arizona's generic criminal solicitation statute and its statute proscribing the possession of marijuana for sale qualified as a violation of a law relating to a controlled substance. It concluded that its holding in Coronado-Durazo controlled and found the petitioner was not deportable. See id.

3. Specific Solicitation Offenses

The Ninth Circuit has not yet definitely resolved whether a conviction under a single statute whose language proscribes both solicitation and a controlled substance is a violation of a law relating to a controlled substance.1 Several unpublished decisions, however, have distinguished Coronado-Durazo and Leyva-Licea and determined that convictions under such specific solicitation statutes are controlled substance offenses.2 See Menjivar-Palma v. Gonzales, 210 Fed. Appx. 625 (9th Cir. 2006) (unpublished); Tucker v. Gonzales, 213 Fed. Appx. 523 (9th Cir. 2006) (unpublished). Both Menjivar-Palma and Tucker rely on the Ninth Circuit's reasoning in Olivera-Garcia v. INS, 328 F.3d 1083 (9th Cir. 2003).3

C. Less than 30 Grams of Marijuana Exception

An alien is not removable under INA § 237(a)(2)(B)(i) for "a single offense involving possession for one's own use of 30 grams or less of marijuana." INA § 237(a)(2)(B)(i). The Government bears the

burden of establishing that the alien's conviction does not fall within this exception. Medina v. Ashcroft, 393 F.3d 1063, 1065 n.5 (9th Cir. 2005).

This exception has been extended by the Ninth Circuit to apply to use or being under the influence of marijuana offenses. See id. at 1066; Flores-Arellano, 5 F.3d at 363. The petitioner in Medina, 393 F.3d at 1065, had been convicted of use or being under the influence of THC-carboxylic acid, a metabolite produced by the human body after use of marijuana, hashish, or THC. The Ninth Circuit applied the categorical and modified categorical approaches, as set forth in Taylor v. United States, 495 U.S. 575 (1990), and concluded that the Government was unable to meet its burden of showing that the petitioner had not been convicted of using or being under the influence of marijuana since THC-carboxylic acid could have been a byproduct of marijuana use. Medina, 393 F.3d at 1066-67.

D. Waiver of Inadmissibility Under INA § 212(h)

The Court may waive, in the exercise of discretion, the controlled substance offense ground of inadmissibility under section 212(h) of the Act for a single offense of simple possession of 30 grams or less of marijuana. INA § 212(h). An alien is statutorily eligible for a waiver under INA § 212(h) if he meets his burden of showing that he falls into any of the following three categories:

- The alien has been rehabilitated and his admission to the United States would not be contrary to its national welfare, safety, or security. INA § 212(h)(1)(A).
- The denial of the alien's admission to the United States would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. INA § 212(h)(1)(B).
- The alien is a VAWA self-petitioner. INA § 212(h)(1)(C).

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1. For example, section 11352(a) of the California Health and Safety Code punishes by imprisonment in state prison "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport . . . any controlled substance . . . ." CHSC § 11352(a) (2007) (emphasis added). This "offer to" language is equivalent to solicitation. See United States v. Rivera-Sanchez, 247 F.3d 905, 908-09 (9th Cir. 2001).

2. Immigration Judge Lawrence Di Costanzo has found that this conclusion is at odds with Coronado-Durazo in light of the Ninth Circuit's holdings in Rivera-Sanchez, supra, and Sandoval-Lua v. Gonzales, 499 F.3d 1121 (9th Cir. 2007). See In re Manuk Vardanyan.

3. The petitioner in Olivera-Garcia, 328 F.3d at 1085, had been convicted as an accessory after the fact under a federal law prohibiting knowingly or intentionally manufacturing, distributing, or dispensing, or possessing with intent to manufacture, distribute, or dispense, a controlled substance. In concluding that his conviction was an aggravated felony, the Ninth Circuit distinguished Coronado-Durazo and Leyva-Licea. Id. at 1086-87. Whereas the petitioners in Coronado-Durazo and Leyva-Licea had been convicted of a generic offense under a general solicitation statute, the petitioner in Olivera-Garcia had been convicted of violating the underlying substantive statute, not the generic federal accessory after the fact statute. Id. at 1087. Cf. Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997) (generic accessory after the fact conviction is not a controlled substance offense).