

Via Electronic Mail

Defense Attorney

Re: ***XXXXX County v. Defendant***
Case No. XX-FO-XXXX

Dear Defense Attorney:

I have been retained by Defendant to advise you on the pending ordinance charge of possession of drug paraphernalia.

Although Defendant only faces a potential fine if found guilty, a citation for possession of drug paraphernalia carries severe immigration consequences. It will render him inadmissible to the U.S., and thus ineligible to adjust status to permanent residency. If Defendant cannot adjust his status, then he will be subject to deportation.

Given these far reaching immigration consequences, I am recommending that Defendant seek one of the three following dispositions:

- (1) Outright dismissal in the interests of justice;
- (2) A brief diversion or hold open agreement **as long as** Defendant does not enter a plea of guilty or no contest or otherwise admit sufficient facts to warrant a conviction; **or**
- (3) An amendment to disorderly conduct with the stipulated factual basis that Defendant was being unreasonably loud. A written stipulation is necessary in order to clearly demonstrate to U.S. Citizenship & Immigration Services (“USCIS”) the factual basis of the plea.

Each of these potential resolutions would avoid the harsh immigration consequences of denial of adjustment of status to permanent residency and deportation to XXXXX.

IMMIGRATION HISTORY

Defendant was born on XXXXX in XXXXX. He lawfully entered the U.S. on a visa on June 6, 2009. His mother also entered on a visa.

Defendant is a senior at XXXXXXXX High School and will be graduating in May. He plans to attend college after graduation.

Defendant will be eligible to adjust to permanent residency later this year through his step-father, who will soon be a naturalized U.S. citizen. Defendant’s application to adjust status is a requirement in order to remain lawfully in the U.S. If he is unable to adjust status to permanent residency, then Defendant will have to either voluntarily return to XXXXX or wait for deportation proceedings to be initiated.

CRIMINAL HISTORY

Defendant was charged with possession of drug paraphernalia in violation of Wis. Stat. §961.573(1). It has been charged as a county citation instead of a misdemeanor. Therefore, the maximum penalty can only be a fine.

Defendant was a passenger with three other individuals when a marijuana pipe and grinder were found in the vehicle during a traffic stop. It is my understanding that the other individuals have already pleaded guilty to a forfeiture for possession of marijuana and/or drug paraphernalia.

It is also my understanding that one of the individuals in the vehicle has admitted to ownership and possession of the pipe and grinder; having stashed these items in Defendant's backpack without his knowledge prior to the police stop.

Defendant has no arrest or conviction record.

ANALYSIS

In order to adjust status to permanent residency, Defendant must establish that he is admissible to the United States. An applicant for adjustment of status may be found inadmissible if he has been convicted of an inadmissible offense. An applicant who is convicted of a violation of any law or regulation "relating to a controlled substance" is inadmissible. 8 U.S.C. §1182(a)(2)(A)(i)(II) (**Ex. A**).

The Board of Immigration Appeals, which is the highest agency interpreting immigration law, held that possession of drug paraphernalia triggers inadmissibility under 8 U.S.C. §1182(a)(2)(A)(i)(II). *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009) (**Ex. B**). The Board reasoned that the "language, structure, and purpose of the Act amply support the view that Congress intended aliens to be rendered inadmissible even for *relatively minor marijuana convictions*." *Id.* at 120 (emphasis added).

The Board followed the decisions made by other courts, including the Seventh Circuit, that also held that a conviction for possession of drug paraphernalia renders a noncitizen inadmissible under 8 U.S.C. §1182(a)(2)(A)(i)(II). *See Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); *Escobar Barraza v. Mukasey*, 519 F.3d 388, 389-90 (7th Cir. 2008); *Luu-Le v. INS*, 224 F.3d 911, 914-16 (9th Cir. 2000).

Importantly, it does not matter that the alleged offense has been charged as a county citation instead of a misdemeanor. The language of the statute does not differentiate between misdemeanors or ordinances. It uses the generic term "violation" of "any law . . . relating to a controlled substance."

I am attaching a blank I-485 application to adjust status to permanent residency. (**Ex. C**). On page 3, the applicant must answer whether he has ever been arrested, *cited*, charged, indicted, convicted, *finned*, or imprisoned for breaking or violating any law or *ordinance*. (emphasis

added). The question is purposely broad enough to encompass an ordinance violation for possession of drug paraphernalia.

Although there is a waiver available for a single offense “relating to” possession of marijuana of 30 grams or less under 8 U.S.C. §1182(h) (**Ex. D**), the standard is “extreme hardship” to either a lawful permanent resident or U.S. citizen spouse, child, or parent, **not** the applicant. The common results of deportation, such as family separation, financial difficulties, and emotional hardship are, standing alone, insufficient to establish extreme hardship. *See, e.g., Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship) (**Ex. E**).

Because Defendant is unmarried and has no children, he would have to show his denial of his adjustment of status application would result in extreme hardship to either his step-father or mother. Practically speaking, a waiver based on extreme hardship of a parent will not be granted unless the child financially supports a parent, or a parent suffers from a serious medical problem and the child serves as caretaker. Since none of these issues are present with Defendant and his parents, he will not be able to establish extreme hardship in the event a waiver is needed.

In sum, Defendant faces the most serious of immigration consequences if he is found guilty of possessing drug paraphernalia. He will be inadmissible to the U.S., and thus ineligible to adjust to permanent residency. As a consequence, Defendant would have to return to XXXXX without his family or wait for deportation proceedings to be initiated.

RECOMMENDATION

Given the harsh immigration consequences if cited for possession of drug paraphernalia, the ideal disposition would be outright dismissal in the interests of justice, especially in light of admissions from the individual who owned and possessed the pipe and grinder.

Alternatively, I am recommending, if possible, that Defendant enter into a brief hold open or diversion program without entering a plea of guilty or no contest. He also cannot otherwise admit sufficient facts to warrant a finding of guilty. The inadmissibility provision is broad enough to include an applicant “who admits having committed, or who admits committing acts which constitute the essential elements of” an inadmissible offense. *See generally* 8 U.S.C. §1182(a)(2)(A)(i) (**Ex. A**). A guilty or no contest plea would be sufficient to trigger inadmissibility even if it is later withdrawn after fulfillment of the deferred prosecution agreement.

The other alternative would be for Defendant to plead to a different ordinance violation, such as disorderly conduct for being unreasonably loud. Unlike possession of drug paraphernalia, a citation for being unreasonably loud carries no immigration consequences. If outright dismissal is not possible in the interests of justice, and the district attorney’s office is agreeable to amending the citation to disorderly conduct, a stipulation should be filed with the court that outlines the factual basis for the disorderly conduct citation.

Defense Attorney
Page 4

Upon receipt of this letter, please feel free to contact me to discuss my analysis and recommendations in more detail.

Sincerely,

Davorin J. Odrčić

Encl.