U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21302173

Date: JUL. 14, 2022

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied to adjust his status to that of a lawful permanent resident and seeks a waiver of inadmissibility under section 212(h) of Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h). He seeks to excuse a criminal conviction for possession of less than 30 grams of marijuana.

The Director of the New York, New York Field Office denied the waiver application. The Director concluded that the Applicant did not demonstrate that refusal of his admission would cause "extreme hardship" to his naturalized U.S. citizen spouse. See section 212(h)(1)(B) of the Act.

On appeal, the Applicant asserted that the Director overlooked evidence of extreme financial and emotional hardship to his spouse. We dismissed the appeal, concluding that the Applicant had not established extreme hardship to his spouse, daughter, or mother. The matter is now before us on a combined motion to reopen and reconsider. The Applicant argues that we did not properly weigh and consider the evidence as sufficient to establish extreme hardship.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss the combined motion to reopen and reconsider.

I. LAW

Noncitizens generally cannot gain admission to the United States if they have been convicted of, or admit committing the essential elements of, controlled substance violations. Section 212(a)(2)(A)(i)(II) of the Act. U.S. Citizenship and Immigration Services (USCIS), however, may waive this inadmissibility ground if it relates to "a single offense of 30 grams or less of marijuana." Section 212(h) of the Act.

Noncitizens may qualify for 212(h) waivers in three ways, one of which is through establishing that refusal of their admissions would cause extreme hardship to their U.S. citizen or lawful permanent resident spouses, parents, sons, or daughters. Section 212(h)(1)(B) of the Act. In all cases, applicants must also demonstrate that they merit favorable exercises of discretion. Section 212(h), (h)(2) of the Act.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the applicant has shown "proper cause" for that action. Thus, to merit reopening or reconsideration, an applicant must not only meet the formal filing requirements (such as submission of a properly completed Form I 290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. See 8 C.F.R. § 103.5(a)(4).

II. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision." 8 C.F.R. § 103.5(a)(1)(i). The issue before us is whether the Applicant has submitted new facts to warrant reopening or has established that our decision to dismiss the prior appeal was based on an incorrect application of law or USCIS policy. We therefore incorporate our prior decision by reference and will repeat only certain facts and evidence as necessary to address the Applicant's claims on motion.

The record supports the Applicant's need for a 212(h) waiver. A court record shows that, in 2011, he pled guilty to criminal possession of marijuana in the fifth degree in violation of N.Y. Penal § 221.10(1). To obtain the required waiver, he must demonstrate that his exclusion from the United States would cause extreme hardship to a qualifying relative. See section 212(h)(1)(B) of the Act. The Applicant asserts that his spouse, daughter, and mother individually and cumulatively would suffer extreme hardship if the Applicant's waiver is denied.

A. Motion to Reopen

Initially, we note that motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. INS v. Doherty, 502 U.S. 314, 323, (1992) (citing INS v. Abudu, 485 U.S. 94, 108 (1988)); see also Selimi v. Ashcroft, 360 F.3d 736, 739 (7th Cir. 2004). There is a strong public interest in bringing proceedings to a close as promptly as is consistent with giving both parties a fair opportunity to develop and present their respective cases. INS v. Abudu, 485 at 107.

Based on its discretion, USCIS "has some latitude in deciding when to reopen a case" and "should have the right to be restrictive." Id. at 108. Granting motions too freely could permit endless delay when foreign nationals continuously produce new facts to establish eligibility, which could result in needlessly wasting time attending to filing requests. See generally INS v. Abudu, 485 U.S. at 108. The new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." Matter of Coelho, 20 I&N Dec. 464, 473 (BIA 1992); see also Maatougui v. Holder, 738 F.3d 1230, 1239–40 (10th Cir. 2013).

Therefore, a party seeking to reopen a proceeding bears a "heavy burden." INS v. Abudu, 485 at 110. With the current motion, the Applicant has not met that burden.

The Applicant's brief on motion contains the bulk of the Applicant's claims of extreme hardship to his qualifying relatives; however, we note that the unsupported assertions of counsel do not constitute evidence. See Matter of Obaigbena, 19 I&N Dec. 533, 534 n.2 (BIA 1988). While we will address the claims contained in the brief, the evidence provided on motion does not support them.

i. The Applicant's Spouse

The Applicant claims that his spouse will suffer extreme hardship if he were to return to Jamaica because she relies on his income. The Applicant also claims that if his wife were to relocate, she would not be able to maintain her full-time U.S. job, she would be unable to find another job or a high enough paying job in Jamaica, and the loss of income would negatively affect her finances as well as negatively impact the care of both the spouse's mother and the Applicant's mother.

On motion, the Applicant provides a list of expenses incurred by his spouse as well as an Internal Revenue Service (IRS) Form 1040 declaring the Applicant and his spouse's income for the purposes of a jointly filed 2020 tax return. While the Applicant may be attempting to establish that his spouse would suffer financial hardship due to the loss of the Applicant's income, this evidence is insufficient. First, the Form 1040 is a self-completed form and there is little evidence in the record to suggest that this return was filed with or accepted by the IRS. Second, the Applicant has not provided corroborating evidence to support the list of deductions and expenses in the spouse's household budget. To illustrate, claims of expenses for gifts, entertainment, tolls, gas, and many other items are not accompanied by receipts, bills, or other evidence to corroborate that the figures provided on the expense list are accurate and require a monthly payment. The list of expenses and their estimated cost does not in itself establish the actual cost. In addition, as we thoroughly discussed the family's finances in our prior decision, the Applicant has not explained how such evidence, even if provided, would be considered new. Even if this evidence was provided and considered to be new facts, this would not explain why the Applicant and his spouse could not make reasonable changes to their lifestyle to reduce their expenditures. For instance, the Applicant and his spouse may not need to continue paying for two separate households, one in New York and the other in Pennsylvania. Further, if the Applicant claims his spouse's mother lives in their New York home and requires day-to-day care, it is not apparent whether the Applicant's mother-in-law could live with the Applicant and his spouse in a single residence in order to reduce the cost of a mortgage or rent on two households. In addition, it is unclear how or why the Applicant and his spouse would need to continue spending $100 on gifts, $200 on entertainment, and $200 on clothing each month. Furthermore, the Applicant has not explained why children's childcare and school expenses cost $220 per month when the Applicant and his spouse claim one adult daughter on their Form 1040 and the evidence on motion indicates that she lives and works in Illinois as a member of the [redacted]

Our prior decision stated that the record "indicates that the Applicant's spouse has a father, four aunts, two uncles, and six half-siblings in the United States. The record doesn't indicate whether, if needed, one or more of her relatives may be willing and able to financially help her." On motion, the Applicant states that two of her aunts or uncles have passed away, the remaining aunts and uncles live too far away in [redacted] are elderly, and cannot assist in the physical care of the Applicant's spouse's mother; however, none of these claims are supported by documentary evidence. Although the Applicant states

that the spouse's father is a cancer survivor and resides primarily in Jamaica, the Applicant also claims that the spouse has no immediate relatives in Jamaica and that her family is in the United States. The statements concerning the location of her father and other relatives is not supported by the evidence submitted on motion. Additionally, the Applicant must resolve inconsistencies with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. Id. In addition, the Applicant has not addressed whether his spouse's six half-siblings are willing or able to help. As there is little evidence to establish that the spouse's relatives are unable or unwilling to assist the Applicant's spouse financially or physically, the assertions relating to the spouse's relatives are not corroborated. Finally, the Applicant did not submit any corroborating evidence on motion to support the claim that the Applicant's spouse would be unable to obtain any work or high enough paying work in Jamaica. For the reasons discussed above and in our prior decision, the record does not establish that the Applicant's spouse would suffer extreme financial hardship.

The Applicant claims that his spouse will suffer extreme hardship if he were to return to Jamaica because his spouse cares for her own mother and the Applicant's mother, works a full-time job, and would suffer financial strain if she lost the Applicant's income. The Applicant also claims that his wife cannot leave her mother behind when she needs assistance and that she cannot manage without the Applicant's support. The Applicant's mother-in-law is not a qualifying relative, and we consider evidence relating to her only to the extent that it may amplify hardship to the Applicant's spouse.

Notably, the Applicant has submitted little evidence to establish that the spouse's mother requires any assistance financially or physically.[1] On motion, the only evidence relating to the Applicant's mother-in-law is a photocopy of her learner's permit. This suggests that the spouse's mother is healthy enough to drive a motor vehicle and may not need day-to-day assistance from the Applicant's spouse as claimed. The Applicant asserts on motion that his spouse is an only child; however, as previously discussed, the record indicates that the spouse has six half-siblings from her father's side, with whom she has a close relationship. The Applicant must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. Id. As the evidence does not currently support a finding that the spouse's relatives are unable or unwilling to provide physical or financial support, nor does the record reflect that the Applicant's mother-in-law requires any assistance, we conclude that these claims do not support a finding of extreme hardship.[2] The evidence therefore does not establish that hardship to the Applicant's spouse would individually or cumulatively rise to the requisite level of extreme.

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[1] Our prior decision noted, "[t]he Applicant's spouse stated that her mother is in poor health. The record, however, lacks objective evidence of the medical condition of the spouse's mother."

[2] Although the Applicant continues to assert on motion that his spouse would suffer emotional hardship if he were to return to Jamaica, we already discussed this in our prior decision. In our prior decision, we concluded that "the record lacks sufficient evidence of how the nature of their relationship would cause or contribute to extreme hardship. Moreover, even if this factor established or contributed to extreme hardship, the Applicant's spouse could avoid it by moving to Jamaica with her spouse." The Applicant does not provide any additional evidence of emotional hardship on motion and has not explained how such evidence, even if provided, would constitute new facts. As we noted in our prior decision, emotional hardship to qualifying relatives is a typical result of separation or adjustment to life outside the United States.

ii. The Applicant's Daughter

On motion, the Applicant provides an additional statement from his adult daughter and evidence of her current military service in Illinois. In our prior decision, we noted that the Applicant had not demonstrated that his exclusion would impair his daughter's ability to serve in the U.S. military, to be called into active duty, or would otherwise amplify the stress of military service to a level reaching extreme hardship. We acknowledge the Applicant's claims on motion that the Applicant's daughter could not pursue her goals in the U.S. military if she relocated to Jamaica with her father and that she could not serve in the military to her full ability if the Applicant were removed from the country. Based on the daughter's statement provided on motion that "living there is something I am not prepared or suited for," it appears that the Applicant's daughter would not relocate with her father to Jamaica. The daughter states that "not having [her father] around would be devastating for me emotionally and mentally, I wouldn't be able to function optimally day to day in my personal life or in my post, the well-being of my parents is an integral part of my life." However, her statement does not provide sufficient details concerning what her level of functioning is now or how her functioning would change. Additionally, the Applicant offers little corroborating evidence to support the assertion that if he were removed to Jamaica, his daughter would experience an impairment of abilities or an exacerbation of stress. To illustrate, the evidence provided does not address how the emotional support and guidance from her father could not continue if he were to live in Jamaica. The daughter claims that she left home at age eighteen to attend college and the record suggests she now lives in Illinois. As the Applicant's daughter already lives apart from her parents and grandparents, the evidence provided does not reflect that the Applicant's removal to Jamaica would present additional hardship due to his physical distance away from her.

Although the Applicant asserts that his daughter would worry for his safety in Jamaica, there is little evidence to explain how this worry has or would amplify the stress of military service to a level reaching extreme hardship. Moreover, the Applicant has not explained how his daughter's possible future concern for her parents, grandparents, or the family's finances would rise to the level of extreme hardship. The Applicant states that "her preoccupation with her father's status affects her daily routine;" however, there is little indication that this preoccupation currently affects her job performance in the military or her personal life. For instance, it is unclear whether the Applicant's daughter has been granted medical leave from her military post to deal with any emotional challenges. The record does not suggest she has pursued any treatment to address the preoccupation she has for her father's status, the worry her family may cause her in the future, or the "stress and anxiety naturally associated with service in the armed forces." Nor does the record indicate that if she sought medical leave or treatment, whether such leave and treatment were effective. The evidence therefore does not establish that hardship to the Applicant's daughter would individually or cumulatively rise to the requisite level of extreme.

iii. The Applicant's Mother

The Applicant stated that his mother would experience financial and physical hardship if he were denied admission to the United States. Our prior decision stated that the record lacked documentary evidence to establish that the Applicant financially assists his mother. We also noted that the record lacked objective evidence that the Applicant's mother was "in ill health." The Applicant states his mother was in an accident and has no pension; however, the record does not contain sufficient independent and objective

evidence of this. In addition, the Applicant has not explained how such evidence, even if provided, would be considered new facts or evidence. The Applicant now submits a medical record purportedly summarizing a healthcare provider's December 2021 examination of the Applicant's mother. This "visit summary" includes various test results and medical diagnoses, such as high blood pressure and prediabetes. The visit summary does not explain whether these or any of the other physical diagnoses are normally associated with aging. Aside from taking medications and returning for a follow-up visit, the document provides little insight into her treatment plan or the severity of her condition. While we acknowledge this visit summary, it does not establish that the Applicant's mother is unable to care for herself without assistance or that she cannot perform basic daily functions. Accordingly, the Applicant has not provided sufficient independent and objective evidence to corroborate that his mother requires his assistance. Although the Applicant states that his mother's adult siblings cannot care for her because they are elderly, the Applicant has not provided sufficient evidence of this. Our prior decision noted that the record did not establish whether the Applicant is his mother's sole support. Furthermore, we stated that the record lacked "documentary evidence of his purported financial assistance to her." On motion, the Applicant does not address these shortcomings. In addition, we noted, "USCIS records indicate that the Applicant's mother has three other adult children in the United States, including a daughter who lives with her in New York. . . . the record doesn't indicate why one or more of his mother's other children couldn't help her." While the Applicant acknowledges on motion that his mother has three other adult children who are not involved in her care, the record contains little explanation of whether they are able or willing to assist her. Although the Applicant asserts that his mother lives alone, this assertion is not supported by evidence. Accordingly, the record does not support a finding that the Applicant's mother would suffer extreme hardship that would individually or cumulatively rise to the requisite level of extreme.

In sum, we acknowledge that the Applicant's exclusion from the United States would cause hardship to his qualifying relatives. But the record does not establish that the hardship - whether his qualifying relatives remain separated from him in the United States or live with him Jamaica - would rise to the level of extreme. Even considering the hardships in the aggregate, the record does not demonstrate that they would rise to the extreme degree required to obtain the requested waiver. Accordingly, the Applicant has not shown proper cause for reopening the proceedings.

B. Motion to Reconsider

The filing before us does not entitle the Applicant to a reconsideration of the denial of the waiver. Rather, a motion to reconsider pertains to our most recent decision. In other words, we examine any new arguments to the extent that they pertain to our prior dismissal of the Applicant's appeal. Therefore, we cannot consider new objections to the earlier waiver denial, and the Applicant cannot use the present filing to make new allegations of error at prior stages of the proceeding.

The Applicant does not point to any error of law or policy in our prior decision, nor does he cite any legal authority or policy to suggest that our decision was incorrect based on the record at the time of the decision. Therefore, the motion does not meet the requirements of a motion to reconsider and it must be dismissed.

III. CONCLUSION

For the reasons discussed, the evidence provided in support of the motion to reopen does not overcome the grounds underlying our prior decision, and the Applicant's motion to reconsider has not shown that our prior decision was based on an incorrect application of law or USCIS policy. Therefore, the combined motion to reopen and reconsider will be dismissed for the above stated reasons.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.