U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 16273525

Date: MAR. 29, 2022

Appeal of San Bernardino, California Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident (LPR) and seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h), for her conviction of a crime involving moral turpitude (CIMT). The Director of the San Bernardino, California Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the Applicant had two convictions for a CIMT, and that the record did not establish that her qualifying relatives, her U.S. citizen spouse and children, would experience extreme hardship if she were denied the waiver.

On appeal, the Applicant asserts that she is not inadmissible because she was convicted of only one CIMT and is eligible for an exception to inadmissibility for committing a "petty offense." She also reiterates that her qualifying relatives would experience extreme hardship if she remains inadmissible to the United States.

It is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office reviews the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

A noncitizen convicted of (or who admits having committed, or who admits committing acts which constitute the essential elements of) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A)(i)(I) of the Act.

This inadmissibility does not apply to a noncitizen who committed only one crime if the maximum penalty possible for the crime did not exceed imprisonment for one year and the noncitizen was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). Section 212(a)(2)(A)(ii) of the Act.

Individuals found inadmissible under section 212(a)(2)(A)(i)(I) of the Act may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Where the activities resulting in inadmissibility

occurred more than 15 years before the date of the application, a discretionary waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the noncitizen has been rehabilitated. Section 212(h)(1)(A) of the Act. A discretionary waiver is also available if denial of admission would result in extreme hardship to a U.S citizen or LPR spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act. Finally, if a noncitizen demonstrates eligibility under section 212(h)(1)(A) or (B) of the Act, USCIS must then decide whether to exercise its discretion favorably and consent to the noncitizen's admission to the United States. Section 212(h)(2) of the Act.

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

II. ANALYSIS

The Applicant has been found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude. In denying the waiver application, the Director found that the Applicant was convicted of two separate crimes, both involving a CIMT. Specifically, the Director found the Applicant inadmissible for her 2011 conviction under Cal. Penal Code § 245(a)(1), assault with a deadly weapon, and also for a 2004 conviction under Cal. Penal Code § 647(b), disorderly conduct involving prostitution.

On appeal, the Applicant states that the Director erred in considering her 2004 conviction a CIMT. She submits court records demonstrating that, although she was initially charged under Cal. Penal Code § 647(b) in 2001, those charges were dismissed in 2002. She ultimately plead guilty to violating [redacted] Cal., Code § 7.54.160, which pertains to unlicensed massage technicians, and was convicted in 2004 following a parole violation.

Upon review of the record, including evidence submitted on appeal, we find that the Applicant has demonstrated that she was convicted of only one CIMT – her 2011 conviction under Cal. Penal Code § 245(a)(1), assault with a deadly weapon.

Therefore, the issues on appeal are whether the Applicant is eligible for the petty offense exception to inadmissibility for a crime involving moral turpitude, and if not, whether she is eligible for a waiver under section 212(h)(1)(B) of the Act.

A. Inadmissibility

As noted above, an applicant may be eligible for a "petty offense" exception if only one CIMT was committed, the maximum possible sentence for the offense does not exceed one year, and the sentence imposed for the offense was six months or less. Section 212(a)(2)(A)(ii) of the Act.

Here, the record reflects that in [redacted] 2011, the Applicant plead guilty to assault with a deadly weapon in violation of Cal. Penal Code § 245(a)(1). She was sentenced to three years of probation and 120 days in jail. The Applicant does not contest that her conviction under Cal. Penal Code § 245(a)(1) is a CIMT.

Cal. Penal Code § 245(a)(1) provides a punishment of "imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." Because the maximum possible sentence for assault with a deadly weapon exceeds one year, the petty offense exception under section 212(a)(2)(A)(ii) of the Act does not apply.

On appeal the Applicant submits evidence indicating that, in [redacted] 2018, she was granted a court order reducing her felony conviction to a misdemeanor (with a maximum punishment of 364 days) and dismissing her felony conviction under Cal. Penal Code § 1203.4. She asserts that the post-conviction order reducing her assault conviction to a misdemeanor demonstrates that the maximum possible sentence for her offense did not exceed one year.

Cal. Penal Code § 1203.4 is a rehabilitative statute that serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. However, under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether [a noncitizen] has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See Id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the noncitizen remains "convicted" for immigration purposes), *reversed on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

In the present case, the record does not establish that the Applicant's felony conviction was dismissed for a procedural or substantive defect in the underlying criminal proceedings. Thus, the Applicant has not met her burden to show that she is no longer convicted of assault with a deadly weapon in violation of Cal. Penal Code § 245(a)(1) for immigration purposes. As the Applicant was convicted for a violation for which the maximum possible sentence exceeded one year, she is ineligible for the petty offense exception. She therefore remains inadmissible and she must demonstrate extreme hardship to a qualifying relative in order to be eligible for a waiver of her inadmissibility.

B. Hardship

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or qualifying relatives, in this case her U.S. citizen spouse and two children. An applicant may show extreme hardship in two scenarios: 1) if the qualifying relative remains in the United States separated from the applicant and 2) if the qualifying relative relocates overseas with the applicant. Demonstrating extreme hardship under both scenarios is not required if the applicant's evidence demonstrates that one of these scenarios would result from the denial of the waiver. The applicant may meet this burden by submitting a statement from the qualifying relative certifying under penalty of perjury that the qualifying relative would relocate with the applicant, or would remain in the United States, if the applicant is denied admission. 9 *USCIS Policy Manual* B.4(B), https://www.uscis.gov/policymanual. In the present case, the Applicant's spouse asserts that he and the children would not relocate with the Applicant to Honduras if the waiver application were denied.

The record reflects that the Applicant has resided in the United States for nearly 25 years and that she and her spouse were married in 2011. The Applicant has a son from a prior marriage who was born in 2004 and her spouse has a daughter from a prior marriage who was born in 2006. The Applicant also had an older son who passed away suddenly in 2015.

With her waiver application, the Applicant submitted a psychological evaluation for her spouse documenting his general anxiety disorder, as well as a statement from her spouse. In his statement the Applicant's spouse discusses his multiple surgeries on his feet and abdomen and the physical hardships he would face without the Applicant, the emotional hardships he would face due to his anxiety and depression, and the financial hardships he would face in having to support his wife if she were to live separately in Honduras. He further discusses the psychological and emotional hardships that the Applicant's son would face, following the recent deaths of his older brother, as well as his father (the Applicant's former spouse), who recently committed suicide.

The Director determined that this evidence was insufficient to establish the claimed extreme hardship to the Applicant's spouse and children. Specifically, the Director noted that the Applicant did not provide medical records to support her spouse's claimed surgeries and other medical conditions. The Director further noted that the Applicant did not submit evidence to support that her spouse would be unable to provide for her financially, or that she would be unable to provide for herself, while living in Honduras. Regarding the Applicant's son, the Director found that the record did not include evidence to support the claimed emotional and psychological trauma caused by the deaths of his brother and father and the potential loss of his mother.

On appeal, the Applicant submits a brief from counsel and additional medical records for her spouse, as well as country conditions information on Honduras, general information about general anxiety disorder, and an article on the effects of deportation on families.

The medical records demonstrate that the Applicant's spouse suffers from multiple medical conditions, including hypertension and emphysema. However, the medical records indicate that his conditions are currently being successfully treated with medication and do not discuss the Applicant's role in her spouse's medical care or indicate that his conditions could worsen in her absence. While the updated

medical records demonstrate that the Applicant's spouse also suffers from chronic neck pain and intends to undergo surgery to alleviate his pain, the records do not demonstrate that the Applicant's spouse would require permanent care following the surgery, that the Applicant would be his only caregiver, or that he would be unable to obtain another caregiver in the Applicant's absence.

Although specifically noted by the Director, the Applicant did not submit additional evidence on appeal concerning financial hardship to her spouse. The record does not include a description or estimate of additional expenses the Applicant may face while living separately in Honduras, evidence that her spouse would be unable to contribute to these expenses, or evidence that she would be unable to provide for herself while living in Honduras.

With regard to emotional and psychological hardship, the Applicant asserts that her spouse will continue to suffer from general anxiety if she is unable to remain in the United States. The previously submitted psychological evaluation report, dated in 2015, details the Applicant's spouse's mental health and emotional well-being. The evaluating psychologist notes that he suffers from generalized anxiety disorder, and. in the summary of findings, recommends that the Applicant's spouse seek individual therapy to "cultivate a more adaptive coping pattern." She states that his "prognosis is poor without continued support and guidance." The Applicant does not submit additional evidence on appeal to document whether her spouse has begun the recommended individual therapy or provide an updated on his prognosis. Although we acknowledge the emotional strain separation from a loved one may cause, we agree with the Director that the record does not demonstrate that the Applicant's spouse's hardships rise to the level of extreme as required by statute.

On appeal, Counsel states that the Applicant's son and stepdaughter will suffer emotionally from losing the Applicant. However, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. The article with general information about the impact of family separation does not demonstrate the specific impact separation will have on the Applicant's children. The record does not include statements from the Applicant's son or stepdaughter or other evidence documenting their emotional and psychological concerns upon separation from the Applicant. Rather, the record indicates that the Applicant's stepdaughter resides in China and the Applicant does not submit evidence demonstrating that the two have a strong emotional bond or even regular communication. Further, although specifically noted by the Director, the Applicant does not submit evidence of her son's claimed treatment following the deaths of his brother and father, nor does the record include other evidence describing the impact of these events on his well-being, or his relationship with the Applicant.

In conclusion, we recognize that the Applicant's spouse and children might experience some degree of financial and emotional difficulties if they were separated from the Applicant; however, the evidence considered in the aggregate does not show that the resulting hardship would go beyond that which is usual or expected under such circumstances. Thus, we find the Applicant has not established that her spouse's and children's hardships would go beyond the common results of removal and rise to the level of extreme hardship. Emotional distress from severing U.S. family and community ties, loss of current employment, and cultural readjustment - even in the aggregate – do not rise to the level of extreme hardship. *Matter of Pilch*, 21 I&N Dec. at 630-31.

The Applicant must establish by a preponderance of the evidence that denial of the waiver application would result in extreme hardship to a qualifying relative upon separation. Section 212(a)(9)(B)(v) of the Act; *Chawathe*, 25 I&N Dec. at 375; *see also* 9 *USCIS Policy Manual*, *supra*, at B.4(B). For the foregoing reasons, the record does not establish that refusal of the Applicant's admission would cause extreme hardship to her qualifying relatives. Therefore, we need not consider whether she merits a waiver in the exercise of discretion. The waiver application will remain denied.

ORDER: The appeal is dismissed.