U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22718613

Date: SEPT. 23, 2022

Appeal of Jacksonville, Florida Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a citizen of Hungary, 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 having been convicted of a controlled substance violation. The Director of the Jacksonville, Florida Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the Applicant did not establish, as required, that denial of admission would result in extreme hardship to her qualifying relatives. The matter is before us on appeal. 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

Any noncitizen convicted of or who admits committing acts which constitute the essential elements 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), is inadmissible. Section 212(a)(2)(A) of the Act. Individuals found inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a controlled substance violation related to a single offense of simple possession of 30 grams or less of marijuana may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(1)(A) of the Act provides for a waiver of inadmissibility where the activities occurred more than 15 years before the date of the application if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated. A waiver is also available if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) 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). If the noncitizen demonstrates the existence of the required extreme hardship, then they must also show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(h) of the Act. The burden is on the foreign national to establish that a waiver of inadmissibility is warranted in the exercise of discretion. Matter of Mendez-Moralez, 21 I&N Dec. 296, 299 (BIA 1996). The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The issues on appeal are whether the Applicant is inadmissible for a controlled substance violation, and if so, whether she is eligible for a waiver under section 212(h)(1)(B) of the Act.[1] On appeal, the Applicant asserts that her controlled substance conviction has been vacated, and therefore, she is no longer inadmissible under section 212(a)(2)(A) of the Act. We have considered all the evidence in the record and conclude that the Applicant remains inadmissible for a controlled substance violation. We further find that the Applicant has not established that the claimed hardships rise to the level of extreme hardship when considered both individually and cumulatively.

A. Inadmissibility

The record reflects that in 2003, the Applicant first entered the United States, when she was nine years old, using a B1/B2 visitor visa. In 2012, she received Deferred Action for Childhood Arrivals (DACA) status. In [redacted] 2016, she was arrested and charged with possession of 20 grams or less of cannabis in violation of section 893.13 of the Florida Statutes Annotated (Fla. Stat. Ann.) and possession of paraphernalia in violation of section 893.147 of the Fla. Stat. Ann. In [redacted] 2016, she pleaded no contest to the charge of cannabis possession and was ordered to pay a fine, and in exchange for her plea, the prosecutor chose to not prosecute the possession of paraphernalia charge.

On appeal, the Applicant submits a [redacted] 2021 order vacating her 2016 plea, judgment, and sentence. She also submits a [redacted] 2021 court order indicating that her cannabis possession and paraphernalia possession charges were nolle prossed or dismissed by the prosecutor.

Per section 101(a)(48) of the Act, the term conviction means a formal judgment of guilt entered by a court, or, if adjudication of guilt has been withheld, where a judge or jury has found the person guilty or the person has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the person's liberty. Under this current statutory definition, "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 an alien has been convicted for immigration purposes." Matter of Roldan, 22 I&N Dec. 512, 527 (BIA 1999).

[1] We note here that the Applicant is not eligible for a waiver under section 212(h)(1)(A) of the Act because her offense occurred in 2016, which is not more than 15 years before the date of the application, as required.

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. 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 alien remains "convicted" for immigration purposes), reversed on other grounds, Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006).

Although the Applicant's plea and judgment were recently vacated and associated charges dismissed, the Applicant has not submitted documentation indicating the basis for the vacatur. If the vacatur was a rehabilitative action and not the result of a violation of constitutional or statutory rights, then the Applicant remains convicted for immigration purposes.[2] It is the Applicant's burden to establish eligibility for the immigration benefit sought. Matter of Chawathe, 25 I&N Dec. at 375. Because the Applicant has not submitted documentation indicating the basis for the vacatur of her controlled substance conviction, the Applicant remains convicted for immigration purposes under section 212(a)(2)(A) of the Act.

B. Extreme 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 U.S. citizen mother. 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 of these scenarios is not required if an applicant's evidence establishes 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. See 9 USCIS Policy Manual B.4(B), https://www.uscis.gov/policymanual (discussing, as guidance, how an applicant can establish extreme hardship upon separation or relocation). In the present case, the Applicant's spouse indicates that he would relocate to Hungary if the waiver application were denied. The Applicant must therefore establish that if she is denied admission, her spouse would experience extreme hardship upon relocation only. With respect to the Applicant's mother, the record contains no statement from the Applicant's mother indicating she intends to remain in the United States or relocate to Hungary if the waiver application is denied. The Applicant must therefore establish that if she is denied admission, her mother would experience extreme hardship both upon separation and relocation.

In his statement, the Applicant's spouse asserts that he and Applicant began dating in 2012 and were married in 2018. He states that they are in the process of building their dream home and are working on starting a family. He contends that the Applicant's immigration difficulties have caused the

[2] We note here that section 3.850 of the Florida Rules of Criminal Procedure (Fla. R. Civ. P.) allows for a conviction to be vacated based on several enumerated grounds, some of which are rehabilitative and others relating to a statutory or constitutional violation. The underlying motion that is the basis for the vacatur should include this information as section 3.850(c) of the Fla. R. Civ. P. provides a detailed list of what a motion to vacate must include, and states at subsection (6) and (7) that "the nature of the relief sought and a brief statement of the facts and other conditions relied on in support of the motion" must be included.

Applicant to experience constant fear and sadness, which has been stressful on their marriage. He states that he is the vice-president of his father's construction company, and he is responsible for supervising all company projects. He also states that his father is undergoing cancer treatment and his mother, who also works at the company, relies upon him for support when his father is recovering from surgical procedures. He contends that if the waiver is denied, he would relocate to Hungary which would cause great distress to his family and put his father's company in an awful predicament. The record also contains a statement from the Applicant's mother's wherein she asserts that it would be a tremendous heartache for her, and the Applicant's two siblings, if the Applicant were not allowed to remain in the United States.

Upon de novo review, the Applicant has not established by a preponderance of the evidence that her qualifying relatives would endure extreme hardship upon separation. We acknowledge the Applicant's spouse's statements regarding the difficulties that relocation to Hungary and separation from his family would cause him as well as the statements from the Applicant's mother regarding the emotional impact of being separated from her daughter. However, the record does not contain any further detail about the impact of any emotional hardships the Applicant's spouse or mother may experience in their daily lives. The record also indicates that the Applicant's spouse has three siblings, and the record does not demonstrate that they would be unable to assist with the family business. Likewise, the record does not contain evidence indicating that current employees of the family business would be unable to assume some of the Applicant's spouse's responsibilities. With respect to the Applicant's spouse's claim regarding emotional hardship in connection with his father's health, the record does not contain any medical documentation indicating that his father has been diagnosed or is being treated for any medical condition, therefore, we are unable to assess the emotional impact of the Applicant's father's health status. In addition, the record does not show how the Applicant's spouse's and mother's claimed emotional hardships are unique or atypical compared to other individuals who relocate or are separated from their spouses or adult children.

Based on the documentation in the record, the Applicant has not established by a preponderance of the evidence that any emotional hardships her qualifying relatives would experience, when considered in the aggregate, would go beyond the common results of inadmissibility or removal and rise to the level of extreme hardship. As such, no purpose would be served in determining whether the Applicant merits a waiver as a matter of discretion. The waiver application will remain denied.

ORDER: The appeal is dismissed.