U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27007937

Date: JULY 20, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of South Korea, was found to be inadmissible to the United States pursuant to pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed crimes involving moral turpitude. The Applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with her U.S. citizen husband and children.

The Director of the Nebraska Service Center denied the application, concluding that the record did not establish that the Applicant was eligible for a waiver as she was convicted of an aggravated felony after being lawfully admitted to the United States for permanent residence. The Director also noted that the waiver would be denied as a matter of discretion. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Matter of Chawathe, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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) of the Act. A discretionary waiver is available if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident (LPR) spouse, parent, son, or daughter of the noncitizen. Section 212(h)(1)(B) of the Act.

A waiver is not available to a noncitizen who has previously been admitted to the United States as lawfully admitted for permanent residence if since the date of such admission the noncitizen has been convicted of an aggravated felony. Section 212(h)(2) of the Act.

Section 101(a)(43) of the Act, enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), provides, in relevant part, that the term "aggravated felony"

includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 . . . ." Section 101(a)(43)(M)(i) of the Act. An aggravated felony includes conspiracy to commit a crime described in section 101(1)(43) of the Act. 8 C.F.R. § 1.2.

II. ANALYSIS

The record reflects that the Applicant entered the United States as an LPR in 1981. The Applicant was subsequently convicted in 2015 of two counts of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 in the United States District Court, [redacted] of Virginia. The Applicant was sentenced to 30 months of imprisonment for each count, to be served concurrently, and three years of supervised release. Based upon her conviction, the Applicant was placed into immigration proceedings and an Immigration Judge ordered her removed in [redacted] 2017, as an alien convicted of an aggravated felony. The Applicant was removed in [redacted] 2017.

Because the Applicant was convicted of two counts of conspiracy to commit wire fraud, an aggravated felony, following her entry into the United States as an LPR, she is ineligible for a waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(2) of the Act.

On appeal, the Applicant does not contest that she has been convicted of an aggravated felony as this term is currently defined under section 101(a)(43)(M) of the Act. The Applicant indicates that her qualifying relatives, her husband and two U.S. citizen children, would experience extreme hardship if her waiver is not granted and she merits a waiver as a matter of discretion. She primarily argues that IIRIRA should not be applied to her because it was enacted after she entered the United States as an LPR.

The Applicant notes that she became an LPR in 1981, long before IIRIRA was enacted. She states that prior to IIRIRA, only murder and trafficking in drugs or firearms were considered aggravated felonies. The Applicant argues that she should be treated the same way that people who adjust status within the United States are treated. The Applicant notes that if she had adjusted status to lawful permanent residency inside the United States rather than entering the United States as an LPR, then she would be eligible for the 212(h) waiver.

Counsel analogizes the instant facts to the facts of INS v. St. Cyr, 533 U.S. 289 (2001). The analogy is inapt, because St. Cyr involved whether IIRIRA should be applied retroactively where the noncitizen made a plea deal prior to enactment of IIRIRA and thought that criminal plea deal would preserve their eligibility for relief from removal. In the instant case, IIRIRA was enacted well before the Applicant was charged with her crimes in 2013 and the Applicant did not rely on pre-IIRIRA law in connection with making a plea deal.

Furthermore, section 348(b) of IIRIRA provides that section 348(a), which amended section 212(h) of the Act to provide that those convicted of an aggravated felony since the date of admission as an LPR are ineligible for a waiver, "shall be effective on the date of enactment of [IIRIRA] and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such date unless a final administrative order in such proceedings has been entered as of such date." Accordingly, the Board of Immigration Appeals (Board) determined that "Congress intended the new restrictions on waivers of relief to aggravated felons, which was added to section 212(h) of the Act by section 348(a)

of the IIRIRA, to have immediate effect," and that the only exception to applicability would be to those noncitizens whose case "had been brought to administrative finality as of the date of enactment of the IIRIRA . . . ." Matter of Pineda-Castellanos, 21 I&N Dec. 1017, 1019 (BIA 1997); see also Matter of Yeung, 21 I&N Dec. 610 (BIA 1996) (stating that section 348(a) of IIRIRA applies retroactively to cases not yet administratively resolved by the effective date). In this case, the Applicant was convicted in 2015 and placed in removal proceedings in 2017, so she was not the subject of a case brought to administrative finality by the time IIRIRA was enacted.

Additionally, even if the Applicant's crime were not considered an aggravated felony at the time she was admitted as an LPR, the aggravated felony definitions under section 101(a)(43) of the Act are retroactively applied in the context of eligibility for a section 212(h) waiver. See Matter of Truong, 22 I&N Dec. 1090, 1096 (BIA 1999). In Matter of Truong, the Board found that aggravated felony definitions "can reach back to encompass any conviction, regardless of when it occurred." Id. The only limitation on this retroactivity is that the amended definitions will apply to "actions taken" (interpreted, at a minimum, as actions and decisions of the Attorney General and their delegates) after the enactment of IIRIRA on September 30, 1996. Id. Here, as stated, the Applicant was convicted of conspiracy to commit wire fraud in 2015 and placed in removal proceedings in 2017.

Finally, to the extent that the Applicant argues that it is unfair to apply the bar at section 212(h)(2) of the Act to her because of the date and circumstances of her admission as an LPR, we lack authority to waive the requirements of the statute, as implemented by the regulations. See U.S. v. Nixon, 418 U.S. 683, 695-96 (1974) (holding that both governing statutes and their implementing regulations carry "the force of law" and must be adhered to by government officials. Also, like the Board, we lack jurisdiction to consider the constitutionality of laws enacted by Congress and the regulations we administer. See, e.g., Matter of Fuentes-Campos, 21 I&N Dec. 905, 912 (BIA 1997); Matter of C-, 20 I&N Dec. 529, 532 (BIA 1992).

Because the Applicant's statutory ineligibility for a waiver under section 212(h) of the Act is dispositive of the appeal, we will not address the Director's discretionary denial of the waiver and hereby reserve that issue. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) (stating that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the Applicant to establish eligibility for the benefit sought. The Applicant has not overcome the basis of denial of her Form I-601 waiver application. The appeal will therefore be dismissed and the Form I-601 will remain denied.

ORDER: The appeal is dismissed.