U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26056734

Date: JUN. 30, 2023

Certification of Chicago, Illinois Field Office Decision

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

The Applicant, a native and citizen of Mexico, 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(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Director of the Chicago, Illinois Field Office denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), and certified the matter to us for review pursuant to 8 C.F.R. § 103.4(a).[1] In the denial, the Director concluded that the Applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of, or admitted having committed, a crime involving moral turpitude (CIMT). The Director further determined that the record did not establish that her qualifying relatives – her parents and children – would suffer extreme hardship if her waiver were denied. The Director further concluded that the Applicant had not established that a favorable exercise of discretion was warranted.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *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 Upon de novo review, the Director's decision is withdrawn, and the application is denied as moot.

I. LAW

Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), provides that any noncitizen convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of, a CIMT (other than a purely political offense) or an attempt or conspiracy to

[1] The Director's denial decision did not indicate, for the Applicant's awareness, that the case would be certified to us pursuant to 8 C.F.R. § 103.4(a). Instead, it informed the Applicant of her right to file an appeal of the decision if she disagreed with the outcome. She did just that, and we received her appeal and accompanying appellate brief in March 2023. We have considered her submitted brief, and all evidence in the record, in the adjudication of this certification. A decision on her appeal will be issued under separate cover.

commit such a crime is inadmissible. An exception to this ground of inadmissibility exists where the maximum possible penalty for the crime of which the noncitizen was convicted (or admitted to having committed or of which they admitted having committed the essential elements) did not exceed one year, and if the noncitizen was convicted of such crime, the noncitizen was not sentenced to a term of imprisonment of more than 6 months. Section 212(a)(2)(A)(ii)(II) of the Act; 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

Individuals found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a CIMT 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 discretionary waiver 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 noncitizen has been rehabilitated. Alternatively, a waiver is available for individuals who demonstrate that 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.

II. ANALYSIS

A. Relevant Facts and Procedural History

The Applicant entered the United States in April 1993 without inspection or admission, and she contends she has not departed since that entry. In [redacted] 2003, the Applicant was charged with Retail Theft in [redacted] Illinois. She signed an agreement with the [redacted] State's Attorney's Office Second Chance Program in which she agreed to admit to the charge. Following completion of the program in October 2004, the charge was dismissed. In [redacted] 2011, the Applicant was again charged with Retail Theft in [redacted] Illinois. She entered the Second Chance Program a second time, again signing an agreement with the [redacted] State's Attorney's Office. The case was likewise dismissed in May 2012 after completion of the program. In [redacted] 2013, the Applicant was charged with one count of Domestic Battery – Bodily Harm and one count of Domestic Battery – Physical Contact in [redacted] Illinois. She pleaded guilty to the charges, received an order of deferred prosecution from the criminal court, and upon completion of the agreement, her guilty plea was vacated in March 2015.

B. CIMT Inadmissibility

As noted above, the Director concluded the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, which states a noncitizen is inadmissible if they have been convicted of, or admitted having committed, or admitted to committing acts which constitute the essential elements of a CIMT (other than a purely political offense) or an attempt or conspiracy to commit such a crime.[2] On certification, the Applicant asserts that she is admissible and "does not need a waiver . . . ."

[2] The Director issued a decision on the Applicant's associated Form I-485, Application to Register Permanent Residence or Adjust Status (adjustment application), concurrent with the decision on the waiver application. In the decision on the adjustment application, the Director concluded the Applicant was inadmissible for having been convicted of multiple CIMTs. We do not have jurisdiction to review that decision; as such, our review is limited to the specific decision and articulated inadmissibility grounds before us on certification.

1. Retail Theft

We first address the Applicant's arguments regarding her two charges for retail theft. Upon review of the record, we conclude that the offense of retail theft under section 5/16-25 of chapter 720 of the Illinois Compiled Statutes (Ill. Comp. Stat.) constitutes a CIMT. The statute requires the taking be with "the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession," which is sufficient to bring the crime within the definition of a CIMT. *See* 720 Ill. Comp. Stat. § 5/16-25; *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 850 (BIA 2016) ("From the Board's earliest days we have held that a theft offense categorically involves moral turpitude if – and only if – it is committed with the intent to permanently deprive an owner of property.").

However, we do not agree that the Applicant's charges for retail theft qualify as convictions for immigration purposes. As noted in the Director's decision, a conviction under the Act requires:

> a formal judgment of guilt . . . or if adjudication of guilt has been withheld, . . . a judge or jury has found the [noncitizen] guilty or the [noncitizen] 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 [noncitizen]'s liberty to be imposed.

Section 101(a)(48)(A) of the Act. As argued by the Applicant on appeal and reflected in the evidence in the record, after both charges for retail theft, she entered into an agreement with the [redacted] State's Attorney's Office to comply with the terms of the Office's Second Chance Program. In both 2003 and 2011, the criminal court granted a continuance to allow the Applicant and the State's Attorney's Office to reach an agreement on her participation in the Second Chance Program, and upon reaching that agreement, a copy was filed with the clerk of the court and the case was continued until a later date, at which time the court followed up to see if the Applicant successfully complied with the program. In both cases, the Applicant was required to report to the State's Attorney's Office for regular check ins as part of the Second Chance Program, and the Applicant paid program fees directly to that office – not to the court. She was required to comply with various additional requirements, such as continuing to reside in Illinois, maintaining employment, notifying the State's Attorney's Office of any change in address, and committing to not violate the law during the proscribed period. At no point, however, was the criminal court involved in the imposition of any restraints on the Applicant's liberties or with the terms of compliance with the program; there was no period of probation or other court-ordered restrictions as part of the agreement. As such, no punishment, penalty, or restraint on the Petitioner's liberty was imposed by the *judge* in either instance, and neither of her charges for retail theft amounted to convictions under the Act. In so much as the Director held these were convictions under the Act and, as a result, constituted CIMTs, we withdraw that finding.

As stated above, section 212(a)(2)(A)(i)(I) additionally renders inadmissible any noncitizen who, even if not convicted of a CIMT under the Act, admits to having committed acts which constitute the essential elements of a CIMT. Thus, even where an applicant is not rendered inadmissible by a conviction, they might still be inadmissible for having admitted to committing acts constituting the essential elements of a CIMT. In order for the admission of a crime or acts constituting the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met:

1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the individual must have been provided with the definition and essential elements of the crime, in understandable terms, prior to making the admission; and 3) the admission must have been voluntary. *Matter of K-*, 7 I&N Dec. 594, 597 (BIA 1957); *see also Matter of G-M-*, 7 I&N Dec. 40, 70 (BIA 1955).

The Applicant never made a qualifying admission in connection to either charge of retail theft and thus, is not rendered inadmissible by way of admission, rather than conviction. Although the record indicates that, in 2003, the Applicant agreed to "state a factual basis under oath admitting to the elements of the pending charge or charges" as part of her agreement with the State's Attorney's Office, there is no evidence in the record of that actually occurring, nor is there any evidence in the agreement with the State's Attorney's Office or otherwise documented in the record that the Applicant was provided with the definition and essential elements of the crime in understandable terms. Further, no such requirement was part of the 2011 agreement, and there is no indication any admission was made in connection with her participation in the Second Chance Program for that charge. We have no evidence of an admission in either case that comports with all three requirements outlined in Board precedent, such that we could find the Applicant knowingly and voluntarily admitted to acts constituting retail theft after having been provided with an explanation of those terms and elements. As such, the Applicant was not rendered inadmissible by way of admission in either instance involving retain theft and we withdraw any finding by the Director that the Applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act on that basis.

2. Domestic Battery

With regard to her charge for domestic battery, the Applicant remains convicted for immigration purposes, and the offense qualifies as a CIMT. *See Coyomani-Cielo v. Holder*, 758 F.3d 908, 910-11 (7th Cir. 2014) (finding no error with the prior finding that Illinois domestic battery qualifies as a CIMT but noting the likelihood that the statutory exception applied where the sentence was brief). The Applicant entered a guilty plea to both charges before the criminal court on [redacted] 2014, and the court placed her under a Domestic Violence Deferred Prosecution Order – a restraint on her liberty – and vacated the guilty plea only after her successful completion of the program. Section 101(a)(48)(A) of the Act; *see Matter of D-L-S-*, 28 I&N Dec. 568, 573 (BIA 2022) (citing *Matter of Roldan*, 22 I&N Dec. 512, 518 (BIA 1999) (finding a noncitizen subject to deferred adjudication to be regarded as "convicted" for immigration purposes where there was a finding or admission of guilt and the imposition of some punishment, even where the proceedings lacked finality)). The Applicant, however, qualifies for the exception to inadmissibility under section 212(a)(2)(A)(ii)(II) of the Act. Her conviction for domestic battery is a Class A misdemeanor in Illinois. 720 Ill. Comp. Stat. § 5/12-3.2(b). Under Illinois sentencing guidelines, the maximum sentence of a term of imprisonment for a Class A misdemeanor "shall be a determinate sentence of less than one year." 730 Ill. Comp. Stat. § 5/5-4.5-55(a). Thus, the maximum sentence which the Applicant could have received for her conviction did not exceed one year, bringing it within the exception outlined in the Act. Further, not only was the maximum sentence insufficient to render her inadmissible under section 212(a)(2)(A)(ii), she was not sentenced to any term of imprisonment, such that she would also have fallen within the exception for the length of the sentence actually rendered. Therefore, the sole ground of inadmissibility articulated in the Director's decision does not apply.

The Applicant is not subject to any ground of inadmissibility that would require a waiver to allow her to adjust her status. That renders the waiver application before us on certification unnecessary, and the waiver application is therefore denied as moot.

ORDER: The application is denied.