U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25335293

Date: MAR. 24, 2023

Appeal of Nebraska Service Center Decision

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

The Applicant was found inadmissible to the United States under 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), based on a foreign conviction for a crime involving moral turpitude (CIMT). He seeks a waiver of inadmissibility under section 212(h) of the Act to adjust status to that of a lawful permanent resident in the United States.

The Director of the Nebraska Service Center denied the waiver request, concluding that the Applicant did not establish that refusal of admission would cause extreme hardship to his U.S. citizen spouse and three U.S. citizen children. The matter is now before us on appeal. 8 C.F.R. § 103.3.

On appeal, the Applicant submits a brief and asserts that the Applicant is not inadmissible because the conviction is not a CIMT. Alternatively, the Applicant contends that, assuming arguendo that the conviction is a CIMT, the Director did not properly evaluate the previously provided evidence, which he claims shows that his spouse will suffer extreme hardship if the waiver is not granted.

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 remand the appeal.

I. LAW

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 commit such a crime is inadmissible. Section 212(a)(2)(A)(i) of the Act.

A foreign conviction can be the basis for a finding of inadmissibility only where the conviction is "for conduct which is deemed criminal by United States standards." Matter of Ramirez-Rivero, 18 I&N Dec. 135, 137 (BIA 1981) (citing Matter of McNaughton, 16 I&N Dec. 569, 572 (BIA 1978)). However, a foreign conviction need not conform to U.S. Constitutional guarantees to be a conviction for immigration purposes. Matter of Gutierrez, 14 I&N Dec. 457, 458 (BIA 1973); Matter of M--, 9 I&N Dec. 132, 138 (BIA 1960).

Individuals who are inadmissible under section 212(a)(2)(A)(i) may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. A discretionary waiver is available if denial of admission would result in extreme hardship to the individual's U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act.

An individual who establishes statutory eligibility for a waiver under section 212(h)(1)(B) of the Act must also demonstrate that U.S. Citizenship and Immigration Services (USCIS) should favorably exercise its discretion and grant the waiver.

II. ANALYSIS

A. Inadmissibility under section 212(a)(2)(A)(i)(I) of the Act

The record shows that the Applicant was convicted under Article 215 of China's Criminal Code (Article 215) in the [redacted] on [redacted] 2016 of illegally manufacturing and selling illegally manufactured registered trademark. The Applicant was sentenced to a fixed-term imprisonment of 2 years and 6 months which was suspended for 3 years of probation, and he was fined RMB ten thousand yuan. The Applicant provided evidence that he served three years of probation in lieu of prison and completed three years of community service.

The crime of illegally manufacturing and selling manufactured registered trademark is a crime involving moral turpitude and is not purely political offense. Therefore, the Department of State Consular Officer found the Applicant inadmissible to the United States. See INA§ 2 I 2(a)(2)(A)(i)(I).

In his brief, counsel for the Applicant contends that one can violate Article 215 knowingly or unknowingly, therefore the conviction "might not" constitute a CIMT. Counsel submits that the Applicant cannot definitively be said to have violated Article 215 knowingly, so the Applicant "might not" be inadmissible. Counsel cites to no authority or expert opinion to support his interpretation of the Chinese statute as it applies to the Applicant. 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)). Moreover, it is clear from the record that the Chinese court did make a specific finding regarding intent. Therefore, the conviction is unequivocally a CIMT under the law of the Ninth Circuit Court of Appeals and we reject counsel's argument.

Counsel for the Applicant's interpretation is belied by the record of conviction. The Chinese court specifically found a knowing violation, finding that the Applicant "ignored" national laws of manufacturing and selling products marked with registered trademarks of others without authorization. The record of conviction notes that the serious circumstances were mitigated by several favorable findings: the Chinese court found the Applicant played a "secondary" role, he was truthful and he took responsibility for his actions. Thus, the Chinese court rendered "a lighter or mitigated punishment" and the criminal sentence was suspended in favor of probation. Accordingly, the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for conviction of a CIMT and requires a waiver of inadmissibility.

B. Extreme Hardship

The next issue is whether the Applicant has established extreme hardship to his spouse and three children, as required to qualify for a waiver of inadmissibility under section 212(h)(1)(B) of the Act and, if so, whether he merits the waiver as a matter of discretion. 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 a qualifying relative 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).

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. See 9 USCIS Policy Manual B.4(B), https://www.uscis.gov/policymanual (providing guidance on the scenarios to consider in making extreme hardship determinations). Demonstrating extreme hardship under both these scenarios is not required if the applicant's evidence demonstrates that one of these scenarios would result from the denial of the waiver. See id. (citing to Matter of Calderon-Hernandez, 25 I&N Dec. 885 (BIA 2012) and Matter of Recinas, 23 I&N Dec. 467 (BIA 2002)). 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 id. In the present case, the record does not contain a clear statement from the Applicant's spouse indicating whether she intends to remain in the United States or relocate to China if the Applicant's waiver application is denied. The Applicant must therefore establish that if he is denied admission, his spouse would experience extreme hardship both upon separation and relocation.

In support of his waiver request, the Applicant initially submitted 2020 medical evidence from [redacted] stating his spouse was under treatment for mild depression. Updated medical evidence from 2022 states the Applicant's spouse demonstrated symptoms of Post-traumatic Stress Disorder and Major Depressive Disorder. The medical reports in the record reflect that the Applicant's spouse's mental health deteriorated over the time period of 2020 to 2022 from minor depression to major depressive disorder. The evidence submitted shows that the Applicant's spouse was under medical care and taking medication for her depression on an ongoing basis during this time period. The 2022 psychological report states that given the Applicant's spouse's history, [t]here is a very high likelihood that, without the emotional, physical and financial support of [the Applicant], [his spouse's] mental state will further decompensate, making her capacity to parent her three children extremely challenging and severely impacting her capacity to function on a daily basis."

With respect to hardship the Applicant's spouse and three children would experience upon relocation to China, in her psychological evaluation, the Applicant's spouse indicated that she did not want to return to China because of the trauma that her family previously experienced due to China's family planning policy. The record also reflects that the Applicant's spouse and their three children were

granted asylee status. The decision to grant the Applicant's spouse asylee status indicates that relocating to the country from which she received protection poses a significantly heightened risk to her safety and could result in retaliatory violence, persecution, or other dangers. In addition, the Applicant's spouse and children have been in the United States for over 10 years, they are naturalized U.S. citizens, and they have significant familial ties to the United States. The spouse's lawful permanent resident mother and sister reside in the United States, i.e. the three children's grandmother and aunt. With respect to separation, we similarly find that the prior decision to grant the Applicant's spouse status as an asylee indicates that she would likely face increased difficulty returning to China to visit the Applicant.

The Director stated that "no evidence was submitted to show that [the Applicant's spouse] and children have been denied a Chinese visa [to visit China]." Regarding the viability of the Applicant's spouse and children visiting China, we take administrative notice of the current 2021 U.S Department of State Country Report for Human Rights for China (Country Report) and the current U.S. State Department China Travel Advisory (Travel Advisory). [1]

The Country Report notes the Chinese government arbitrarily imposes exit bans on foreigners, preventing them from leaving the country. "[Chinese] Authorities also detained citizens and foreigners under broad and ambiguous state secret laws..." In light of the Country Report, the Applicant's spouse would be at risk of being detained or being prevented from exiting China if she visited the Applicant. The Travel Advisory dated January 2023 indicates the second-highest level of warning and advises U.S. citizens to reconsider travel to China. The Travel Advisory summary states that the Chinese government arbitrarily enforces local laws, including issuing exit bans on U.S. citizens and citizens of other countries without fair and transparent process under the law. The State Department has determined the risk of wrongful detention of U.S. nationals by the Chinese government exists in mainland China and that U.S. citizens in China may be subjected to prolonged interrogations and extended detention without due process of law.

Considering the totality of the hardship factors presented in the aggregate, we find that the Applicant's spouse and three children would experience extreme hardship both if the Applicant is not admitted to the United States and if the spouse and three children relocated to China.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. See Section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. The Applicant has demonstrated that his spouse would experience extreme hardship. Accordingly, we will withdraw the Director's decision and return the matter for a determination of whether the Applicant warrants a favorable exercise of discretion such that her adjustment of status application may be approved.

[1] See Matter of R-R, 20 I&N Dec. 547, 551 (BIA 1992) ("It is well established that administrative agencies and the court may take judicial (or administrative) notice of commonly known facts")(citation omitted).

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.