U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23571654

Date: MAY 8, 2023

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Brazil and currently residing there, has applied to adjust status to that of a lawful permanent resident (LPR). A noncitizen seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a controlled substance violation and seeks a waiver of that inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). 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 Tampa, Florida Field Office denied the Form I-601 waiver application, concluding that the Applicant did not establish the denial would result in extreme hardship to his U.S. citizen spouse, his sole qualifying relative for purposes of a waiver of inadmissibility under section 212(h)(1)(B) of the Act. We subsequently dismissed his appeal and his two combined motions to reconsider and reopen the proceeding, concluding that the Applicant failed to demonstrate the requisite hardship to his qualifying relative.

The matter is before us on the Applicant's third combined motions to reconsider and reopen the proceeding. In support of the motions, he submits a brief and the same evidence previously submitted with his second motion filing. The Applicant contends that we did not give proper weight to the evidence provided and that he has shown his spouse would experience extreme hardship if his waiver application were denied. Upon review, we will dismiss the combined motions.

I. LAW

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that meets these requirements and establishes eligibility for the benefit sought. Additionally, a review of any motion is limited to the bases supporting the prior adverse decision. *See* 8 C.F.R. § 103.5(a)(1)(i), (ii) (conferring jurisdiction "for proper cause shown" over "the prior decision"). Thus, we examine any new facts and

arguments to the extent that they pertain to our dismissal of the Applicant's prior combined motions to reconsider and reopen the proceeding.

USCIS may adjust the status of noncitizens admitted or paroled into the United States to that of permanent resident if they are physically present in the United States and not otherwise ineligible to receive an immigrant visa. Section 245(a) of the Act, 8 U.S.C. 1255(a); 8 C.F.R. § 245.1(a). An applicant for an immigrant visa, adjustment of status, or a K or V nonimmigrant visa who is inadmissible under any provision of section 212(a) of the Act for which a waiver is available under section 212 of the Act may apply for the related waiver by filing the form designated by USCIS, with the fee prescribed in 8 C.F.R. § 106.2, and in accordance with the form instructions. 8 C.F.R. § 212.7(a)(2).

To be eligible for a waiver of inadmissibility under section 212(h)(1)(B) of the Act, an applicant must demonstrate that denial of the waiver would result in extreme hardship to their United States citizen or lawfully resident spouse, parent, son, or daughter. If the record does not contain a statement from the applicant's qualifying relative specifically indicating whether they intend to remain in the United States or relocate with the applicant, then the applicant must establish by a preponderance of the evidence that denial of the Form I-601 waiver application would result in extreme hardship to the qualifying relative both upon separation and relocation. *See* 9 *USCIS Policy Manual* B.4(B), https://www.uscis.gov/policy-manual/volume-9-part-b-chapter-4 (providing, as guidance, the scenarios to consider in making extreme hardship determinations). In this case, the record does not contain a statement from the Applicant's spouse indicating whether she intends to remain in the United States or relocate to Brazil upon the denial of his Form I-601 waiver application. The Applicant must therefore establish that if he were denied the wavier, his spouse would experience extreme hardship both upon separation and relocation.

A determination of whether denial of waiver would 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). We recognize that some degree of hardship to the 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). Moreover, in these proceedings, it is the applicant's burden to establish by a preponderance of the evidence eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

In our prior decision on appeal, we determined that the Applicant had not met his burden of proof to establish that his U.S. citizen spouse would suffer extreme hardship on separation or relocation. We dismissed the Applicant's first combined motions for failure to satisfy motion requirements. Similarly, in our subsequent decision dismissing the second combined motions, incorporated here by reference, we determined that the Applicant had not shown our prior decision on his first motion was contrary to established precedent, law, or policy or contained any factual errors such that

reconsideration is warranted, and that the new evidence submitted on the corresponding motion to reopen did not establish that the Applicant's U.S. citizen spouse would suffer extreme hardship if she were to relocate to Brazil or if the Applicant and his spouse remained separated.

As explained, since the Applicant did not provide a statement of his spouse's intent regarding whether she would relocate to Brazil or remain in the United States if the Applicant's waiver application is denied, the Applicant must establish that denial of the waiver application would result in extreme hardship to his spouse both upon separation and relocation. As the Applicant has not stated on this motion that we erred as a matter of law of policy regarding extreme hardship to his qualifying relative in the event of separation or provided new facts or evidence relevant to separation, we cannot conclude that he has met this requirement.

On this motion to reconsider, the Applicant contends that we erred in concluding his spouse would not experience extreme hardship upon relocating with him to Brazil and resubmits the evidence submitted on his last motion, including a 2021 psychological evaluation for the Applicant's spouse, a minimum wage county comparison chart, a 2019 Huffington Post opinion article, and a map of [redacted] Brazil. The Applicant asserts that we did not consider all the relevant evidence of extreme hardship including the fear the Applicant's spouse experiences while thinking about her personal safety if she were to move to Brazil and the corresponding mental health effects, that she no longer works for the company that previously employed her in Brazil, and that her financial needs could not be met on her spouse's income alone. A review of our previous decision shows that we fully considered the Applicant's evidence of hardship, including those arising from his spouse's mental health concerns, her fears for her personal safety in Brazil, and the couple's claimed financial hardship upon relocation there, in determining that the level of claimed hardship did not rise to the level of extreme hardship.

The Applicant further states that we erred in concluding that because the Applicant's spouse was able to find someone to translate for her so she could receive medical care in Brazil, she "would be able to obtain psychological treatment" there through an interpreter, without consideration of the distinction between the two forms of care. Contrary to the Applicant's assertions, we made no such affirmative finding that his spouse would be able to find an interpreter to assist her in obtaining mental health care in Brazil. Rather, in our previous decision, we noted that the Applicant's new evidence on motion did not support her claim about the unavailability of medical or mental health care for his spouse in Brazil based on her inability to speak Portuguese. *See generally*, *Matter of Chawathe*, 25 I&N Dec. at 375 (stating that applicants bear the burden to establish eligibility for the benefit sought). In doing so, we pointed to information in the new December 2021 psychological assessment provided on motion showing that the spouse was able to obtain medical treatment with the assistance of a translator in Brazil. We also noted that documentation submitted on motion generally addressing the availability of psychological treatments in Brazil was not sufficient to establish that she would be unable to obtain psychological treatment with the assistance of a translator or from English-speaking medical providers in Brazil if she relocated. Finally, we noted that the Applicant, who had been living in Brazil apart from his spouse for nearly two years, did not show that his spouse required mental health treatment as claimed, as the record reflected that the spouse visited a mental health professional only twice between September 2020 and December 2021.

On motion, counsel for the Applicant also asserts that "all services . . . including psychological counseling" in Brazil are in the Portuguese language in Brazil and that therefore there are no English-

speaking therapists there and particularly in the small town where the Applicant currently resides. 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. Here, the Applicant nor his spouse provided any probative testimony in support of this assertion in their statements. We acknowledge previously submitted evidence on motion, including a map of the Applicant's town reflecting how far the closest major city is and a 2019 Huffington Post opinion article. However, as indicated in our prior decision, they do not address the lack of English-speaking therapists or the current state of mental health care in Brazil.

The Applicant further contends that we erred in relying on the spouse's prior employment in Brazil to find that she could find employment there again if she relocated, where his spouse's statement indicated she previously worked in Brazil on a work visa for a U.S. company that sent her there but no longer works for that company. He maintains that his spouse would not be able to find work in Brazil for a local Brazilian company particularly because she does not speak the language. However, regardless of her previous employment in Brazil, as stated in our prior decision, the record does not show that his spouse could not find employment there, despite her inability to speak Portuguese, and it also indicates that the Applicant is currently employed there. Consequently, while we recognize the Applicant's spouse would suffer financial harm upon relocation, the Applicant has not shown hardship that exceeds that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. at 630-31. (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)

We acknowledge the Applicant's renewed claims of emotional, medical, and psychological hardship upon relocation. However, as discussed, the Applicant has not established that we erred in our previous motion decision based on the record then before us or established that we misapplied relevant law or policy, in particular as it applies to separation. As such, he has not satisfied the motion to reconsider requirements under 8 C.F.R. § 103.5(a)(3). Similarly, the Applicant has not submitted new evidence or established new facts that would warrant reopening. *See* 8 C.F.R. § 103.5(a)(2). Accordingly, the Applicant has not overcome our prior determination that the record, although it shows that the Applicant's spouse would likely experience hardship if the applicant were denied admission, is insufficient to demonstrate that the level of hardship would exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. at 630-31 (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).

Additionally, we note that the record indicates the Applicant no longer has an underlying application for adjustment of status or application for an immigrant visa abroad to serve as a basis for a waiver of inadmissibility under section 212(h) of the Act as required. *See* 8 C.F.R. § 212.7(a)(1); *see also Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013) (finding that a waiver under section 212(h) of the Act is not available to a noncitizen on a "stand alone" basis if they are not an arriving alien or applicant for adjustment of status). The Applicant's application for adjustment of status was denied with the current corresponding waiver application in November 2019. The Applicant did not submit a motion to reopen or reconsider the decision on his adjustment of status application. The Applicant then departed the United States, without advance parole, in June of 2020 and has not returned. Since the Applicant is

not present in the United States, he is unable to renew his previous application even if this waiver application was granted. *See* section 245(a) of the Act; 8 C.F.R. 245.1(a) (requiring applications for permanent residence to be made while physically in the United States). He also has not made an application with the Department of State to receive an immigrant visa abroad. USCIS does not adjudicate waivers under section 212(h) of the Act without an underlying benefit request.

III. CONLCUSION

The Applicant has not established that our previous motion decision was based on an incorrect application of law or policy, or that it was incorrect based on the evidence then before us. Therefore, he has not met the requirements for a motion to reconsider the matter. *See* 8 C.F.R. § 103.5(a)(3). In addition, the Applicant has not submitted new evidence that establishes that his spouse would experience extreme hardship upon separation from him or relocation with him to Brazil. Therefore, he has not established that reopening is warranted. *See* 8 C.F.R. § 103.5(a)(2). Furthermore, the Applicant is not eligible to receive a waiver under section 212(h) of the Act because he is not an applicant for adjustment of status or an immigrant visa.

ORDER: The motion to reconsider is dismissed.

FURTHER ORDER: The motion to reopen is dismissed.