U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25234272

Date: MAY 11, 2023

Motion on Administrative Appeals Office Decision

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

The Director of the Jacksonville, Florida Field Office denied the Application for Waiver of Grounds of Inadmissibility, Form I-601, after determining the Applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II) due to her 2016 conviction for marijuana possession. The Director also determined she had not established eligibility for a rehabilitation waiver under section 212(h)(1)(A), or that her spouse would suffer extreme hardship if she were denied admission as required under section 212(h)(1)(B).[1] We subsequently dismissed the Applicant's appeal after concluding she remained inadmissible for her controlled substance violation despite the fact that her plea was vacated and the charges nolle prosequi and dismissed. In making this decision we stated that the Applicant had not provided sufficient evidence of the basis for vacating and dismissing her conviction and included in a footnote that section 3.850 of the Florida Rule of Criminal Procedure (Fla. R. Crim. Proc.) provides different bases for a conviction to be vacated through a motion as well as the required contents of such a motion. We also determined that she did not establish her spouse or mother would suffer extreme hardship. The matter is now before us on a motion to reopen. Upon review, we will dismiss the motion.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We may grant a motion that satisfies these motion requirements and demonstrates eligibility for the requested immigration benefit.

On motion, the Applicant first claims that she was not convicted of a controlled substance violation because the criminal court vacated her plea after the State dropped the case, and that there "never was a Motion to Vacate the plea" making compliance with section 3.850 of the Fla. R. Crim. Proc. moot and impossible to do.[2] In our previous decision, which we incorporate herein, we stated that if a conviction was vacated based on a rehabilitative statute rather than a statutory or constitutional violation, it remains a conviction for immigration purposes. *See Matter of Roldan*, 22 I&N Dec. 512,

[1] We note that the Director incorrectly cited to section 212(a)(2)(A)(i)(I) of the Act referring to inadmissibility for having been convicted of a crime involving moral turpitude. A waiver under section 212(h)(1)(B) of the Act, however, has the same requirements regardless of whether the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) or (II) of the Act.

[2] The order of these events as described by the Applicant appears to be factually incorrect as the record shows the Judge vacated the Applicant's plea on November 22, 2021, whereas the State of Florida's filing of nolle prosequi is dated November 23, 2021.

527 (BIA 1999). As noted above, we then determined that the Applicant had not provided sufficient evidence indicating the basis for vacating her plea and the subsequent dismissal of the charges against her. While the Applicant says that it is impossible to provide such evidence, the order vacating her plea explicitly states that "the Defendant's Motion is Granted," which undermines her claim that there "never was a Motion to Vacate the plea." In fact, this reflects that the Applicant filed a motion to have her plea vacated, did not provide evidence of the basis for that motion, and therefore did not meet her burden of proof to show the conviction was ineffective for immigration purposes. Accordingly, the Applicant remains inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on her conviction in 2016 and must establish extreme hardship to a qualifying relative to waive the ground.

The Applicant next claims that there has been a change in circumstances such that her spouse will suffer extreme hardship if she is denied admission. In our previous decision, we evaluated whether the spouse would experience extreme hardship upon relocation and determined that the record lacked detail about the emotional hardship he would experience in his daily life, as well as documentation that would allow us to assess the emotional impact of his father's health, and did not establish that other family members could not assist with the spouse's family business. We also evaluated whether the mother would experience extreme hardship upon both separation and relocation and similarly determined that the record lacked detail about the emotional hardship she would experience in her daily life. In both cases we then determined that the evidence in the record, when considered in the aggregate, did not establish the hardship rose to the level of extreme.

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 scenarios is not required if an applicant's evidence establishes that one of these scenarios would result from the denial of the waiver. On motion, the Applicant states that she is pregnant and as a result her spouse will not relocate and instead remain in the United States. She also provides that her mother similarly will not relocate overseas. Thus, we will evaluate only whether the requisite hardship is established upon separation.

In support of her motion, the Applicant submits a copy of her marriage certificate and the spouse's birth certificate; statements from herself, her spouse, her spouse's parents, her spouse's siblings, and her work supervisor; a therapist's letter for her and her spouse; medical records for her and her spouse's parents; documents related to her criminal history; and a settlement statement for the purchase of her house.

The Applicant states that she and her spouse have been together for 10 years, are expecting a child who they want to raise in the United States, and recently purchased property and built a house. She also indicates that her spouse's father and mother suffer from cancer and sciatica, respectively, and that she helps them by making dinner, cleaning, caring for their animals, and helping with their family-owned company. She claims that if she were separated from her spouse, he would not be able to balance work, providing for their home, and taking care of their child and his parents, and that he would have difficulty visiting Hungary. She states that the separation from him would cause her emotional hardship given how close they are and would cause financial hardship to her spouse as they would incur additional daycare expenses and lose her income which they need to cover their mortgage, credit card debt, and everyday expenses.

Her spouse explains in his affidavit that he is the vice president of his family-owned company and is in charge of overseeing the company's daily projects. He states that separation from the Applicant would be an emotional strain as they have been together for ten years, would be a financial strain as well because they rely on her income to pay their mortgage, bills, and $10,000 in debt, and that they would incur additional costs related to childcare and travelling to Hungary. He claims that he would become the primary caregiver to their child and thus would likely have to cut back on hours at work and be forced to leave work if there was an emergency or if their child was sick. He claims he would be overwhelmed by having to do laundry, grocery shopping, cleaning, yard work, cooking, bathing his child, caring for their animals, and continuing to work, while losing rest from staying up with his child, putting her to bed, and waking her up. He adds that he would also have to assume the care of his parents that the Applicant provides and expresses concern for his child growing up without the Applicant.

A therapist's letter for the spouse reflects the same concerns above and concludes that his concerns are normal and appropriate, that separation would cause harm and potentially be detrimental to his mental health and well-being, but that he did not need any further treatment.

The spouse's father states in his affidavit that he depends on his son to oversee every construction project at his company when he is unable to work due to his cancer surgeries and that none of his other children have an interest in construction. He adds that the Applicant is a secondary caretaker during the recovery periods of his surgeries, and that she helps with meals, errands, and deliveries for his company. The Applicant provided medical documentation showing the spouse's father had six surgeries from 2016 through 2022. The spouse's mother states that the Applicant assists her and her husband by making meals, running errands, cleaning the house, taking care of animals, and running business errands. She adds that the Applicant has helped her husband after his surgeries and that she has become dependent on the Applicant due to her back injury. Statements from the spouse's siblings reflect that they are unable to assist with the family's business or provide financial assistance to the spouse.[3]

We recognize the spouse's concerns with having to balance his employment and parenting, and understand there will be financial and emotional challenges associated with raising a child without the Applicant. However, the record does not contain financial documents to support the spouse's financial concerns, and the Applicant and spouse appear to have the support of his parents with whom they were recently living, as well as siblings with whom they are close and who live on adjacent properties. Thus, the Applicant has not provided sufficient evidence to establish that the birth of their child, the care associated with raising her, and balancing those responsibilities with work would create hardships that are unusual or beyond which would normally be expected as a result of being the sole parent.

The Applicant has shown that her spouse's father has undergone multiple surgeries to remove carcinomas, that his mother suffers from sciatica, and that the Applicant acts as a secondary caretaker to the father during his recoveries, and otherwise assists both parents with cooking, cleaning, and running errands. However, while the spouse claims that he would assume these caretaking

[3] We previously determined regarding relocation to Hungary that the Applicant did not demonstrate the siblings were unable to assist with the family business in her spouse's absence. However, as the spouse now asserts he will remain in the United States and continue his involvement with the business, the fact that the other siblings claim they would not assist with the business is no longer a dispositive factor in our analysis.

responsibilities, the addresses provided in his sibling's statements reflect that one of them lives with his parents and another lives on an adjacent property. Given they are living with or close to their parents, it is unclear why his siblings could not help in providing care to their parents. Thus, while the Applicant claims her absence would be a great hardship for her spouse's parents, the evidence provided does not establish the degree to which such hardships would extend to her spouse or how they would be unusual or beyond what would normally be expected upon separation.

Regarding hardship to her mother, the Applicant states in her affidavit that her mother lives with her husband (the Applicant's stepfather) in [redacted] and would not relocate from the United States. While the Applicant does not have daily contact with her mother, she recently travelled to her mother's home to provide her care after she had three surgeries. The Applicant claims her other siblings are unavailable to her mother and that she needs to be able to provide her care when her health declines. The mother provides a statement wherein she describes her recent surgeries and how the Applicant stayed with her for five days in 2022 during the most difficult periods of her recovery. She states that they regularly communicate and claims she would suffer emotional trauma if the Applicant were far away. She also indicates that she may live with her daughter in the future and wants her grandchild near her. The record shows, however, that the mother already lives a significant distance from the Applicant, and that she lives with her husband who could act as a caregiver if any medical issues arise. Thus, the evidence provided is insufficient to establish the hardship her mother would suffer due to separation is unusual or beyond that which would normally be expected.

Considering the above with the rest of the record, the Applicant has not established that the hardship to her spouse, mother, or both in the aggregate rises to the level of extreme hardship.

As noted above, we may grant a motion that states new facts, is supported by documentary evidence, *and* demonstrates eligibility for the requested immigration benefit. The Applicant has not established by a preponderance of the evidence that her spouse, mother, or both in the aggregate would suffer extreme hardship if she were denied admission and thus is ineligible for a waiver of inadmissibility. As she remains ineligible for a waiver of inadmissibility, we must dismiss her motion.

ORDER: The motion to reopen is dismissed.