U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23877129

Date: MAR. 01, 2023

Appeal of Queens, New York Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident (LPR) and seeks a waiver of inadmissibility under section 212(i) of the Act for fraud or willful misrepresentation.

The Director of the Queens, New York Field Office denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), concluding that the Applicant did not establish extreme hardship to a qualifying relative and not merit a favorable exercise of discretion. The matter is now before us on appeal. 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

Any noncitizen who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act, is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the U. S. citizen or lawful permanent resident spouse or parent of the noncitizen. Section 212(i) of the Act.

Section 204(l) of the Act, 8 U.S.C. § 1154(l), provides that an applicant who immediately prior to the death of a qualifying relative was the beneficiary of a pending or approved petition for classification as an immediate relative, who resided in the United States at the time of the death of the qualifying relative, and who continues to reside in the United States shall have their application for adjustment of status based upon a family relationship, and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless a discretionary determination is made that approval would not be in the public interest.

If the noncitizen demonstrates the existence of the required extreme hardship, then they must also show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act. The burden is on the noncitizen to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing an applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the noncitizen and their family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

II. ANALYSIS

The issues present on appeal are whether the Applicant is inadmissible for fraud or willful misrepresentation, whether he meets the requirements of section 204(l) of the Act, and whether a favorable exercise of discretion for the inadmissibility ground is warranted.

A. Inadmissibility

The Director determined that the Applicant was inadmissible for fraud or willful misrepresentation. Specifically, the Director found that the Applicant misrepresented a material fact when he submitted a sworn affidavit on which his current spouse, falsely representing herself as his sister, attested to incidents of abuse perpetrated against him by his prior U.S. citizen spouse in support of a Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant.[1] On appeal, the Applicant contends that the Director erred in determining his inadmissibility based upon the submission of this affidavit in support of his Form I-360. He explains that when he was asked about this affidavit during his adjustment interview, he immediately disavowed any knowledge of it.

To be found inadmissible for fraud or willful misrepresentation under section 212(a)(6)(C)(i) of the Act, the record must contain evidence showing that a reasonable person would find that an applicant used fraud or that he or she willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the United States, or any other immigration benefit. 8 *USCIS Policy Manual* J.3(A)(1), https://www.uscis.dhs.gov/policymanual. The burden of proof is always on the Applicant to establish admissibility. *Id.* Here the record reflects that the Applicant did submit the affidavit referenced above in support of his Form I-360. This affidavit was central to the Form I-360's approval because a nonimmigrant seeking immigrant classification as an abused spouse of a U.S.

[1] The record reflects that in April 2008, the Applicant filed his Form I-360 in order to seek immigrant classification as the abused spouse of a U.S. citizen under section 204(a)(1)(A)(iii) of the Act based upon his prior marriage to a U.S. citizen spouse. This petition was denied in 2009.

citizen under section 204(a)(1)(A)(iii) of the Act must demonstrate, in relevant part, that they were subjected to battery or extreme cruelty by their U.S. citizen spouse. Section 204(a)(1)(A)(iii)(I) of the Act. Although the Applicant explains on appeal that he disavowed knowledge of the affidavit after being informed about it during his adjustment interview, the record indicates that he signed the Form I-360 with which this affidavit was submitted. Because USCIS applications are signed "under penalty of perjury," an applicant, by signing and submitting the application or materials submitted with the application, is attesting that their claims are truthful. 8 *USCIS Policy Manual*, *supra* at J.3(D)(1). The Applicant's signature on this Form I-360 "establishes a strong presumption" that he knew and assented to the contents. *Matter of Valdez*, 27 I&N Dec. 496, 499 (BIA 2018). The Applicant has not offered any evidence on appeal to support his claim that he was unaware of the affidavit or its contents or to otherwise demonstrate that he did not willfully submit an affidavit containing false information in an attempt to obtain an immigrant visa.

In addition, we note the Applicant's explanation on appeal that he disavowed knowledge of the affidavit immediately after being made aware of it. However, this does not constitute a timely retraction of his misrepresentation such that it renders him admissible. *See Matter of Namio*, 14 I&N Dec. 412, 414 (BIA 1973) (stating that "we have consistently held that the recantation must be voluntary and without delay" and concluding that a retraction made after it appeared that the disclosure of the falsity of the statements was imminent was neither voluntary nor timely); *Matter of R-R-*, 3 I&N Dec. 823, 827 (BIA 1949); *see also* 8 *USCIS Policy Manual supra* at J.3(D)(6).

For these reasons, the Applicant has not satisfied his burden to establish that he is not inadmissible under section 212(a)(6)(C)(i) of the Act.

B. Extreme Hardship

The Director then denied the Applicant's waiver application, concluding that the Applicant had not established extreme hardship to himself, or to his U.S. citizen daughter and to his lawful permanent resident (LPR) daughter. On appeal the Applicant asserts that the Director erred in concluding that he had not established extreme hardship because, according to USCIS policy, the death of his U.S. citizen spouse should be treated as the functional equivalent of a finding of extreme hardship. We agree with the Applicant.

According to the USCIS Policy Manual, the applicant must generally show extreme hardship to a qualifying relative who is alive at the time the waiver application is both filed and adjudicated. 9 *USCIS Policy Manual*, *supra* at B.4(C). Unless a specific exception applies, an applicant cannot show extreme hardship if the qualifying relative has died. Section 204(l) of the Act provides the only exception, and allows USCIS to approve, or reinstate approval of, an immigrant visa petition and certain other benefits even though the petitioner or the principal beneficiary has died. Section 204(l) of the Act also provides that it applies generally to "any related applications," thereby including applications for waivers related to immigrant visa petitions. Further, an individual who establishes that the requirements of this provision have been met may apply for a waiver even though the qualifying relative for purposes of establishing extreme hardship has died. Moreover, in cases in which the deceased individual is both the qualifying relative for purposes of section 204(l) of the Act and the qualifying relative for purposes of the extreme hardship determination, the death of the

qualifying relative is treated as the functional equivalent of a finding of extreme hardship. 9 *USCIS Policy Manual*, *supra* at B.4(C).

With respect to the Applicant's U.S. citizen spouse's death and its impact on the Applicant's waiver application, section 204(l) of the Act specifies two conditions that an applicant must satisfy to be eligible for a waiver when the qualifying relative dies. First, the applicant must be residing in the United States at the time of the qualifying relative's death and continue to reside in the United States after the death. Second, the applicant must have been, immediately prior to the qualifying relative's death, the beneficiary of a petition or application described under section 204(l). The record reflects that in February 2017, the Applicant's U. S. citizen spouse filed a Form I-130, Petition for Alien Relative, on his behalf, and that his spouse died in June 2019, during the pendency of this Form I-130. It also shows that the Applicant resided in the United States at the time of his U.S. citizen spouse's death and continues to do so. The record therefore establishes that he qualifies for relief under section 204(l) of the Act. The record further shows reflects that the Applicant's deceased U.S. citizen spouse is the qualifying relative for the purpose of the extreme hardship determination. The Applicant has therefore established extreme hardship to himself because he has established that the death of his U.S. citizen spouse is the functional equivalent of a finding of extreme hardship. We will withdraw the Director's finding to the contrary.

C. Discretion

In denying the Applicant's waiver application, the Director finally concluded that the Applicant had not established that a favorable exercise of discretion to waive the ground for inadmissibility was merited. The Director acknowledged, and afforded positive weight, the Applicant's ties to the United States, including his U.S. citizen daughter and to his lawful permanent resident daughter, as well as the approval of his Form I-360.[2] However, the Director's decision assigned the Applicant's submission of a fraudulent affidavit, discussed above, significant negative weight. The Director then discussed the Applicant's criminal history, incorporated here by reference, and assigned it negative discretionary weight.

On appeal, the Applicant submits additional letters of support and contends that the Director erred in concluding that that a favorable exercise of discretion in his case was not warranted. He first asserts that the Director abused discretion when concluding that his criminal history, including five convictions for disorderly conduct, two convictions for unlawful sale of cigarettes, and one conviction for unlawful sale of fireworks, reflected a "disregard for the immigration laws" of the United States. Upon review, the Applicant misconstrues the Director's conclusion. The Director's decision determined that in the aggregate, both the Applicant's criminal history and the Applicant's submission of a fraudulent affidavit, constitute such disregard.

The Applicant further contends on appeal that the Director mischaracterized his criminal history as "extensive" and therefore erroneously reached a conclusion that a favorable exercise of discretion was not warranted due to this criminal history. The Applicant explains on appeal that these incidents reflect "scrapes" from dealing with customers at his business, which he notes is next to a high crime area and

[2] The record reflects that, upon the death of his U.S. citizen spouse, the Form I-130 converted to a Form I-360, which was subsequently approved.

that none of these infractions rise to the level of a crime of moral turpitude, nor do his convictions for unlawful sale of fireworks or unlawful sale of cigarettes. As noted above, the existence of a criminal record, and if so, its nature, recency and seriousness, is an adverse factor to be considered in a discretionary analysis. *Matter of Mendez-Moralez*, 21 I&N Dec. 299 at 301. Here the Applicant's convictions for disorderly conduct, unlawful sale of cigarettes, and unlawful sale of fireworks demonstrate a pattern indicative of a disregard for the laws of the United States. Relating to the Applicant's argument on appeal that these incidents are simply "scrapes" and do not rise to the level of moral turpitude, the record lacks sufficient documentation to demonstrate the circumstances surrounding these incidents, and the Applicant does not offer additional evidence on appeal.[3] Accordingly, we find no error with the negative weight that the Director assigned the Applicant's criminal history.

We note on appeal the Applicant has established extreme hardship. We consider this a positive factor and accord it significant positive weight in our discretionary analysis. We further acknowledge, as did the Director, the positive equities of the Applicant's lengthy residence in the United States and his family ties to his U.S. citizen daughter and LPR daughter. We note the letters from the Applicant's pastor and his children submitted on appeal describing the Applicant as a hard worker, and a kind and patient man, and afford them positive weight. However, when weighed against the significant negative factors of the Applicant's willful misrepresentation when submitting the fraudulent affidavit, and his pattern of criminal behavior, the totality of the record is not sufficient to overcome the Director's determination that a favorable exercise of discretion is not warranted. The waiver application will therefore remain denied.

ORDER: The appeal is dismissed.

[3] The record includes Certificates of Disposition from the Criminal Court of New York, County of [redacted] for these convictions. However, these certificates do not provide descriptions of the circumstances leading to the convictions.