U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19539647

Date: FEB. 9, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied for an immigrant visa and seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), for unlawful presence. The Director of the Nebraska Service Center denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application). The Director concluded that the record establishes that the Applicant's qualifying relative, her U.S. citizen spouse, would experience extreme hardship if the Applicant were denied the waiver. But the Director also concluded that the Applicant had not established exceptional and extremely unusual hardship to overcome another ground of inadmissibility. Specifically, the U.S. Department of State (DOS) found that the Applicant had been convicted of a crime involving moral turpitude (CIMT), rendering her inadmissible under section 212(a)(2)(A)(i) of the Act, and the Director determined that the Applicant's conviction was for a violent or dangerous crime. The matter is now before us on appeal.

On appeal, the Applicant submits copies of previously submitted evidence and contends that the provisions relating to CIMT conviction do not apply because she withdrew the guilty plea that led to the conviction. 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

A noncitizen who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act. This ground of inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. Section 212(a)(9)(B)(v) of the Act.

Section 212(a)(2)(A) of the Act provides that any noncitizen convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (CIMT) (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Noncitizens found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(1)(B) of the Act provides for a waiver if denial of admission would

result in extreme hardship to the noncitizen's United States citizen or lawful permanent resident spouse, parent, son, or daughter.

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 296, 299 (BIA 1996). However, a favorable exercise of discretion is not warranted for noncitizens who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as cases involving national security or foreign policy considerations, or when an applicant "clearly demonstrates that the denial . . . would result in exceptional and extremely unusual hardship" according to 8 C.F.R. § 212.7(d). Exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001). Even if the noncitizen were able to show the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d), that alone may not be enough to warrant a favorable exercise of discretion. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (providing that if the noncitizen's underlying criminal offense is grave, a showing of exceptional and extremely unusual hardship might still be insufficient to grant the immigration benefit as a matter of discretion).

II. ANALYSIS

The Applicant does not dispute that she is inadmissible for unlawful presence. She entered the United States without inspection in 2000, and remained, with no lawful status, until 2019. When she applied for an immigrant visa at the U.S. Consulate in Ciudad Juarez, Mexico, DOS determined that she is also inadmissible for a CIMT conviction. Specifically, in [redacted] 2012, the Applicant pled guilty to a felony charge of abuse, neglect, or endangerment of a child in violation of Nevada Revised Statutes 200.508. She was sentenced to 12-32 months imprisonment (suspended), with credit for 28 days' time served, and three years' probation, with various other conditions imposed. The Director determined that this CIMT was a violent or dangerous crime because she kicked a four-year-old child and struck a nine-year-old child in the face. The Director concluded that the Applicant had shown extreme hardship to her U.S. citizen spouse, but that she had not met the higher threshold of exceptional and extremely unusual hardship.

On appeal, the Applicant argues that she is not inadmissible for a CIMT, because in [redacted] 2013 she withdrew her guilty plea and pled no contest to two misdemeanor charges of disorderly conduct in violation of [redacted] Code 12.33.010. She was sentenced to time served. She argues that, because the conviction is now for two misdemeanor charges that are not categorically CIMTs, she is not required to show exceptional and extremely unusual hardship.

Under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether [a noncitizen] has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a

conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the noncitizen remains "convicted" for immigration purposes), reversed on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

In this instance, the record shows that the Applicant filed a "Motion to Withdraw Guilty Plea Agreement and Setting Aside the Judgment of Conviction Based upon Breach of Plea Agreement as Neg[o]tiated and Padilla v. Kentucky and Notice of Motion" on [redacted] 2013.[1] On [redacted], 2013, the Court granted what it called the Applicant's "Motion to Set Aside Guilty Plea Agreement and Judgment of Conviction for Inability to Complete Probation as Negotiated and Related Reasons."

The [redacted] 2013 court order granting the motion does not mention *Padilla*, specify the reason for the Applicant's "inability to complete probation," or otherwise identify any specific reasons for setting aside the guilty plea. The [redacted] 2013 court order states that the Court "reviewed the papers and pleadings on file," but no related "papers" are attached to the copy of the order in the record. The record does not specify whether the Applicant made her [redacted] 2013 motion in writing, or orally in court proceedings. The Applicant has submitted neither a copy of the written motion, if one exists, nor a transcript of any hearing where the Applicant made the motion orally.

Because the Applicant is residing abroad and applying for an immigrant visa, DOS makes the final determination concerning her eligibility for a visa. Thus, as a result of the Consular Officer's finding of inadmissibility, the Applicant requires a waiver for her CIMT.

It is appropriate for us to consider whether or not the CIMT was a violent or dangerous crime. We agree with the Director's determination that the crime in this case was violent or dangerous. The Applicant does not argue otherwise; instead, she asserts that, for procedural reasons, we ought not consider the circumstances underlying her conviction.

Given the violent and dangerous nature of what DOS has deemed a CIMT, the Applicant must establish exceptional and extremely unusual hardship in order to qualify for a discretionary waiver of inadmissibility. Throughout this proceeding, the Applicant has never made such a showing or attempted to do so. Instead, the Applicant has consistently claimed that there was no CIMT conviction and therefore she need not show exceptional and extremely unusual hardship.

Because the Applicant has not shown exceptional and extremely unusual hardship, we cannot grant the waiver that she seeks in this proceeding.

ORDER: The appeal is dismissed.

[1] In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the U.S. Supreme Court held that defense attorneys must inform their clients of the immigration risks of guilty pleas, and that failing to do so constitutes inadequate assistance of counsel. In this respect, we note that the Applicant's Guilty Plea Agreement, filed on [redacted] 2012, includes this clause: "I understand that . . . any criminal conviction will likely result in serious negative immigration consequences including but not limited to . . . removal from the United States . . . [and a]n inability to reenter the United States."