U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 17678980

Date: MAY 9, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Mexico, 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 application as a matter of discretion, indicating that the Applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for accruing unlawful presence in the United States of one year or more before departing and seeking admission within 10 years of his last departure.

On appeal, the Applicant asserts that he qualifies for a waiver. 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. To establish eligibility for a waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act an alien must show, as a preliminary matter that refusal of admission would result in extreme hardship to the alien's U.S. citizen or lawful permanent resident spouse or parent.

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 qualifying relatives 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).

Once the noncitizen demonstrates the requisite extreme hardship, he or she must show that U.S. Citizenship and Immigration Services (USCIS) should favorably exercise its discretion and grant the waiver. Section 212(a)(9)(B)(v) of the Act. The burden is on the foreign national 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). 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 foreign national and his or her 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.*

The burden of proof is on an applicant to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

## II. ANALYSIS

The record indicates that after voluntarily returning to Mexico in 1988, the Applicant reentered the United States without inspection in 1991 and remained until he was removed on [redacted] 2018, thus accruing unlawful presence. The Applicant does not contest that he is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. The remaining issue is whether the Applicant has demonstrated that he merits a waiver as a matter of discretion.

The Director discussed the favorable factors, including the hardships to his spouse, as well as the unfavorable factors in the Applicant's case and noted that his "history of criminal violations are too numerous to ignore and show a pattern of a serial lawbreaker."[1] The Director ultimately concluded that "the unfavorable factors . . . far outweigh the favorable factors." On appeal, the Applicant generally reasserts the harships his wife will face if his waiver is not granted. In addition, he addresses his criminal history, noting that some convictions were vacated and other charges were dismissed, reiterates his remorse, and states that he "has turned his life around."

Upon consideration of the entire record, including the arguments made on appeal, we adopt and affirm the Director's decision with the comments below. *See Matter of P. Singh, Attorney*, 26 I&N Dec. 623 (BIA 2015) (citing *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Chen v. INS*, 87 F.3d 5, 7-8 (1st Cir. 1996) ("[I]f a reviewing tribunal decides that the facts and evaluative judgments prescinding from them have been adequately confronted and correctly resolved by a trial judge or

[1] The Applicant's first conviction occurred in 1995 and his most recent conviction was in 2013.

hearing officer, then the tribunal is free simply to adopt those findings" provided the tribunal's order reflects individualized attention to the case).

We note that, regarding the Applicant's convictions[2] which were vacated, unless the conviction was expunged or vacated because a court found a procedural or substantive defect in the underlying criminal proceeding, the conviction remains for immigration purposes. *See 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), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). *See also Matter of Thomas and Thompson*, 27 I&N Dec. 674 (A.G. 2019) (state court orders that modify, clarify, or otherwise alter a sentence are only considered for immigration purposes if the order is based on procedural or substantive defects in the criminal proceeding).[3]

While we acknowledge the statements made on appeal, including the hardships to his spouse and that the Applicant's last arrest was almost ten years ago, we agree with the Director that the unfavorable factors, such as his lengthy and varied criminal history, outweigh the favorable factors. The appeal, therefore, remains denied as a matter of discretion.

**ORDER:** The appeal is dismissed.

[2] Section 101(a)(48)(A) of the Act provides two definitions of the term "conviction." First, a conviction means a formal judgment of guilt entered by a court. Second, if adjudication of guilt has been withheld, a conviction exists for immigration purposes where a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty.

[3] We also note that any noncitizen convicted of or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802), is inadmissible. Section 212(a)(2)(A) of the Act. The Applicant was convicted in California for felony possession of a controlled substance (Health & Safety Code 11377(a)) on [redacted], 2005. The conviction was vacated under Penal Code section 1203.4. The Applicant was also arrested two additional times for possession of a controlled substance: [redacted] 2006 in [redacted] CA and [redacted] 2006 in [redacted], CA. The final dispositions of these two arrests are unclear. For all these reasons, the Applicant may also be inadmissible for violations related to a controlled substance. *See Pickering*, 23 I&N Dec. at 624. However, because he intends to apply for an immigrant visa, the U.S. Department of State (DOS) will make the final determination concerning admissibility and eligibility.