U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23870066

Date: JAN. 20, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied for an immigrant visa and seeks waiver of two grounds of inadmissibility under sections 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) and 212(d)(11), 8 U.S.C. § 1182(d)(11) of the Immigration and Nationality Act (the Act).

The Director of the Nebraska Service Center denied the application, concluding that no purpose would be served in approving her waiver for smuggling because she would remain inadmissible for unlawful presence. The Director also determined that section 204(l) of the Act did not apply to her unlawful presence waiver because her qualifying relative was not the petitioner in her underlying family-based visa petition. 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.

Any noncitizen who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other foreign national to enter or to try to enter the United States in violation of law is inadmissible. Section 212(a)(6)(E)(i) of the Act. Section 212(a)(6)(E)(iii) of the Act provides for a discretionary waiver of this ground of inadmissibility for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, but only if the individual whom the noncitizen encouraged, induced, assisted, abetted, or aided in entering the United States in violation of law was their spouse, parent, son, or daughter (and no other individual) at the time of the offense. Sections 212(a)(6)(E)(iii) and 212(d)(l l) of the Act.

The Applicant, a Mexican national, is seeking an immigrant visa to enter the United States as a legal permanent resident on the basis of a family-based visa petition filed by her U.S. citizen (USC) daughter. The record reflects that the Applicant's daughter filed Form I-130, Petition for Alien Relative, on her behalf in 2017, and it was approved the same year. Because the Applicant entered the United States without authorization in 1987, prior to leaving the United States to pursue consular

processing, she filed a Form I-601A, provisional unlawful presence waiver of inadmissibility.[1] For purposes of the Form I-601A, she listed her USC father as her qualifying relative and her waiver was approved in December 2018. In April 2021, the Applicant traveled to Mexico to attend her immigrant visa interview at the U.S. Consulate in Cuidad Juarez, Mexico. The Consulate denied her visa application concluding that she was inadmissible under section 212(a)(6)(E) of the Act. When her visa application was denied, the Consulate invalidated her previously approved Form I-601A.

In June 2021, the Applicant filed a waiver conceding her inadmissibility under sections 212(a)(9)(B) and 212(a)(6)(E) of the Act and requesting section 204(l) of the Act relief because her father (and only qualifying relative for purposes of the unlawful presence waiver) is deceased. The Director determined that section 204(l) of the Act did not apply because her father did not file the underlying I-130 petition.[2] Ultimately, the Director concluded that no purpose would be served in approving her waiver for smuggling because she would remain inadmissible for unlawful presence and denied her waiver application.[3] We agree.

On appeal, the Applicant asserts for the first time that she is not subject to the smuggling inadmissibility ground found at section 212(a)(6)(E) of the Act because it is not retroactive and, therefore, her I-601A should be reinstated.

The Applicant contends that she is not inadmissible under section 212(a)(6)(E) of the Act because in 1987, when she entered with her two minor children, she did not bring them with her for monetary gain. However, the current smuggling inadmissibility ground removed the monetary gain element and is broadly interpreted to encompass the actions taken by the Applicant in 1987.[4]

The Applicant cites to caselaw to argue that applying the current smuggling ground of inadmissibility to her 1987 behavior is an impermissible retroactive application of the statute. She asserts that doing so would increase her "liability for past conduct" in accordance with *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1990). In *Landgraf*, the Supreme Court held:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the

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[1] 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.

[2] As the Applicant does not contest the Director's conclusion on appeal, we consider this issue waived. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009).

[3] We incorporate the Director's decision here by reference.

[4] Prior to the Immigration Act of 1990 (IMMACT), the smuggling ground of inadmissibility provided that a person who "knowingly and for gain" encouraged or aided smuggling was inadmissibility. IMMACT removed the "for gain" requirement and recodified the ground at section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E). *See* IMMACT, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

> statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

Thus, the first step in determining if a statute is retroactive is to determine whether Congress intended it to have a retroactive effect. Here, the plain language of section 212(a)(6)(E) shows Congress intended retroactive application because of the inclusion of the language "at any time," which excludes any temporal element in order for the inadmissibility to apply. *See* section 212(a)(6)(E) of the Act, 8 U.S.C. § 1182(a)(6)(E). Furthermore, the Department of State's Foreign Affairs Manual (FAM) makes clear that the "conduct which is proscribed under [section 212(a)(6)(E) of the Act] may have occurred at any time in the past." *See* 9 FAM 302.9-7(B)(2) and 9 FAM 302.9-7(B)(5)(U). Thus, the applicant is inadmissible under section 212(a)(6)(E).

The Applicant also argues that the Consulate erred in invalidating her approved I-601A because she is not inadmissible for smuggling. As discussed above, however, we agree with the Consulate and the Director's conclusion that her 1987 actions meet the definition of smuggling under section 212(a)(6)(E) of the Act and the change in the definition of what constitutes smuggling does not alter this determination. *See Matter of Alarcon*, 20 I. & N. Dec. 557, 562 (BIA 1992) (finding that "[a]n application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time the application is finally considered. When a law is changed . . . the agency must apply the new law.")

For the above reasons, we agree with the Director that no purpose would be served in approving her waiver for smuggling because she would remain inadmissible for unlawful presence. Therefore, her waiver remains denied in the exercise of discretion.

ORDER: The appeal is dismissed.