U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28536746

Date: DEC. 1, 2023

Appeal of Nebraska Service Center Decision

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

The Applicant, a national of Mexico who was removed from the United States, has applied for an immigrant visa abroad. The U.S. Department of State (DOS) determined that the Applicant was inadmissible to the United States for having been convicted of a crime involving moral turpitude (CIMT). She seeks a waiver of inadmissibility under sections 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(h) to obtain status as a lawful permanent resident in the United States.

The Director of the Nebraska Service Center denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (waiver application), concluding that the Applicant does not merit a favorable exercise of discretion under the heightened hardship standard for being convicted of a violent or dangerous crime. On appeal, the Applicant submits additional evidence.

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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Any noncitizen convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a CIMT (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A)(i) of the Act. Noncitizens who are inadmissible on this ground may seek a discretionary waiver of inadmissibility under section 212(h) of the Act.

A foreign national who has been convicted of a crime involving moral turpitude may establish eligibility for a waiver of inadmissibility if, 1) the activities occurred more than 15 years prior to the date of their application for admission, 2) they can establish that their admission would not be contrary to the national welfare, safety, or security of the United States, and 3) they establish that they have been rehabilitated. Section 212(h)(1)(A) of the Act. A foreign national may also be eligible for a

waiver if they establish that they have a qualifying relative who may experience extreme hardship as a result of the foreign national's denial of admission. Section 212(h)(1)(B) of the Act.

In addition to demonstrating the requisite extreme hardship, the applicant must also show that United States Citizenship and Immigration Services (USCIS) should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act.

The regulation at 8 C.F.R. § 212.7(d) generally precludes a favorable exercise of discretion in cases where a noncitizen is inadmissible under section 212(a)(2) of the Act on account of a violent or dangerous crime, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application would result in exceptional and extremely unusual hardship.

In Matter of Monreal, 23 I&N Dec. 56 (BIA 2001), the Board of Immigration Appeals (BIA) first considered the "exceptional and extremely unusual" hardship standard in a precedent decision in the case of a 34-year-old Mexican national who was the father of three United States citizen children. The BIA held that to establish exceptional and extremely unusual hardship under section 240A(b) of the Act, a noncitizen must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the person's departure. The BIA specifically stated, however, that the alien need not show that such hardship would be "unconscionable." Id. at 60. The BIA also noted that, in deciding a cancellation of removal claim, consideration should be given to the age, health, and circumstances of family members in question, including how a lower standard of living or adverse country conditions in the country of return might affect those relatives. Id. at 63.

An application for admission to the United States or for adjustment of status 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. Matter of Alarcon, 20 I&N Dec. 557, 562 (BIA 1992).

II. ANALYSIS

The Applicant, a native and citizen of Mexico, filed the instant waiver application in August 2021, as she was informed that she was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for a CIMT under Texas Penal Code Section 22.04 for Negligent Injury to a Child for which she was sentenced to a two-year suspended imprisonment. After entering a plea of guilty to the charge, the Court found the evidence sufficient to warrant the adjudication of guilt deferred until after she completed two years of unsupervised community supervision. The record reflects that the Applicant was discharged satisfactorily from community supervision and the criminal case was dismissed without the Applicant being adjudicated guilty of any offense.

After review of the evidence provided with the waiver application, and in response to a request for evidence (RFE), the Director denied the waiver application. The Director's decision concluded that the record fell short of establishing rehabilitation under section 212(h)(1)(A) of the Act. However, the Director found that the Applicant met the requirement for a waiver under section 212(h)(1)(B) of the Act of showing extreme hardship on her qualifying relatives – her husband and 11-year-old son. Next, the Director found that favorable discretion would not be exercised because the Applicant did not

demonstrate that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship pursuant to 8 C.F.R. § 212.7(d).

We note that exceptional and extremely unusual hardship pursuant to 8 C.F.R. § 212.7(d) encompasses hardship on persons who are not qualifying relatives for the waiver, including the hardship on the Applicant herself, extended family and community.

In considering exceptional and extremely unusual hardship pursuant to 8 C.F.R. § 212.7(d), the Director stated:

> USCIS has carefully considered the evidence presented. The submitted psychological evaluations establish that your 2019 visa refusal is resulting in emotional/mental hardship to [your husband and son]. The submitted evidence does not contain financial information that documents your financial situation from prior to your removal and the present time. USCIS does not question that maintaining two households is resulting in extreme financial hardship. While you have presented evidence that denial of your admission to the United States is resulting in extreme hardship to you and your family, you have failed to demonstrate that is resulting in exceptional and extremely unusual hardship. Exceptional and extremely unusual hardship is hardship that is 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). Having weighed all the evidence, it cannot be concluded that the hardships asserted, individually and in the aggregate, rise to the level of exceptional and extremely unusual as to meet the heightened standard required under 8 C.F.R. § 212.7(d).

On appeal, the Applicant submits a monthly budget of her and her spouse's income and expenses, updated statements from the Applicant, her husband and son, nine letters of support from friends and family attesting to the Applicant's rehabilitation and the hardship suffered by the Applicant's family, updated April 2023 psychological reports for the Applicant, her spouse and child, copies of bills, and Spanish-language documents without English translations. The budget claims that the Applicant's monthly income (in Mexico) is $389.00 and her spouse's monthly income is $1200.00, and it suggests that their expenses exceed their income. The psychological report indicates that the Applicant suffers from generalized anxiety disorder, her spouse suffers from depression disorder, and their son suffers from symptoms of separation anxiety.

In assessing whether the aggregate hardship rises to the level of exceptional and extremely unusual as to meet the heightened standard required under 8 C.F.R. § 212.7(d), the record does not show that the Director considered evidence of hardship on the Applicant, including a psychological report and personal statement.

We note that the Applicant claimed childcare needs caused her spouse to take a lower paying job with fewer hours, thus reducing his income. This claim is consistent with submitted tax returns indicating that her husband's income fell from $36,110 in 2020 to $13,275 in 2021 and consistent with a letter from the Applicant's husband provided with the appeal which states:

> I was working very well as a truck driver my situation economically was very good (sic) Now I had to leave that job to be able to take care of my son we are living a very difficult economic situation due to the schedule of school I can't have a stable job and it's hard for me it's hard to help pay bills in [redacted] and help my wife in Mexico I think my parents for helping me take care of my son sometimes because they are older than 80.

In response to the Request for Evidence, the Applicant submitted letters from her son's then-current teacher and teacher from the prior year, both describing the toll that separation was taking on the Applicant's son in terms of the son being distracted in class and getting distracted easily. Such evidence is material, and while the Director's conclusion indicates consideration of hardship to the Applicant's son, the decision does not clearly show the analysis that led to that conclusion.

When considering the new evidence and above observations, if the Director finds that the aggregate psychological and financial hardship meets the standard of exceptional and extremely unusual hardship pursuant to 8 C.F.R. § 212.7(d), then the Director should proceed to assess the favorable and unfavorable discretionary factors. All factors must be considered in making a discretionary determination. See 1 USCIS Policy Manual E.8, https://www.uscis.gov/policymanual ("The act of exercising discretion involves weighing both positive and negative factors and considering the totality of the circumstances in the case before making a decision"). The discretionary factors, including but not limited to, the severity and type of hardship on the Applicant's spouse and child, family ties, length of residence in the United States, payment of taxes, the fact that the Applicant made lawful entries into the United States and complied with the removal order of the immigration court, evidence of respect for the law, rehabilitation and good moral character, compliance with the criminal court's supervision order, and evidence that the criminal court ultimately dismissed the criminal complaint without an adjudication of guilt in light of the equities. Although the Applicant's criminal conviction of more than 15 years ago cannot be condoned, the Director must consider the totality of the circumstances in deciding whether the positive factors in this case outweigh the negative factors.

III. CONCLUSION

The Director has not had the opportunity to consider the new evidence submitted on appeal, and the record does not show that the Director considered the totality of hardship pursuant to 8 C.F.R. § 212.7(d). As such, we will remand the matter for further consideration of the record, including claims and documentation submitted on appeal, and entry of a new decision.

ORDER: The decision of the Director of the Nebraska Service Center is withdrawn and remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.