U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27640553

Date: SEPT. 12, 2023

Appeal of Nebraska Service Center Decision

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

The Applicant, a national of Peru 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 multiple crimes involving moral turpitude (CIMT), for fraud or misrepresentation, and for prior unlawful presence.[1] He is seeking related waivers of inadmissibility under sections 212(h), 212(i), and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(h), (i), and (a)(9)(B)(v).

The Director of the Nebraska Service Center denied the Form I-601, concluding that the Applicant was inadmissible on the above grounds, and that he did not establish eligibility for a waiver under section 212(h) of the Act as a matter of law or discretion. On appeal, the Applicant submits a brief and reasserts eligibility.

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.

Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a waiver is available if admission to the United States would not be contrary to the national

[1] DOS also found that the Applicant was inadmissible under section 212(a)(9)(A)(ii) of the Act for having been previously ordered removed. The Applicant filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, which the Director denied as a matter of discretion in a separate decision.

welfare, safety, or security of the United States and the noncitizen has been rehabilitated. Section 212(h)(1)(A) of the Act. A waiver is also available if denial of admission would result in extreme hardship to the noncitizen's U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act.

In addition, 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. Furthermore, 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. U.S. Citizenship and Immigration Services (USCIS) may waive both inadmissibility grounds if refusal of admission would result in extreme hardship to the noncitizen's lawful permanent resident spouse or parent. Sections 212(i) and 212(a)(9)(B)(v) of the Act.

Once the noncitizen establishes statutory eligibility for a waiver, they must also demonstrate that USCIS should favorably exercise its discretion and grant the waiver.

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.

II. ANALYSIS

The Applicant does not dispute the DOS inadmissibility findings.[2] The sole issue on appeal is whether he has established that he is eligible for the requested waivers of inadmissibility and merits a favorable exercise of USCIS discretion.

The record contains the Applicant's testimony that he was admitted to the United States in 2001 under an assumed identity with a fraudulently obtained passport and U.S. visa, and that he thereafter used this false identity for various purposes while residing in the United States unlawfully until he was removed in 2018. The Applicant also has an extensive criminal history in the United States, which includes:

1. A 2007 conviction of family violence battery in violation of Georgia Code Annotated (Ga. Code Ann.) § 16-5-23.1(f), for which he was sentenced, in part, to 12 months of probation.
2. A 2007 conviction for giving false information to law enforcement officer in violation of Ga. Code Ann. § 16-10-25, for which he was sentenced to 12 months of probation.
3. A 2008 conviction for theft by shoplifting in violation of Ga. Code Ann. § 16-8-14, for which he was sentenced, in part, to 12 months of confinement in a county jail, but allowed to serve this sentence on probation.

[2] Because the Applicant is residing outside the United States, DOS makes the final determination concerning his inadmissibility and eligibility for a visa.

4. A 2008 conviction for failure to appear for trial in violation of Ga. Code Ann. § 17-6-12, for which he was sentenced to eight days of confinement.
5. A 2012 conviction for simple battery in violation of Ga. Code Ann. § 16-5-23(a)(1) (reduced from family violence battery), for which he was sentenced, in part, to 12 months of probation.
6. A 2018 conviction for disorderly conduct in violation of Ga. Code Ann. § 16-11-39, for which he was sentenced to 60 days in jail.

In [redacted] 2018 the Applicant was removed from the United States to his native Peru, and subsequently applied for an immigrant visa as a spouse of a U.S. citizen. After DOS notified the Applicant of his inadmissibility on the grounds stated above and ineligibility for the immigrant visa, he filed the instant waiver request.

With his Form I-601 and in response to the Director's request for evidence (RFE) the Applicant submitted divorce, marriage, and birth certificates; affidavits and family photographs; mental health evaluations for his spouse and stepdaughter; school and financial records; information about conditions in Peru; and letters attesting to his character, work ethic, and devotion to his family.

In denying the Applicant's Form I-601 the Director determined that the offense of family violence battery of which the Applicant was convicted in 2007 was not only a CIMT, but also a violent or dangerous crime subject to the heightened discretionary standard set forth in the regulation at 8 C.F.R. § 212.7(d). The Director further found that the Applicant was ineligible for a waiver under section 212(h)(1)(A) of the Act (rehabilitation waiver), because the activities for which he was inadmissible occurred less than 15 years before his application for the immigrant visa and he did not show rehabilitation, or a waiver under section 212(h)(1)(B) of the Act, because he did not establish the requisite extreme hardship to his qualifying relatives. Lastly, the Director concluded that a grant of a waiver under section 212(h) of the Act would not otherwise be warranted as a matter of discretion, due to the Applicant's conviction for a violent or dangerous crime, his inadmissibility on other grounds, and lack of evidence to establish extreme hardship to his qualifying relatives.

On appeal, the Applicant asserts that the Director improperly disregarded evidence that his spouse and stepdaughter are experiencing anxiety and depression as a result of their prolonged separation from him, and the negative impact his absence from the United States has on his stepson's behavior. The Applicant also indicates that he is eligible for a rehabilitation waiver under section 212(h)(1)(A) of the Act because all his CIMT convictions occurred more than 15 years ago, and the Director's determination to the contrary was in error.

As an initial matter, we agree that the Applicant is eligible to seek a rehabilitation waiver. According to the plain language of section 212(h)(1)(A) to qualify for such a waiver an applicant must show, as a threshold requirement, that "the *activities* for which [he] is inadmissible occurred more than 15 years before [his] application for a visa, admission or adjustment of status" (emphasis added). 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). Here, the record shows that the arrests and, thus, *activities* underlying the Applicant's convictions for family violence battery, giving false information to law enforcement officer, and theft by shoplifting, occurred in [redacted] 2006 and [redacted] 2008—more than 15 years ago. Because over 15 years have now passed since the criminal

activities for which DOS found the Applicant inadmissible under section 212(a)(2)(A) of the Act, he is eligible to seek a rehabilitation waiver under section 212(h)(1)(A) of the Act, which does not require him to establish extreme hardship to his qualifying relatives; rather, the Applicant must show that he has been rehabilitated and that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States. Although the Director determined that the Applicant did not establish rehabilitation, the Director did not explain the specific reasons for this determination.[3] Furthermore, in evaluating whether the Applicant demonstrated extreme hardship to qualify, in the alternative, for a waiver under 212(h)(1)(B) of the Act, the Director listed some of the evidence the Applicant provided, but did not explain why it was insufficient to show that the claimed emotional, medical, and financial hardships to the Applicant's spouse and children would be extreme.

Lastly, the Director's decision indicates that the adverse discretionary determination was based, in large part, on a finding that the Applicant was convicted of a violent or dangerous crime, which requires him to meet the heightened hardship and discretionary standards described in the regulation at 8 C.F.R. § 212.7(d). However, the Director did not explain the basis for this finding in the denial notice or in the RFE, and did not give the Applicant an opportunity to either rebut it or to submit evidence that he meets the relevant conditions set forth in the regulation before denying his waiver request.

Because of these deficiencies, we will return the matter to the Director to reevaluate the evidence and, if the new decision is adverse, to explain the specific reasons why it is not sufficient to establish the Applicant's eligibility for the waivers he requested.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[3] *See* 8 C.F.R. § 103.3(a) (requiring USCIS, in relevant part, to explain in writing the specific reasons for denial of a benefit request).