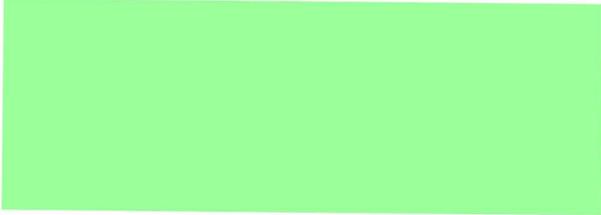


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)



U.S. Citizenship
and Immigration
Services



Date: **JUL 14 2014** Office: VERMONT SERVICE CENTER FILE:

IN RE: PETITIONER:

PETITION: Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (the director), denied the U nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will remain denied.

The petitioner seeks nonimmigrant classification under section 101(a)(15)(U) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(U), as an alien victim of certain qualifying criminal activity.

Applicable Law

Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918, Petition for U Nonimmigrant Status (Form I-918 U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion.

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent part:

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

(i) In General.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

* * *

is inadmissible.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if –

* * *

(II) the maximum penalty possible for the crime for which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

* * *

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

- (i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

* * *

(9) Aliens Previously Removed

(A) Certain Aliens Previously Removed

* * *

- (ii) Other Aliens.-Any alien not described in clause (i) who-

- (I) has been ordered removed under section 240 or any other provision of law, or

- (II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

* * *

(B) Nonimmigrants.-

- (i) In General.- Any alien (other than an alien lawfully admitted for permanent residence) who-

* * *

- (I) 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 such alien's departure or removal from the United States, is inadmissible.

* * *

(C) Aliens Unlawfully Present After Previous Immigration Violations

- (i) In General.-Any alien who -

- (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law,

and who enters or attempts to reenter the United States without being admitted is inadmissible.

The regulation at 8 C.F.R. § 214.14(c)(4), prescribes the evidentiary standards and burden of proof in these proceedings:

The burden shall be on the petitioner to demonstrate eligibility for U-1 nonimmigrant status. The petitioner may submit any credible evidence relating to his or her Form I-918 for consideration by USCIS. USCIS shall conduct a de novo review of all evidence submitted in connection with Form I-918 and may investigate any aspect of the petition. Evidence previously submitted for this or other immigration benefit or relief may be used by USCIS in evaluating the eligibility of a petitioner for U-1 nonimmigrant status. However, USCIS will not be bound by its previous factual determinations. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including Form I-918, Supplement B, "U Nonimmigrant Status Certification."

Facts and Procedural History

The petitioner is a native and citizen of Mexico who claims to have initially entered the United States in 1994 without admission, inspection or parole. The petitioner claims to have departed and reentered the United States without admission, inspection or parole on several occasions in 1997, 1998, 2001, and 2004 or 2005. The petitioner filed the instant Form I-918 U petition on February 27, 2012. On the same day, the petitioner filed an Application for Advance Permission to Enter as Nonimmigrant (Form I-192). On March 19, 2013, the director issued a Request for Evidence (RFE) regarding the petitioner's grounds of inadmissibility. On November 14, 2013, the director denied the Form I-192 finding that the petitioner was inadmissible under sections 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude), 212(a)(6)(A)(i) (present without admission or parole), 212(a)(9)(A)(ii) (aliens previously removed), 212(a)(9)(B)(i)(II) (unlawful presence), and 212(a)(9)(C) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. The director denied the petitioner's Form I-918 U petition on the same day because she was inadmissible to the United States and her Form I-192 waiver of inadmissibility was denied. The petitioner, through counsel, timely appealed the denial of the Form I-918 U petition.

On appeal, counsel does not dispute that the petitioner is inadmissible to the United States but claims that the petitioner has been rehabilitated and must remain in the United States to maintain family unity. In support of her claims, counsel submits a new Form I-192¹, additional evidence, and documents already included in the record.

¹ This second Form I-192, receipt number [REDACTED] filed on January 10, 2014, has not been adjudicated by the Vermont Service Center.

Analysis

All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i). For aliens seeking U nonimmigrant status who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv) require the filing of a Form I-192 in conjunction with a Form I-918 U petition in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As we do not have jurisdiction to review whether the director properly denied the Form I-192, we don’t consider whether approval of the Form I-192 should have been granted but whether the director was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

A full review of the record supports the director’s determination that the petitioner is inadmissible under section 212(a)(6)(A)(i) (present without admission or parole) of the Act. The petitioner does not dispute that she is present in the United States without admission or parole. As noted above, the petitioner has multiple departures from the United States and reentries without inspection. As such, the petitioner is inadmissible under section 212(a)(6)(A)(i) of the Act.

In addition, the director found the petitioner inadmissible under sections 212(a)(9)(A)(ii) (aliens previously removed), 212(a)(9)(B)(i)(II) (unlawful presence), and 212(a)(9)(C)(i)(I) (unlawfully present in the United States for one year or more and reentering the United States without being admitted) of the Act. Under section 212(a)(9)(B)(ii) of the Act, an “alien is deemed to be unlawfully present in the United States if the alien is present . . . without being admitted or paroled.” However, “[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence” See section 212(a)(9)(B)(iii) of the Act. The petitioner was born on August 1, 1994, and she initially entered the United States in 1994 without admission, inspection or parole. She also departed the United States on unknown dates and reentered without admission, inspection or parole in 1997, 1998, 2001, and 2004 or 2005, before she was 18 years of age. Therefore, the petitioner did not accrue unlawful presence before her last entry without inspection in 2004 or 2005, and there is no evidence in the record that she has departed the United States since her last entry. In addition, the record does not establish that the petitioner has been removed from the United States. Therefore, the petitioner is not inadmissible under sections 212(a)(9)(A)(ii), 212(a)(9)(B)(i)(II), and 212(a)(9)(C)(i)(I) of the Act. These portions of the director’s decision are withdrawn.

The director also found the petitioner inadmissible under section 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude) of the Act. The record shows that on April 23, 2013, the petitioner was convicted of intimidating a witness and victim, in violation of section 136.1(b)(1) of the California Penal Code (CPC)², for which she was sentenced to 103 days incarceration and three years of probation. The

² Section 136.1(b)(1) of the California Penal Code provides that “every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is a witness to a crime from doing any of the following is guilty of a public

maximum term of imprisonment for a violation of CPC § 136.1(b)(1) is not to exceed one year, and the petitioner was sentenced to less than six months incarceration. Therefore, even if the petitioner's conviction is for a crime involving moral turpitude, her conviction meets the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act, and the inadmissibility ground at section 212(a)(2)(A)(i)(I) of the Act does not apply to her. Accordingly, this portion of the director's decision is also withdrawn.

On appeal, counsel does not contest the petitioner's inadmissibility for her entry without inspection but focuses her assertions on why the director should have favorably exercised his discretion and approved her Form I-192 waiver request. The director denied the petitioner's application for a waiver of inadmissibility and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 U petition. 8 C.F.R. § 212.17(b)(3).

Conclusion

The petitioner has not established that she is admissible to the United States under section 212(a)(6)(A)(i) (present without admission or parole) of the Act or that her ground of inadmissibility has been waived. She is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(i) of the Act and the appeal must be dismissed. Nevertheless, the second Form I-192 filed in January 2014 remains pending and the director must reconsider the petitioner's inadmissibility anew when determining whether to grant the waiver application.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.