U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-C-E-R-

DATE: AUG. 24, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-918, PETITION FOR U NONIMMIGRANT STATUS

The Petitioner seeks "U-1" nonimmigrant classification as a victim of qualifying criminal activity. *See* Immigration and Nationality Act (the Act) sections 101(a)(15)(U) and 214(p), 8 U.S.C. §§ 1101(a)(15)(U) and 1184(p). The U-1 classification affords nonimmigrant status to victims of certain crimes who assist authorities investigating or prosecuting the criminal activity.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner was inadmissible to the United States and that a favorable exercise of discretion was not warranted in this case.

The matter is now before us on appeal. On appeal, the Petitioner submits a brief. The Petitioner claims that some of the grounds of inadmissibility cited by the Director do not apply to him and that his application for a waiver deserves a favorable exercise of discretion.

Upon *de novo* review, we will dismiss the appeal.

I. 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 (U petition), and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. The Petitioner bears the burden of establishing that he is admissible to the United States or that any grounds of inadmissibility have been waived. *See* 8 C.F.R § 214.1(a)(3)(i).

For petitioners 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, Advance Permission to Enter as a Nonimmigrant (U waiver), in conjunction with a 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 U waiver, we do not consider whether approval of the U waiver should have been granted. The only issue that may come before us is whether the director

was correct in finding the petitioner inadmissible to the United States and, therefore, requiring an approved U waiver pursuant to 8 C.F.R. §§ 212.17, 214.14(c)(2)(iv).

Section 212(d)(3)(A) of the Act governs the U waiver and states:

> Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), may, after approval by the Attorney General of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General, or (ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General. The Attorney General shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph.

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

> (1) Health-related grounds.-
>
> (A) In general.-Any alien-
>
> . . . .
>
> (iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict, is inadmissible.
>
> (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 . . .

(II) a violation of. . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . .

. . . .

is inadmissible.

. . . .

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)). . .

. . . .

is inadmissible.

. . . .

(7) Documentation requirements.-

(B) Nonimmigrants.-

(i) In general.-Any nonimmigrant who-

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period . . . is inadmissible.

. . . .

The burden of proof is on a petitioner to demonstrate eligibility by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). A petitioner may submit any evidence for us to consider in our *de novo* review; however, we determine, in our sole discretion, the credibility of and the weight to give that evidence. *See* section 214(p)(4) of the Act; 8 C.F.R. § 214.14(c)(4).

II. ANALYSIS

In his decision denying the U waiver, the Director found that the Petitioner was inadmissible under sections 212(a)(1)(A)(iv) (drug abuser or addict), 212(a)(2)(A)(i)(I) (conviction for a crime involving moral turpitude), 212(a)(2)(A)(i)(II) (controlled substance violation), 212(a)(2)(C) (controlled substance traffickers), and 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport) of the Act and that the Petitioner had not demonstrated that he warranted a favorable exercise of discretion. The Director did not state the basis for finding the Petitioner inadmissible under sections 212(a)(1)(A)(iv) and (2)(C) of the Act and the record does not support that determination. There is insufficient evidence to support that the Petitioner is a controlled substance trafficker or a drug abuser.[1] Therefore, the Petitioner is not inadmissible under sections 212(a)(1)(A)(iv) and (2)(C) of the Act. This portion of the Director's decision is withdrawn.

The Petitioner has the following criminal record:

- Juvenile offense: assault on a public servant; sentenced to 18 months of probation;
- Juvenile offense: assault with bodily injury on a family or household member; sentenced to 12 months of probation;
- Juvenile offense: four separate violations of probation;
- On [redacted] 2012, the Petitioner pled no contest to evading arrest or detention under Texas Penal Code section 38.04(b); he was sentenced to nine months of probation, 60 days incarceration, and was fined $1000;
- On [redacted] 2012, the Petitioner pled no contest to possession of cocaine, under 1 gram, in violation of Texas Penal Code section 481.115(B); he was sentenced to three years of probation and fined $1500.

On appeal, the Petitioner asserts that "several" of the cited grounds of inadmissibility do not apply to him, but in his brief he only discusses how his arrest for evading arrest or detention is not a crime involving moral turpitude (CIMT). The Petitioner claims that because his conviction did not involve force or fraud, it is not a CIMT. However, the Board of Immigration Appeals has held that "[a]ffirmative acts to conceal criminal activity and impede law enforcement have been found to be crimes involving moral turpitude." *Matter of Robles*, 24 I&N Dec. 22, 25-26 (BIA 2006). Furthermore, the Fifth Circuit, in which this case arises, has held that a conviction under section 38.04(b) of the Texas Penal Code is a crime involving moral turpitude. *See Pulido-Alatorre v. Holder*, 381 F. App'x 355, 358 (5th Cir. 2010). The Petitioner has not shown that he has not been convicted of a crime involving moral turpitude.

The Petitioner further contends that his juvenile convictions do not qualify as convictions for immigration purposes and are not grounds of inadmissibility. The Petitioner is correct that juvenile

[1] Further, a civil surgeon must make a determination, in accordance with regulations prescribed by the Secretary of Health and Human Services, that a person is a drug abuser or addict before we will find him inadmissible under section 212(a)(1)(A)(iv) of the Act. There is no such determination in the record.

convictions would not make the Petitioner inadmissible. In *Matter of Miguel Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000), the Board of Immigration Appeals stated, "We have consistently held that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." *Devison-Charles* at 1365; *see also Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). However, although an act of juvenile delinquency is not a criminal conviction on which to base removal or bar relief from removal, a juvenile offense can be considered in reviewing a request for a discretionary benefit. *See Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006); 8 C.F.R. § 212.17(b)(1). Further, the Director may consider any negative factors that are present in the Petitioner's case, even if they do not reach the level of a conviction or a separate ground of inadmissibility, to determine whether a waiver would be in the public or national interest. *See* section 212(d)(14) of the Act.

On appeal, the Petitioner does not dispute that he is inadmissible to the United States on the other stated grounds, including sections 212(a)(2)(A)(i)(II) (controlled substance violation) and 212(a)(7)(B)(i)(I) (nonimmigrant without a valid passport) of the Act, and asserts that he merits a favorable exercise of discretion such that his U waiver and U petition should be granted. However, we have affirmed that the Director correctly concluded that the Petitioner is inadmissible, he denied the Petitioner's U waiver, and we have no jurisdiction to review the discretionary denial of a U waiver submitted in connection with a U petition. *See* 8 C.F.R. § 212.17(b)(3).

III. CONCLUSION

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.

Cite as *Matter of O-C-E-R-*, ID# 17766 (AAO Aug. 24, 2016)