U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-O-A-

DATE: NOV. 18, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF INADMISSIBILITY

The Applicant, a native and citizen of Colombia, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the Applicant had established extreme hardship to a qualifying relative. Nevertheless, the Director noted that as the Applicant had been convicted of a violent or dangerous crime, she had not established exceptional and extremely unusual hardship to merit favorable discretion. The Director denied the Applicant's Form I-601 accordingly.

On appeal, the Applicant asserts that she was not convicted of a violent or dangerous crime. As such, the Applicant maintains that the heightened standard of exceptional and extremely unusual hardship does not apply and thus, the waiver should be granted as she was found to have met the extreme hardship standard. In support of the appeal, the Applicant submits a statement and criminal records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, in relevant part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (the Board) stated in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules

> of morality and the duties owed between man and man, either one's fellow man or society in general....
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

The record reflects that the Applicant was convicted on [redacted] 2011, of Intentional Personal Injury in violation of the Colombian Criminal Code, Book II, Title I, Chapter III, Article 111. 112.1st, by the Criminal Municipal Court Nineteen. She received a suspended sentence of one year, two years of probation, and monetary penalties.

Court documents in the record establish that the court found that the Applicant engaged in a "willful act" and that personal injury entails "any damage in the body or health of an individual, caused internally or externally by an attacker who uses physical, chemical, biological and psychological elements, without causing the death of the injured..."

In regard to the crime, the Applicant previously asserted that she was pushed without provocation and insulted; she slapped the individual in the face; her actions were in self-defense; and she is thus innocent of the charges. Collateral attacks upon an applicant's conviction "do not operate to negate the finality of [the] conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). We "cannot go behind the judicial record to determine the guilt or innocence of the alien." *Id.* (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980).

On appeal, the Applicant states that she does not contest that this conviction can be qualified as a crime involving moral turpitude. As the Applicant does not contest her inadmissibility and the record does not show the determination that this is a crime involving moral turpitude to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

Section 212(h) of the Act provides, in relevant part:

> The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –
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> (1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that –
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> (i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and

(2) the [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

The record reflects that the Director found that the Applicant had established extreme hardship to a qualifying relative. This finding does not appear to be in error and we will thus not disturb this finding on appeal. As such, the Applicant has met the extreme hardship requirement of section 212(h)(1)(B) of the Act.

We will now address whether the Applicant is eligible for a favorable exercise of discretion under section 212(h)(2) of the Act. A favorable exercise of discretion is limited in the case of an Applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) provides:

> The [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates 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. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and we are aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of

violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Secretary declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). Black's Law Dictionary, Seventh Edition (1999), defines violent as "of, relating to, or characterized by strong physical force" and dangerous as "likely to cause serious bodily harm." Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

On appeal, counsel asserts that the Applicant is not subject to the heightened hardship standard in 8 C.F.R. § 212.7(d). Counsel maintains that there is no comparable crime in the federal system or in the Florida Statutes; the conduct of the Applicant's crime would have resulted in a charge of simple battery in Florida; the Applicant slapped the victim twice; and the victim's injuries were without permanent consequences. In regard to the claim that the Applicant slapped the victim twice and the crime was similar to simple battery, we again note that collateral attacks upon an applicant's conviction "do not operate to negate the finality of [the] conviction unless and until the conviction is overturned." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). We "cannot go behind the judicial record to determine the guilt or innocence of the alien." *Id.* (citing *Matter of Fortis*, 14 I&N Dec. 576, 577 (BIA 1974); *see also Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980). Furthermore, we note that without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We find that intentional personal injury, which court records establish involves "any damage in the body or health of an individual, caused internally or externally by an attacker who uses physical, chemical, biological and psychological elements, without causing the death of the injured..." is a violent and dangerous crime within the meaning of 8 C.F.R. § 212.7(d), and the heightened discretionary standard of that regulation applies in this case. In application proceedings, it is the

Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. The Applicant must thus establish that "extraordinary circumstances" warrant approval of the waiver. 8 C.F.R. § 212.7(d). Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the Applicant's admission would result in exceptional and extremely unusual hardship. Id. Finding no evidence of foreign policy, national security, or other extraordinary equities in this case, we will consider whether the applicant has "clearly demonstrate[d] that the denial of . . . admission as an immigrant would result in exceptional and extremely unusual hardship." *Id.*

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board determined that exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." However, the applicant need not show that hardship would be unconscionable. *Id.* at 60-61. The Board stated that in assessing exceptional and extremely unusual hardship, it would be useful to consider the factors considered in determining extreme hardship. *Id.* at 63. Those factors include, but are not limited to, a qualifying relative's family ties in the United States and in the country to which he or she would relocate; the conditions in the country in the country of relocation; the financial consequences of departing the United States; and significant medical conditions, especially where appropriate health care services would be unavailable in the country of relocation. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999); *see also Matter of Anderson*, 16 I&N Dec. 596, 597-98 (BIA 1978).

In *Monreal-Aguinaga*, the Board provided additional examples of the hardship factors it deemed relevant for meeting the higher standard of exceptional and extremely unusual hardship:

> [T]he ages, health, and circumstances of qualifying lawful permanent resident and United States citizen relatives. For example, an applicant who has elderly parents in this country who are solely dependent upon him for support might well have a strong case. Another strong applicant might have a qualifying child with very serious health issues, or compelling special needs in school. A lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship. As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship.

23 I&N Dec. at 63-64. The Board has also noted that "the relative level of hardship a person might suffer cannot be considered entirely in a vacuum. It must necessarily be assessed, at least in part, by comparing it to the hardship others might face." *Matter of Andazola-Rivas*, 23 I&N Dec. 319, 323 (BIA 2002). Even where an Immigration Judge has found that a respondent's children "would suffer hardship of an emotional, academic and financial nature," and would "face complete upheaval in their lives and hardship that could conceivably ruin their lives," *id.* at 321, the Board has held that such hardships "are simply not substantially different from those that would normally be expected upon removal to a less developed country." *Id.* at 324.

However, in *Matter of Gonzalez Recinas*, the Board clarified that "the hardship standard is not so restrictive that only a handful of applicants, such as those who have a qualifying relative with a serious medical condition, will qualify for relief." 23 I&N Dec. 467, 470 (BIA 2002). The Board found that the hardship factors presented by the respondent—including her "heavy financial and familial burden . . . the lack of support from her children's father, [her U.S.] citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of [her] immediate family, and the concomitant lack of family in Mexico"—cumulatively amounted to exceptional and extremely unusual hardship to her qualifying relatives. *Id.* at 472. The Board emphasized that the case was "on the outer limit of the narrow spectrum of cases in which the exceptional and extremely unusual hardship standard will be met." *Id.* at 470.

An analysis under *Monreal-Aguinaga* and *Andazola-Rivas* is appropriate in this case. *See Gonzalez Recinas*, 23 I&N Dec. at 469 ("While any hardship case ultimately succeeds or fails on its own merits and on the particular facts presented, *Matter of Andazola* and *Matter of Monreal* are the starting points for any analysis of exceptional and extremely unusual hardship.").

First, we will address hardship to the Applicant's spouse upon relocation to Colombia. The Applicant states that her spouse operates a hair salon and he will have to sell his business and start fresh in Colombia. She maintains that competition is stiff in Colombia for this type of business and if he cannot open a business his prospects for employment are almost non-existent as hairdressers are almost exclusively females. The Applicant further references that her spouse will have to bring his son with him to Colombia and his son's educational opportunities will be very limited as he is mainly English-speaking and the price of tuition for an English-speaking school would be beyond his means.

The Applicant further contends that his spouse's mother lives with him and he is her emotional, financial, and social support. She contends that her spouse's mother has multiple ailments and separating from his mother will be traumatizing to her spouse and alternatively, her husband's mother may not have access to comparable medical care in Colombia. The Applicant's spouse's mother's physician states that the Applicant's son is her sole caregiver, he cares for her at home, and he accompanies her for medical appointments. The physician lists her extensive medical history, including 27 types of medical issues, and states that many of her medical conditions require continual medical follow-up and care.

The Applicant also references that Colombia is a Catholic country and her spouse is a religious Jew and he will thus have a difficult time finding a place of worship. She also maintains that her spouse will experience hardship as a result of long-term separation from his synagogue where he has been a member for a long time and where he has built a close circle of friends. Further, the Applicant contends that her spouse may become the target of ridicule and stigma in Colombia. The record includes a letter from the Applicant's spouse's rabbi who states that he is an active member of the religious institution.

The record reflects that the Applicant's spouse may experience hardship due to leaving his business in the United States. However the record does not include evidence of country conditions in

Colombia related to financial hardship he would experience there. The record reflects that his son is now 22 years old and it is not clear what educational opportunities he would lose and how this would affect the Applicant's spouse. In regard to the Applicant's spouse's mother, the letter provided lists her medical history but does not specify her current conditions and the short and long-term treatment plan. However, we acknowledge hardship as she has "many medical conditions" and he cares for her.

In addition, the record does not include supporting documentary evidence that the Applicant's spouse would experience hardship due to his religion. We find that the record lacks sufficient documentary evidence of emotional, financial, medical, or other types of hardship that, in their totality, establish that the Applicant's spouse would experience exceptional and extremely unusual hardship upon relocation to Colombia.

Describing the hardship the Applicant's spouse would experience in the United States without the Applicant, the Applicant states that her spouse has had a difficult time without her; he cannot travel frequently due to his job; and it is expensive to travel to Colombia. A friend of the Applicant's spouse states that he has been very affected by the long-distance relationship with the Applicant. Another friend states that the Applicant's spouse is very depressed, and he is being affected emotionally, physically, and economically. Another friend states that the Applicant's spouse is the primary caregiver for his mother and his son.

The record reflects that the Applicant's spouse would experience emotional hardship if he remained in the United States. However, when all of the alleged hardship factors are considered in the aggregate, we find that the hardship endured by the Applicant's spouse as a result of separation from the applicant does not meet the "exceptional and extremely unusual hardship" standard set forth in 8 C.F.R. § 212.7(d).

The documentation in the record does not establish the existence of exceptional and extremely unusual hardship to a qualifying relative. As such, the Applicant is not eligible for a favorable exercise of discretion under section 212(h)(2) of the Act.

In application proceedings, it is the Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of M-O-A-*, ID# 14225 (AAO Nov. 18, 2015)