U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-Z-

DATE: FEB. 10, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Italy, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h); and § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v). The Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

In a decision dated May 19, 2015, the Director noted that the Applicant was inadmissible for unlawful presence in the United States for more than one year, and for committing crimes involving moral turpitude. The Director further noted that the Applicant was convicted of violent or dangerous crimes and thus did not merit a favorable exercise of discretion. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the Applicant submits a memorandum, a statement from the Applicant's spouse, a statement from his mother-in-law, a mental health evaluation from a licensed professional counselor on behalf of the Applicant's spouse, evidence establishing the birth and U.S, citizenship of the Applicant's two children, evidence of antidepressant medication prescribed to the Applicant's spouse in May 2015, and information on British citizenship. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9) of the Act states, in pertinent part:

> (B) ALIENS UNLAWFULLY PRESENT.-
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> > (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > . . .
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> > (II) 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.

> (ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.
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> . . .
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> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

In this case, the record reflects that in August 1984, the Applicant entered the United States as a nonimmigrant visitor and remained beyond the period of authorized stay. The Applicant accrued more than one year of unlawful presence from 1999, when he turned 18 years old, until he was removed from the United States in 2007. The Applicant is therefore inadmissible under section 212(a)(9)(B)(i)(II) of the Act for more than one year of unlawful presence. The Applicant does not contest this finding of inadmissibility on appeal.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(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.

Section 212(h) of the Act states, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if –
>
> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that--
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> (i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or 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 Attorney General 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; or . . .

The record establishes that on 2004, the Applicant was convicted under New York Consolidated Laws Service Penal Law (N.Y. Penal Law) § 120.05-2 of Assault in the Second Degree, under N.Y. Penal Law § 120.00-1 of Assault in the Third Degree, and under N.Y. Penal Law § 120.14-1 of six counts of Menacing in the Second Degree. On 2004, the Applicant was convicted under N.Y. Penal Law § 160.10(1) of Robbery in the Second Degree. The Applicant, on appeal, does not contest that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for committing crimes involving moral turpitude.

The Applicant requires a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(h) of the Act. However, even if the Applicant establishes that he meets the requirements of these sections, the Secretary may not favorably exercise discretion in his case except in extraordinary circumstances because the record reflects that the Applicant has been convicted of violent or dangerous crimes. *See* 8 C.F.R. § 212.7(d).

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) states:

> The Attorney General [Secretary, Department of Homeland Security], 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 unaware of any 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. The Attorney General 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). 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 (Dec. 26, 2002).

Nevertheless, we 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). 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.

The Applicant was convicted under N.Y. Penal Law § 160.10(1) of Robbery in the Second Degree. Section 160.10 states that a person commits robbery in the second degree when he forcibly steals property. A person forcibly steals property when he uses or threatens the immediate use of physical force upon another person. *See* N.Y. Penal Law § 160. The Applicant was also convicted under N.Y. Penal Law § 120.05-2 of Assault in the Second Degree. Section 120.05-2 states that a person commits assault in the second degree when he intentionally injures another person using a deadly weapon or dangerous instrument. Considering the plain language of these statutes, we concur with the finding that the Applicant's crimes, Robbery in the Second Degree and Assault in the Second Degree, qualify as violent or dangerous crimes.

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. 8 C.F.R. § 212.7(d). Finding no evidence of foreign policy, national security, or other extraordinary equities, 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" to a qualifying relative. *Id.*

In *Monreal-Aguinaga*, the Board of Immigration Appeals (the Board) provided additional examples of the hardship factors it deemed relevant for establishing 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.").

The Applicant and his spouse contend that the Applicant's spouse and children are experiencing extreme hardship as a result of residing abroad with the Applicant due to his inadmissibility. They state that they have been living in England for over four years, and that the Applicant's spouse was

born and raised in the United States and has no family or social ties to England. The couple maintains that the Applicant's spouse has taken medicine for anxiety and depression due to long-term separation from her family and friends. The Applicant's spouse references that her mother survived breast cancer, and she has anxiety about not being able to help take care of her were the cancer to return. She also declares that she gave birth to twins in and has been overwhelmed with her role as a working mother. The couple states that they cannot afford childcare so the Applicant's spouse works only part-time. The couple asserts that the Applicant works as a full-time restaurant manager but the couple's combined income barely pays their living expenses. The Applicant's spouse asserts that she has anxiety about not being able to further her education, her children having limited access to healthcare as noncitizens, and not being able to obtain a better paying job due to employment discrimination. The Applicant's mother-in-law asserts that she has a close relationship with her daughter, and that she has struggled to make ends meet since her daughter moved to England and has not been able to assist her financially. She asserts that her daughter is constantly worried about not being able to provide for her children.

In support of financial and emotional hardship, the Applicant submitted wage records and invoices. The Applicant has also submitted evidence of his spouse's travel to the United States. Moreover, the Applicant has provided evidence demonstrating that his spouse takes antidepressant medicine. The Applicant has also submitted a June 14, 2015, mental health evaluation from a licensed professional counselor that states that the Applicant's spouse has suffered psychological hardship and her ability to focus and take care of her responsibilities has been affected by ongoing depression and anxiety as a result of separation from her community in the United States, separation from her mother, raising her children in a foreign country, social isolation, and not having the same opportunities that she would have had in the United States. The counselor recommends regular monitoring, a consult with a psychiatrist for a medication evaluation, and psychotherapy once a week for the Applicant's spouse.

The record establishes that the Applicant's spouse is in her 30s, was born and raised in the United States, and has no social or family ties to England. She has lived in England for four years and long-term separation from her family and her community has caused her extreme hardship. The evidence in the record, however, does not demonstrate that the hardships with respect to relocation would produce a "truly exceptional situation" that would meet the exceptional and extremely unusual hardship standard to warrant a favorable exercise of discretion. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. We note that both the Applicant and his spouse are gainfully employed abroad. The record does not establish that the Applicant's spouse is unable to work full-time and pay for child care. Moreover, the record does not indicate that the Applicant's spouse's relatives are unable to visit her and the children abroad. Nor does the record contain any evidence in support of the assertion that the Applicant's children are experiencing hardship abroad. "[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings." *In re Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, although extreme hardship has been established with respect to relocation, the hardships that arise from relocation do not meet the heightened "exceptional and extremely unusual hardship" standard set forth in 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

The Applicant's U.S. citizen spouse asserts that she and her twins will experience extreme hardship if they were to return to the United States while the Applicant remains abroad as a result of his inadmissibility. She asserts that she has lived with the Applicant in England for over four years and has a close relationship with him and does not want their children to grow up without him. She declares that if she and her children were to relocate to the United States, long-term separation from the Applicant would devastate her and her children. She further asserts that her children would have a lifetime of hardship in the absence of their father. The Applicant's spouse maintains that if the Applicant were admitted to the United States, he would be able to financially support her and their children and she would be able to further her education.

In support of the hardship claims, the Applicant submitted evidence establishing that he has a job offer in the United States. The Applicant has also submitted evidence of his spouse's antidepressant medicine. The licensed professional counselor states that the Applicant's spouse declares that the Applicant has been a supportive husband and father to their twins, and if she and their children were to relocate to the United States, long-term separation from the Applicant would devastate her and their children. As we noted above, the licensed professional counselor maintains that the Applicant's spouse's ability to focus and take care of her responsibilities has been affected by ongoing depression and anxiety as a result of her spouse's immigration situation.

In this case, the evidence in the record establishes that the Applicant's spouse and children would experience extreme hardship were they to return to the United States while the Applicant remains in England due to his inadmissibility. The evidence in the record, however, does not demonstrate that the hardships with respect to separation from the Applicant would produce a "truly exceptional situation" that would meet the exceptional and extremely unusual hardship standard to warrant a favorable exercise of discretion. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56 at 62. The record establishes that the Applicant's spouse has relatives in the United States willing to help with the care of her children, and that the Applicant's spouse would be able to obtain employment as she previously worked in the United States before relocating to England. The Applicant has not established that his spouse would be unable to financially support herself and her children in the United States. Alternatively, the Applicant has not demonstrated that he would be unable to assist his spouse financially if necessary. Moreover, the record does not establish that the Applicant's spouse and children would be unable to travel abroad to visit the Applicant. Accordingly, based on a totality of the circumstances, the hardships that would arise from separation do not meet the heightened "exceptional and extremely unusual hardship" standard set forth in 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. Accordingly, we dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of P-Z-*, ID# 15986 (AAO Feb. 10, 2016)