U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6361049

Date: JAN. 17, 2020

Appeal of Newark, New Jersey Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Newark, New Jersey Field Office denied the application, concluding that the Applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (CIMT). The Director then found that the Applicant did not establish a qualifying relative or relatives would experience extreme hardship if he is denied admission, and he did not show that he merited a favorable exercise of discretion.

On appeal, the Applicant submits a brief. Therein he asserts that he does need a waiver and that the Director also did not consider evidence of his qualifying relative's medical condition.

The burden of proof in these proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal because the Applicant has not met this burden.

I. LAW

A foreign national convicted of (or who admits having committed, or who admits committing acts which constitute the essential elements of) 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(a)(2)(A)(i) of the Act. A discretionary waiver is available under section 212(h)(1)(B) of the Act if the denial of admission would result in extreme hardship to an applicant's U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship

exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

If a foreign national demonstrates his or her eligibility under section 212(h)(1)(B) of the Act, U.S. Citizenship and Immigration Services must then decide whether to exercise its discretion favorably and consent to the foreign national's admission to the United States. Section 212(h)(2) of the Act.

II. ANALYSIS

The issues on appeal are whether the Applicant inadmissible for a CIMT and, if so, whether he has established extreme hardship to a qualifying relative and merits a favorable exercise of discretion.

A. Inadmissibility

The Director determined the Applicant was inadmissible for having been convicted of a CIMT, specifically for a 2008 conviction for endangering the welfare of children, third degree, in violation of New Jersey Criminal Statute 2C:24-4. The Director indicated that the Applicant pled guilty to charges as a condition to enter a pre-trial intervention program (PTI). On appeal, the Applicant asserts that the Director erred in finding his dismissed criminal charges were reopened to rectify immigration issues rather than constitutional purposes and wrongly found his vacated PTI remains a conviction.

Documentation reflects that he entered the United States in 2001 as a nonimmigrant visitor, in 2005 he was charged with endangering the welfare of children, in 2008 he pled guilty and entered the PTI program, and in 2011 charges were dismissed after completion of the PTI. In 2013, USCIS denied the Applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, and a Form I-601, finding him inadmissible for his conviction and that he had not established extreme hardship to a qualifying relative. The Applicant appealed the decision to us, and we determined that because the Applicant entered a guilty plea and was punished, by the restraint placed on his liberty as a result of his supervision, he is considered convicted for immigration purposes. We also found that the Applicant did not establish that he qualifies for a waiver under section 212(h)(1)(B) of the Act. We further concluded that even if the Applicant established extreme hardship to his spouse and son, he would be subject to the heightened discretionary standards of 8 C.F.R. § 212.7(d) because endangering the welfare of a child, as it is defined in New Jersey, is a dangerous crime and he would not warrant the favorable exercise of discretion.

In denying the Applicant's second Form I-485, the Director found that the Applicant entered into a second PTI in 2016, after completing the first in 2011, seeking to vacate his 2008 guilty plea by entering a PTI that did not require a plea of guilt. The Director then concluded that the second PTI Order of Postponement does not indicate the original PTI was vacated or that the second PTI was ordered due to any procedural or substantive defect in the original proceedings, and that the Applicant sought the second PTI for rehabilitative and immigration purposes.[1]

On appeal of that waiver denial, the Applicant concedes that he entered a plea for endangering the welfare of a child and though charges were dismissed after he completed the PTI there was still a

[1] In that decision the Director cites *Matter of Pickering*, 23 I&N Dec. 621, 624-25 (BIA 2003).

conviction. However, the Applicant contends that PTI pleas have been eliminated by New Jersey court rulings, that he requested the prosecutor's office reopen his case, and a superior court judge then vacated his plea. The Applicant argues his case was reopened primarily because of a violation of his rights where he was forced to make a plea and that assisting his immigration matter was ancillary. He refers to two New Jersey court decisions contending that they found defendants should not have been made to make a plea to enter PTI and argues that in 2006 he had no ability to enter PTI without a guilty plea. The Applicant maintains that once his case before superior court was reopened the plea was vacated, it was no longer part of the record, and if vacated then he no longer has an admission to the acts for immigration purposes.[2] He further asserts that the Director picks parts of the superior court transcript to conclude the vacatur was to help with his immigration problem without including parts that discuss violation of his rights under New Jersey's PTI.

Of the court cases discussed by the Applicant on appeal, one is an unpublished decision in New Jersey Superior Court that is not binding on our adjudication.[3] In the second case, *State of New Jersey v. Mosner*, 407 N.J.Super. 40 (App. Div. 2009), the court addressed the requirement for a guilty plea to connect non-indictable charges in exchange for defendant's admission to the PTI program.

Any rehabilitative action subsequent to a conviction that overturns the state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See Matter of Thompson and Thomas*, 27 I&N Dec. 674 (A.G. 2019). Evidence in the record does not establish that the Applicant's plea or conviction have been vacated. The 2017 Order of Dismissal for the PTI indicates simply that the matter was dismissed pursuant to Rule 3:28, Pretrial Intervention Programs. The decision does not indicate that the Applicant's plea was vacated. The proceedings transcript shows that the judge informed the Applicant that once he successfully completed the PTI his case is over. Although the transcript indicates the Applicant was requesting the judge to vacate his original plea, and shows that he explained to the judge the immigration consequences of the plea if even charges are dismissed following PTI, it provides no clarity to a ruling about the Applicant's request. The transcript terminates with a prosecuting attorney apparently stating to someone "Do you know - - do you know that the rule is to vacate the guilty plea? I mean is it --"

Moreover, the record contains no order vacating the plea and the transcript does not reflect that the Applicant's plea was actually vacated. For these reasons, we cannot find that the record demonstrates that the Applicant's original plea has been vacated. Consequently, we cannot find that he is no longer convicted for immigration purposes.

B. Hardship

An applicant may show extreme hardship if the qualifying relative remains in the United States separated from the applicant and if the qualifying relative relocates overseas with the applicant. Demonstrating extreme hardship under both of these scenarios is not required if an applicant's evidence establishes that one of these scenarios would result from the denial of the waiver. 9 *USCIS*

[2] The Applicant refers to the U.S. Department of State Foreign Affairs Manual, which provides information to Department of State staff and contractors rather than USCIS adjudicators.

[3] The Applicant referenced the same court case in appeal of his 2013 waiver denial.

Policy Manual B.4(B), https://www.uscis.gov/policymanual. Because the Applicant has not submitted statements from his qualifying relatives, his spouse and son, or other evidence indicating their intention to remain in the United States or relocate to Colombia with him, he must establish extreme hardship both upon separation and relocation.

On appeal, the Applicant argues that his spouse has a history of gastrointestinal issues including colon cancer that will continue throughout her life. The Applicant refers to previously-submitted evidence and maintains that separation would be an extreme hardship for his spouse. He further contends that he has already described why his spouse cannot relocate to Colombia.

In her affidavit, the spouse contends that she needs the Applicant for help with her health, financial, and emotional issues and it will negatively impact her if he is removed. The spouse maintains that she suffers high blood pressure for which she takes medication, needs frequent colonoscopies, has been feeling exhausted, and is at a high risk for cancer. With the appeal the Applicant submits a letter from his spouse's doctor that states she has been a patient for 30 years and notes her medical complaints, including: severe iron deficiency due to chronic blood loss; recurrent disabling abdominal and pelvic pain; partial colectomy to remove a malignant neoplasm; disabling headaches; calcified tendinitis of her right shoulder where treatment causes limited function; back injuries from a 2016 car accident; attacks of vertigo; and peripheral vestibular dysfunction. The record includes the spouse's medical records from 2017 and 2018 showing lab results, a colon rectal surgery report, diagnoses, and surgical reports. The doctor's letter states that the Applicant helps his spouse care for their son, notably when she is unable to drive due to migraines or vertigo, and that losing the Applicant would have a strong negative impact on her ability to care for her son.

The spouse maintains that she and the Applicant share responsibility for the children, including her three children from her prior marriage, who have bonded with the Applicant and would suffer emotionally without him, and that he babysits their son while she works. She further asserts that without the Applicant's salary she would have trouble keeping up with bills. Financial documentation in the record includes a 2018 W-2 for the spouse showing $40,189 in income and another W-2 showing her with $30,280 in income. A 2016 Form 1040 and W-2 for the spouse shows a $58,720 income; a 2015 Form 1040 and W-2 shows $34,320; and a 2014 Form 1040 and W-2 shows $34,320. A 2019 letter from the Applicant's employer that he has been employed since 2014 and earns $14 hour.

Although the Applicant asserted that his son will be devastated by losing his father as he enters his teenage years, the Applicant provided no further description of hardship to his son and on appeal offers no additional information.

We agree with the Director that the evidence in the record is insufficient to establish that the Applicant's spouse and children will experience extreme hardship if the Applicant is unable to remain in the United States. Although the spouse contends she needs the Applicant's help, her affidavit offers little detail about the emotional support the Applicant provides her and neither she nor the Applicant explain how his absence would impact his spouse and son on a daily basis apart from the usual care he provides his son as a parent. She does not indicate that her older children are unable to provide assistance. The medical records and letter from the spouse's doctor provide the spouse's diagnoses and medical conditions, but there is little information to demonstrate what assistance she needs, any assistance that would require the Applicant's presence, or that she is otherwise unable to obtain help

from the adult children. The spouse also contends she needs the Applicant's financial support, but financial documentation reflects primarily the spouse's income and indicates she is the breadwinner. Furthermore, the record does not contains documentation of expenses, assets or liabilities, thus does not create a clear picture of the family's financial situation. On appeal, the Applicant does not submit any other current documentation with respect to financial considerations or explain the financial difficulties his family would face without him, or provide evidence that he would be unable to find employment in Colombia to alleviate any burden on his family.

Regarding relocation, the spouse asserts that she cannot go to Colombia because she has been in the United States since she was young and her children from her prior marriage were born here and all attend college. She maintains that she is currently working, but Colombia has a difficult job market and since she is not fluent in Spanish it would be hard to find meaningful employment. The spouse contends she has health issues, but Colombia has a subpar health care system where it is unclear she would have access to quality health care benefits. The spouse points out that her son has allergies and speaks only English, so he would have a hard time acclimating to Colombia, and that the country is dangerous with high crime where she and her son would be targets as U.S. citizens. The Applicant submitted his son's 2018-19 school records and country information for Colombia regarding health care.

Based on the record, we cannot conclude that the Applicant has established extreme hardship. The Applicant must establish that denial of the waiver application would result in extreme hardship to a qualifying relative both upon separation and relocation, but as he has not established extreme hardship due to separation we cannot conclude he has met this requirement. As such, no purpose would be served in revisiting the Director's discretionary analysis. Accordingly, the application remains denied.

ORDER: The appeal is dismissed.