U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-E-H-H-

DATE: AUG. 16, 2016

APPEAL OF SAN FERNANDO VALLEY, CALIFORNIA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility for fraud or misrepresentation. *See* Immigration and Nationality Act (the Act) section 212(i), 8 U.S.C. § 1182(i). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to that of a lawful permanent resident (LPR) must be admissible or receive a waiver of inadmissibility. The Applicant is the beneficiary of an approved self-petition, under the Violence Against Women Act (VAWA), as an abused spouse of a U.S. citizen. U.S. Citizenship and Immigration Services (USCIS) may grant a discretionary waiver of inadmissibility for fraud or misrepresentation to VAWA self-petitioners if refusal of admission would result in extreme hardship to the self-petitioner or to a qualifying relative or qualifying relatives.

The Applicant was also found inadmissible for entering the United States without being admitted after having been ordered removed from the United States and seeks permission to reapply for admission into the United States. *See* section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii). Permission to reapply for admission to the United States is an exception to this inadmissibility, which U.S. Citizenship and Immigration Services (USCIS) may grant in the exercise of discretion for those who seek admission after residing abroad for 10 years following their last departure. Alternatively, this inadmissibility may be waived for a VAWA self-petitioner pursuant to section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii), if there is a connection between the foreign national's battery or subjection to extreme cruelty and the foreign national's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

The San Fernando Valley Field Office Director, Chatsworth, California, denied the application. The Director determined the Applicant inadmissible pursuant to section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for fraud or misrepresentation. The Director further determined that the Applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having reentered the United States without being admitted after having been removed from the United States. The Director noted that the Applicant was the beneficiary of an approved self-petition, under VAWA, and had established extreme hardship. Nevertheless, the Director concluded that the Applicant had not established that her unlawful reentry to the United States after removal

was connected to the battery or extreme cruelty she experienced, as required for a waiver under section 212(a)(9)(C)(iii) of the Act.[1]

The matter is now before us on appeal. On appeal, the Applicant claims the Director incorrectly required that she show a connection between the battering or extreme cruelty she suffered and her removal and subsequent reentry to the United States without being admitted. Rather, the Applicant contends that she filed the Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, in reliance on the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft,* and thus, she is eligible to adjust status.

Upon *de novo* review, we will withdraw the Director's decision. We will remand the matter to the Director, San Fernando Valley Field Office, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

I. LAW

The Applicant is seeking to adjust status to that of an LPR and has been found inadmissible under section 212(a)(6)(C) of the Act, for fraud or misrepresentation. Section 212(i) of the Act provides that USCIS may grant a discretionary waiver of inadmissibility to self-petitioners under VAWA if refusal of admission would result in extreme hardship to the self-petitioner or to a qualifying relative or qualifying relatives.

Decades of case law have contributed to the meaning of extreme hardship. The definition of extreme hardship "is not . . . fixed and inflexible, and the elements to establish extreme hardship are dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565 (BIA 1999) (citation omitted). Extreme hardship exists "only in cases of great actual and prospective injury." *Matter of Ngai,* 19 I&N Dec. 245, 246-47 (BIA 1984). An applicant must demonstrate that claimed hardship is realistic and foreseeable. *Id.*; *see also Matter of Shaughnessy,* 12 I&N Dec. 810, 813 (BIA 1968) (finding that the respondent had not demonstrated extreme hardship where there was "no showing of either present hardship or any hardship . . . in the foreseeable future to the respondent's parents by reason of their alleged physical defects"). The common consequences of removal or refusal of admission, which include "economic detriment . . . [,] loss of current employment, the inability to maintain one's standard of living or to pursue a chosen profession, separation from a family member, [and] cultural readjustment," are insufficient alone to constitute extreme hardship. *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (citations omitted); *but see Matter of Kao and Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which the qualifying relatives would relocate). Nevertheless, all

[1] The Director had previously denied the Applicant's Form I-485, Application to Adjust Status, based on her inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, but on July 31, 2014, reopened the application on Service motion to provide the Applicant an opportunity to apply for a VAWA waiver under section 212(a)(9)(C)(iii) of the Act.

"[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted). Hardship to the Applicant or others can be considered only insofar as it results in hardship to a qualifying relative. *Matter of Gonzalez Recinas*, 23 I&N Dec. 467, 471 (BIA 2002).

The Applicant has also been found inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, for having reentered the United States without being admitted after having been removed from the United States. Permission to reapply for admission to the United States is an exception to this inadmissibility, which USCIS may grant in the exercise of discretion for those who seek admission after residing abroad for 10 years following their last departure. Alternatively, this inadmissibility may be waived for VAWA self-petitioners pursuant to section 212(a)(9)(C)(iii) if there is a connection between the foreign national's battery or subjection to extreme cruelty and the foreign national's removal, departure from the United States, reentry or reentries into the United States, or attempted reentry into the United States.

II. ANALYSIS

The issue on appeal is whether the Applicant should be granted a waiver of inadmissibility in the exercise of discretion.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(C)(i)(II) of the Act. Specifically, the record establishes that the Applicant attempted to procure entry to the United States on April 4, 1998, with a fraudulent Form I-586, Border Crossing Card. The Applicant was ordered removed and departed pursuant to the removal order on 1998. The Applicant subsequently reentered the United States without being admitted on or around April 30, 1998, and has remained in the United States continuously ever since. The Applicant does not contest inadmissibility, determinations supported in the record.

B. Waiver

Pursuant to section 212(i) of the Act, the Applicant, as a VAWA self-petitioner, must demonstrate that refusal of admission would result in extreme hardship to herself or a qualifying relative, in this case her U.S. citizen son. The Director determined that the Applicant had established extreme hardship to her U.S. citizen child. This finding is supported in the record. We will thus not readdress this criterion on appeal.

The Director noted that although the Applicant was the beneficiary of an approved VAWA self-petitioner, she had not established that her unlawful reentry to the United States after removal was connected to the battery or extreme cruelty she experienced, as required for a waiver under section 212(a)(9)(C)(iii) of the Act. The Applicant does not contend on appeal that her reentry to the United

States after removal was connected to the battery or extreme cruelty she experienced, and we will not review applicability of section 212(a)(9)(C)(iii) of the Act to the Applicant's case.

C. Permission to Reapply

A foreign national who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for permission to reapply unless the individual has been outside the United States for more than ten years since the date of the individual's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *see also Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). Thus, to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, the Board of Immigration Appeals (Board) has held that it must be the case that the foreign national's last departure was at least ten years ago, the foreign national has remained outside the United States, and USCIS has granted the foreign national permission to reapply for admission into the United States.

The Applicant contends that her Form I-212 was filed in reliance on the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004), in which the Ninth Circuit held that individuals who were removed and who unlawfully reentered the United States were eligible to apply for permanent residence and for permission to reapply for admission. The Applicant claims that the decision in *Duran Gonzales v. DHS,* 508 F.3d 1227 (9th Cir. 2007), precluding relief under section 212(a)(9)(C) of the Act, should not be applied retroactively to her case.

On August 13, 2004, the Ninth Circuit Court of Appeals held that a foreign national could apply for adjustment of status under section 245(i) of the Act by filing a Form I-212 to overcome inadmissibility under section 212(a)(9)(C)(i)(II) of the Act without remaining outside the United States for 10 years. *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 790 (9th Cir. 2004). In *Matter of Torres-Garcia* the Board rejected the Ninth Circuit's rational in *Perez-Gonzalez* and held that individuals inadmissible under section 212(a)(9)(C)(i)(II) of the Act could not be granted permission to reapply until they remained outside the United States for 10 years after the date of the latest departure. 23 I&N Dec. at 875-76. On November 30, 2007, the Ninth Circuit Court of Appeals deferred to the BIA's interpretation in *Torres-Garcia* and overturned *Perez-Gonzalez. Duran Gonzales v. DHS*, 508 F.3d 1227 (9th Cir. 2007) ("*Duran Gonzales I*").

Pursuant to the July 21, 2014, Settlement Agreement in the *Duran Gonzales* class action lawsuit *(Duran-Gonzalez v. Department of Homeland Security.,* Civil Action No. C06-1411-MJP (W.D. Wash., 2014)), certain individuals who reside within the jurisdiction of the Ninth Circuit may be afforded an opportunity to establish that *Matter of Torres-Garcia* should not apply retroactively to them and have their applications for adjustment of status and permission to reapply for admission adjudicated on the merits.

The Settlement Agreement applies to class members defined as any person who:

1. Is the beneficiary or derivative beneficiary of an immigrant visa petition or labor certification filed on or before April 30, 2001, provided that, if the immigrant visa petition or labor certification was filed after January 14, 1998:

    a. the beneficiary was physically present in the United States on December 21, 2000, or
    b. If a derivative beneficiary, the derivative beneficiary or the primary beneficiary was physically present in the United States on December 21, 2000.

2. Is inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act, because he or she entered or attempted to reenter the United States without being admitted between April 1, 1997 and November 30, 2007, and without permission after having previously been removed;

3. Properly filed a Form I-485, Application to Register Permanent Residence or Adjust Status, and Supplement A to Form I-485, Adjustment of Status Under Section 245(i)), while residing within the jurisdiction of the Ninth Circuit on or after August 13, 2004, and on or before November 30, 2007;

4. Filed a Form I-212 on or after August 13, 2004, and on or before November 30, 2007;

5. Form I-485, Supplement A to Form I-485, and Form I-212 were denied by USCIS and/or the Executive Office for Immigration Review ("EOIR") on or after August 13, 2004, or have not yet been adjudicated;

6. Is not currently subject to pending removal proceedings under section 240 of the Act, or before the United States Court of Appeals for the Ninth Circuit on a petition for review of a removal order resulting from proceedings under section 240 of the Act; and

7. Did not enter or attempt to reenter the United States without being admitted after November 30, 2007.

Class members are divided into three subclasses. Subclass A members are applicants who (i) have remained physically present in the United States since the filing of the Form I-485, Form I-485 Supplement A, and Form I-212, and (ii) against whom removal proceedings under INA § 240 were not initiated with the filing of a Notice to Appear subsequent to the filing of the Form I-485 and Form I-212. You appear to meet the requirements for Subclass A membership.

The subclass members are further divided into two groups based on when they filed their Forms I-212, I-485, and I-485A. Applicants who filed all three applications between August 13, 2004, and January 26, 2006, are members of the first group, and applicants who filed all three applications between January 27, 2006, and November 30, 2007, are members of the second group.

According to the Settlement Agreement, individuals in the first group are presumed to have reasonably relied on *Perez-Gonzalez*, and their I-212 applications may be adjudicated on the merits

regardless of whether they spent 10 years outside the United States after their last departure. The Settlement Agreement further states that applicants in the second group must establish that their reliance on *Perez-Gonzalez* was reasonable and that *Matter of Torres-Garcia* should not apply to them. *See Garfias-Rodriguez v. Holder,* 702 F.3d 504 (9th Cir. 2012) (applying retroactivity test set forth in *Montgomery Ward & Co. v. FTC,* 691 F.2d 1322, 1333 (9th Cir. 1982)). If a class member fails to show reasonable reliance on *Perez-Gonzalez,* USCIS must still consider whether the burden resulting from following *Matter of Torres-Garcia* is sufficiently onerous to make it improper to rely on *Matter of Torres-Garcia.*[2]

Based on a review of the record, it appears that the Applicant is a Subclass A member. As the record establishes that she filed the relevant applications between January 27, 2006, and November 30, 2007, the Applicant is a member of the second group.[3] As detailed above, members in the second group must demonstrate eligibility for benefits under the Settlement Agreement by establishing that they reasonably relied on the Ninth Circuit's holding in *Perez-Gonzalez,* or that the burden of denial would be greater than the ordinary circumstances of removal. The record establishes that on July 1, 2014, the Applicant, through counsel, requested that her I-485 and I-212 applications be reopened pursuant to the Settlement Agreement. The record does not establish that the Director reopened the Applicant's applications. Nor does the record establish that the Director issued a decision on the merits of the Applicant's request to reopen pursuant to the Settlement Agreement. For these reasons, we will remand the matter to the Director, San Fernando Valley Field Office, to address the effect of the Settlement Agreement on the adjudication of the Applicant's Form I-212.

If on remand the Field Office Director determines that the Applicant is eligible for relief pursuant to the Settlement Agreement, the Field Office Director will also issue a new decision addressing the merits of the Applicant's Form I-601.[4] Although, as we detailed above, the Director found that the Applicant had established extreme hardship to her son, the Director did not determine whether the Applicant merited a waiver of inadmissibility as a matter of discretion. If that decision is adverse to the Applicant, it will be certified for review to this office pursuant to 8 C.F.R. § 103.4.

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[2] USCIS Policy Memorandum PM-602-0121, *Additional Guidance for Implementation of the Settlement Agreement in Duran Gonzalez v. Department of Homeland Security- Adjudication of Request for U.S. Citizenship and Immigration Services (USCIS) Motions to Reopen Certain Consent to Reapply and Adjustment of Status Applications Filed in the Ninth Circuit Between August 13, 2004, and November 30, 2007* (Aug. 25, 2015), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0825_Duran-Gonzalez_Settlement_PM_APPROVED.pdf

[3] The Form I-485 that was filed during the relevant time period as detailed in the Settlement Agreement was ultimately denied due to the withdrawal of the Form I-130, Petition for Alien Relative, by the U.S. citizen spouse that subjected her to battery and extreme cruelty. The Settlement Agreement does not specify that a Form I-485 denial due to Form I-130 revocation bars a foreign national from eligibility for benefits under the agreement. Rather, the Settlement Agreement requires only that the Form I-485 be properly filed during the relevant time period while the applicant was residing within the jurisdiction of the Ninth Circuit.

[4] Without an approved Form I-601, no purpose would be served in granting the application for permission to reapply for admission, as it would not result in the Applicant's admissibility. *See Matter of Martinez-Torres,* 10 I&N Dec. 776 (Reg'l Comm'r 1964); *Matter of J-F-D-,* 10 I&N Dec. 694 (Reg'l Comm'r 1963).

ORDER: The decision of the Director, San Fernando Valley Field Office, is withdrawn. The matter is remanded to the Director, San Fernando Valley Field Office, for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of L-E-H-H-*, ID# 16185 (AAO Aug. 16, 2016)