U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-M-

DATE: AUG. 30, 2016

APPEAL OF HARTFORD, CONNECTICUT FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Jamaica, seeks a waiver of the ground 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 must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Field Office Director, Hartford, Connecticut, denied the application. The Director concluded that, although the evidence in the record demonstrated that extreme hardship would be imposed on the Applicant's U.S. citizen spouse if the Applicant were denied admission into the United States, the evidence was nevertheless insufficient to demonstrate that the Applicant merited a favorable exercise of discretion.

The matter is now before us on appeal. In the appeal, the Applicant claims abuse of discretion in his case. The Applicant reasserts that his spouse and family will experience extreme hardship if he is denied admission into the United States. He contends further that his criminal convictions were not for serious crimes, he has taken responsibility for his unlawful behavior and is now an upstanding member of his community, and that the positive factors in his case outweigh his negative actions.

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

I. LAW

The Applicant has been found inadmissible under section 212(a)(6)(C)(i) of the Act for procuring admission into the United States by fraud or misrepresentation, specifically for entering the country with a photo-substituted foreign passport and U.S. nonimmigrant visa with another person's name and date of birth.

Section 212(a)(6)(C)(i) of the Act renders inadmissible any foreign national who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured)

a visa, other documentation, or admission into the United States or other benefit provided under the Act.

Section 212(i) of the Act, provides for a waiver of this inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national.

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 "[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 foreign national must also demonstrate that a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 299 (BIA 1996).

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

A. Inadmissibility Finding

As stated above, the Director found the Applicant to be inadmissible under section 212(a)(6)(C)(i) of the Act, for fraud or misrepresentation, specifically for entering the United States in April 1994, with a photo-substituted passport and U.S. nonimmigrant visa that were not his. The Applicant does not contest that he is inadmissible for fraud or willful misrepresentation of a material fact, and we affirm that a finding of inadmissibility on this basis is supported by the record.[1]

[1] The Applicant states in a 2014 sworn affidavit that he entered the United States with a passport and a nonimmigrant visa that were not his.

B. Additional Basis for Inadmissibility

Although not addressed in the Director's decision, the record in this case reflects an additional basis for inadmissibility. Specifically, the record reflects that during his adjustment of status interview on March 5, 2008, the Applicant was asked to disclose all of his arrests; however, he did not disclose that he had been arrested days earlier, on 2008, and charged with possession of a controlled substance/marijuana; possession with intent to sell/dispense; and violation of these laws within 1500 feet of a school/housing/day care center.

A misrepresentation is material if it "tends to shut off a line of inquiry which is relevant to the alien's eligibility [for an immigration benefit] and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec 436, 447 (AG 1961). Here, the 2008, controlled substance offenses that the Applicant was charged with related to more than a single offense of simple possession of 30 grams or less of marijuana.

Under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), an individual is inadmissible if he or she is convicted of, admits having committed, or admits committing acts which constitute the essential elements of a violation of any law or regulation of a State relating to a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802. Section 212(h) of the Act, 8 U.S.C. § 1182(h) provides a limited waiver for controlled substance offenses; but, only where the offense relates to a single offense of simple possession of 30 grams or less of marijuana.

Court records for the 2008 controlled-substance charges reflect that the Applicant ultimately did not plead guilty and the matter was not prosecuted (*nolle prosequi*) based on his completion of a pretrial drug education program in 2011. Nevertheless, the Applicant's failure to reveal the arrest and charges during his adjustment of status interview shut off a line of inquiry that was relevant to his eligibility, in that the Applicant was in proceedings for offenses for which no waiver of inadmissibility was available, and for which a conviction or admission to the essential elements would have rendered him inadmissible under section 212(a)(A)(i)(II) of the Act, and ineligible for adjustment of status. In other words, if the Applicant had disclosed this recent arrest, he would have opened a line of inquiry related to the eventual disposition, which was relevant to the Applicant's eligibility for permanent residence.

Attorneys for the Applicant indicated, in letters dated in April 2008 and August 2014, that the Applicant did not disclose the arrests because he believed that the charges were unjust and would be dismissed upon completion of a pretrial drug program.[2] The record, however, contains no independent statement from the Applicant, addressing why he did not disclose the 2008 arrest and charges during his adjustment of status interview. The assertions are also uncorroborated by the evidence in the record, which reflects that the Applicant's initial court hearing on the matter took

[2] The 2008 letter was submitted by prior counsel.

place in a after the Applicant's adjustment of status interview, and his pretrial drug education program request occurred months later, in 2008. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the Applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See 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).

Because the Applicant did not disclose his controlled substance-related arrest and charges that were relevant to his ability to adjust status to that of a lawful permanent resident, he is also inadmissible under section 212(a)(6)(C)(i) of the Act, for attempting to procure adjustment of status through willful misrepresentation of a material fact.

C. Extreme Hardship Finding

Because the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, he must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or qualifying relatives, in this case his U.S. citizen spouse. The Director determined that the evidence in the record demonstrated that the Applicant's citizen spouse would experience extreme hardship if the Applicant were denied admission into the United States. The record does not indicate that the Director's finding should be overturned, and we affirm this finding.

III. ANALYSIS

The remaining issue in this case is whether the Applicant has demonstrated that he merits a waiver of inadmissibility as a matter of discretion. The Applicant claims on appeal that his convictions were not for serious crimes, and that he has taken responsibility for his unlawful behavior and is an upstanding member of his community. The Applicant contends further that the positive factors in his case, including extreme hardship that his spouse and family will experience if he is denied admission, outweigh his negative actions.

The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez,* 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties,

evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

The favorable factors in the Applicant's case are the extreme hardship that his U.S. citizen spouse would experience if the Applicant were denied admission into the country. The Applicant also asserts that his and -year-old U.S. citizen daughters would experience extreme hardship if he were denied admission into the country, that he has resided in the United States for over 20 years, and that his mother and two sisters reside in this country. In addition, letters from family members and a friend attest to the Applicant's good character. The Applicant also states in a 2014 affidavit, that he was young and did not know U.S. laws when he entered the country with a passport that was not his, and that he did not know that using the passport would cause him so many problems; however, as the Applicant was years old when he entered the United States, we find it unlikely that he did not know that use of a fraudulent passport to obtain admission was unlawful.

Two unfavorable factors in the Applicant's case include his entry into the United States in 1994 with a photo-substituted foreign passport and U.S. nonimmigrant visa that were not his. The Applicant cites to a legal decision, *Matter of Alonzo,* 17 I&N Dec. 292 (Comm'r 1979), and contends that this factor should be disregarded because it is the basis of his inadmissibility; however, the Board of Immigration Appeals subsequently declined to follow *Alonzo*, and has determined that the underlying ground of inadmissibility may be considered as an unfavorable factor for discretionary analysis purposes. *See In re Tijam*, 22 I&N Dec. 408, 416 (BIA 1998). As discussed above, the record also reflects that during his adjustment of status interview in 2008, the Applicant misrepresented a material fact by not disclosing that he had been arrested and charged with controlled substance related crimes. The Applicant's presence in the United States without a legal immigration status between 1994 and 1996 is also an unfavorable factor in his case.

The Applicant's criminal history constitutes a further unfavorable factor. In 1998, the Applicant was found guilty of two offenses: breach of peace, in violation of Conn. Gen. Stat. § 53a-181; and threatening, in violation of Conn. Gen. Stat. § 53a-62. In addition, the Applicant was found guilty of disorderly conduct in 2010, in violation of Conn. Gen. Stat. § 53a-182, and in 2011, the Applicant was found guilty of breach of peace, in violation of Conn. Gen. Stat. § 53a-181. The record also reflects that on 2001, the Applicant was arrested and charged with possession of a controlled substance/marijuana (less than four ounces), in violation of Conn. Gen. Stat. § 21a-279(c); however, the Applicant submitted documentation, in response to our December 2015 request for evidence, demonstrating that the charge was dismissed upon his completion of a and the Applicant was ultimately not convicted of the offense.

The record contains no personal statements from the Applicant, or evidence explaining the circumstances of his criminal convictions and demonstrating rehabilitation.

A finding of extreme hardship carries considerable weight in the exercise of discretion and we have carefully considered the extent to which the Applicant's spouse's hardship mitigates the unfavorable factors in this case. Here, the record reflects that the Applicant presented a passport and

nonimmigrant visa that were not his in order to enter the United States in 1994, and he subsequently remained in the United States without a legal immigration status between 1994 and 1996. The Applicant also did not disclose controlled substance charges against him, which could have affected his ability to adjust status to that of a lawful permanent resident. In addition, the Applicant was convicted of several criminal offenses in the United States between 1998 and 2011. Upon review, we find that the aggregate evidence in the record reflects an ongoing disregard for U.S. laws by the Applicant; that the record contains insufficient evidence to demonstrate that the Applicant has taken responsibility for his past violations of U.S. immigration and state criminal laws, or that his character is rehabilitated; and that the record is insufficient to demonstrate that the favorable factors in the Applicant's case outweigh the unfavorable factors, or that a favorable exercise of discretion is merited in the Applicant's case.

IV. CONCLUSION

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, in that he has provided insufficient evidence to demonstrate that a favorable exercise of discretion is merited in his case.

ORDER: The appeal is dismissed.

Cite as *Matter of D-M-*, ID# 14081 (AAO Aug. 30, 2016)