U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27916968

Date: OCT. 25, 2023

Appeal of California Service Center Decision

Form I-129F, Petition for Alien Fiancé(e)

The Petitioner seeks to classify the Beneficiary as his K-1 nonimmigrant fiancée. Immigration and Nationality Act (the Act) section 101(a)(15)(K)(i), 8 U.S.C. § 1101(a)(15)(K)(i). For this classification, the Petitioner must establish that the couple met in person during the two-year period preceding the petition's filing, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within 90 days of admission. Section 214(d)(1) of the Act, 8 U.S.C. § 1184(d)(1).

The Director of the California Service Center denied the petition, concluding that the record did not establish that the Petitioner was eligible for a waiver of the filing limitations imposed by the International Marriage Broker Regulation Act of 2005 (IMBRA)[1] and section 214(d)(1) of the Act. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

To help ensure that fiancée visas are reserved for bona fide relationships, the Act does not allow the approval of a petition if less than two years have passed since the filing date of a previously-approved fiancée petition. Section 214(d)(2)(A)(ii) of the Act, 8 U.S.C. § 1184(d)(2)(A)(ii). U.S. Citizenship and Immigration Services (USCIS) may provide a discretionary waiver of this limitation if justification exists. Section 214(d)(2)(B) of the Act.

However, if a petitioner has a history of violent criminal offenses, the filing limitation may not be waived unless the petitioner submits a signed and dated letter requesting the waiver and accompanied by evidence showing that extraordinary circumstances exist in their case. Section 214(d)(2)(B) of the Act; *See generally* USCIS Policy Memorandum HQOPRD 70/6.2.11, *International Marriage Broker*

[1] This provision is part of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162, 119 Stat. 2960 (2006).

Regulation Act Implementation Guidance 3-4 (Jul. 21, 2006) (Aytes memo). Evidence of the petitioner's rehabilitation following their criminal offenses, combined with other compelling factors, may warrant the granting of a waiver. *Id.*

Fiancée visa petitions are also subject to IMBRA's criminal history reporting requirements. These are codified at section 214(d)(1) of the Act, which states that such a petition cannot be approved unless it includes "information on any criminal convictions of the petitioner for any specified crime . . . and information on any permanent protection or restraining order issued against the petitioner related to any specified crime."[2]

If a petitioner has been convicted by a court or military tribunal of any of the specified crimes, they are required to submit certified copies of all court and police records showing the charges and dispositions for each of these convictions. *See generally* Aytes Memorandum, *supra*, at 1-2. These records, as well as the relevant results of any criminal background checks conducted by USCIS, then become part of the Form I-129F, Petition for Alien Fiancé(e) record, and if the petition is approved, the Department of State will disclose the relevant criminal convictions to the beneficiary during their consular interview. *Id.*; 8 U.S.C. § 1375a(b)(1)(A). Any permanent restraining or protection order issued against the petitioner relating to a specified crime must also be disclosed to the beneficiary at this time. 8 U.S.C. § 1375a(b)(1)(A); section 214(d)(1) of the Act.

Section 101(a)(48)(A) of the Act states:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> > (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendre or has admitted sufficient facts to warrant a finding of guilt; and
> >
> > (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

II. ANALYSIS

The present petition was filed in March 2020, less than two years after the Petitioner filed another fiancée visa petition on the Beneficiary's behalf in June 2018.[3] As such, the present petition cannot be approved unless the Petitioner receives a waiver of the IMBRA filing limitations in the exercise of discretion. Section 214(d)(2)(A)(ii) of the Act.

A general waiver of the filing limitations requires a showing that some justification exists. Section 214(d)(2)(B) of the Act. However, if the petitioner has a history of violent criminal offenses, a waiver cannot be granted unless the petitioner shows that extraordinary circumstances exist in their case, with limited exceptions. *Id.*; *see generally* Aytes Memorandum, *supra*, at 3-4.

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[2] The list of specified crimes is found at Section 214(d)(3)(B) of the Act.

[3] After USCIS approved this prior petition, the Beneficiary's visa was refused by the Department of State in March 2019.

In this instance, the Director concluded that the Petitioner has a history of violent offenses and is therefore subject to the higher "extraordinary circumstances" requirement when applying for a waiver. Upon examining the evidence, the Director found that such circumstances did not exist in the Petitioner's case and did not grant the requested waiver of the filing limitations. On appeal, the Petitioner claims that he does not have a history of violent criminal offenses because he was never convicted of any crimes, and so does not need to make a showing of extraordinary circumstances. Additionally, he claims that even if he is subject to the higher standard, extraordinary circumstances exist in his case which qualify him for the waiver.

A. The Petitioner Has Been Convicted for Immigration Purposes

The first issue on appeal is whether the Petitioner has established that he has not been convicted of any criminal offenses. The Petitioner states that since his various criminal charges resulted in nolle prosequi dispositions and dismissals, he was never actually convicted of any offense. Upon review, we find that the Petitioner has been convicted for immigration purposes.

The record indicates that in July 2009, the Petitioner was charged with four counts of child abuse and neglect under Va. Code Ann. section 18.2-371.1 and two counts of assault and battery on family or household members under Va. Code Ann. section 18.2-57.2. The court entered nolle prosequi dispositions for these charges, discontinuing the prosecution. Because the court did not find the Petitioner guilty and the Petitioner did not plead guilty or nolo contendre or admit sufficient facts to warrant a finding of guilt, these were not considered convictions for immigration purposes. Section 101(a)(48)(A) of the Act.

In [ ] 2016, the Petitioner was charged with two counts of assault and battery on family or household members under Va. Code Ann. section 18.2-57.2 and entered a plea of nolo contendre. The court found the evidence sufficient to justify a guilty verdict, but deferred adjudication and ordered the Petitioner to complete a community-based probation program. Va. Code Ann. § 18.2-57.3. The Petitioner successfully completed the program and was released from his probation in 2017. In 2018, he was granted "first offender status" and the charges were retroactively dismissed. *Id.*

The law at Va. Code Ann. section 18.2-57.3(E) states that "[d]ischarge and dismissal under this section shall be without adjudication of guilt . . .". However, under section 101(a)(48)(A) of the Act, a disposition can still be a conviction for immigration purposes even if adjudication of guilt has been withheld, so long as two conditions are met. First, the noncitizen must plead guilty, nolo contendre, or admit sufficient facts to warrant a finding of guilt. *Id.* The Petitioner here entered a plea of nolo contendre, and so meets the first condition. Second, the judge must order some form of punishment, penalty, or restraint on the noncitizen's liberty. *Id.* Here, the Court ordered the Petitioner to successfully complete a community-based probation program and to be of good behavior for a term of no less than two years. Va. Code Ann. § 18.2-57.3(D). This order was a punishment, penalty, or a restraint on the Petitioner's liberty, and so he meets the second condition at section 101(a)(48)(A)(ii) of the Act. We therefore conclude that regardless of the subsequent dismissal of his charges, for immigration purposes the Petitioner has been convicted of two counts of assault and battery on a family member under Va. Code Ann. section 18.2-57.2.

B. Definition of a Violent Offense

The second issue on appeal is whether the Petitioner's convictions are for "violent criminal offenses," which would require him to show extraordinary circumstances in order to receive a waiver of the IMBRA filing limitations. Section 214(d)(2)(B) of the Act. The Aytes memo states a "violent offense" is one "that has as an element of the crime the use, attempted use, or threatened use of physical force against the person or property of another." Aytes Memorandum, *supra*, at 3.[4] Furthermore, the physical force in question must be "violent" force – that is, force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. 133, 140 (2010).

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit, including any waiver of the IMBRA filing limitations. *Matter of Chawathe,* 25 I&N Dec. 369, 375-76; *see generally* Aytes Memorandum, *supra*, at 2-4. Here, The Petitioner has not addressed the issue of whether a conviction under Va. Code Ann. section 18.2-57.3(E) is a violent criminal offense, either on appeal or in the underlying petition. As such, he has not established that his waiver request should be adjudicated under the general waiver standard rather than the "extraordinary circumstances" standard required for petitioners with a history of violent offenses.

C. Criminal History Disclosures and Eligibility for Waiver of Filing Limitations

As noted above, the Petitioner has not established that his waiver request should be adjudicated using the general IMBRA waiver standard rather than the heightened standard used in cases involving a history of violent offenses. However, regardless of which standard applies, we conclude that he has not met his burden and established that he should receive such a waiver in the exercise of discretion. *Matter of Chawathe*, 25 I&N Dec. at 375-76.

The Aytes memo states that even when adjudicating a general waiver request, officers should consider factors including "[w]hether the petitioner appears to have a history of domestic violence." Aytes Memorandum, *supra*, at 3. Therefore, the Petitioner's past arrests and the behavior leading to these arrests are relevant to his waiver application whether or not he is subject to the heightened "extraordinary circumstances" standard.

Furthermore, section 214(d)(1) of the Act states that fiancée visa petitions cannot be approved unless they include the information required by regulation, including criminal history disclosures. The instructions for Form I-129F, which are incorporated into regulation, require petitioners to submit certified copies of all police and criminal records related to any arrest or conviction for any specified crime, and to disclose any protective order related to such a crime. They also require petitioners to submit information explaining the circumstances of every arrest, citation, charge, indictment, conviction, fine, and imprisonment that has been imposed on them, except for certain traffic

[4] The Aytes memo's definition of "violent offenses" also includes all of the specified crimes at sections 214(d)(3)(B)(i)-(ii) of the Act. *Id.* This list of specified crimes incorporates the definition of "domestic violence" found at section 3 of VAWA 2005, which in turn incorporates the definition of "crime of violence" found at 18 U.S.C. § 16. For misdemeanor convictions such as the Petitioner's, this definition of what makes a domestic offense violent is identical to the Aytes memo's definition of a violent offense, and so we will not address it separately. *Id.*, 18 U.S.C. § 16(a).

violations.[5] The Petitioner has not done so here, and without this information we cannot find that he is eligible for a waiver of the filing limitations.

First, the Petitioner has not disclosed all of the protection orders he has been subject to. The Petitioner answered "yes" to Form I-129F, Part 3, Question 1, which asked if he had been subject to a temporary or permanent protection or restraining order, and provided an attached statement which said that this occurred in [ ] 2019, that it was "[c]riminal due to assault and battery" and that the "charges [were] dropped". This claim was accompanied by two documents: An [ ] 2016 dismissal of a protection order application at the request of the Petitioner's ex-wife; and a [ ] 2018 protection order, relating to the Petitioner's ex-wife and stepdaughter, which had a length of one year and indicated that it was an extension of an existing order. The record does not include the [ ] 2019 protection order mentioned in the Petitioner's statement.

USCIS criminal background check records indicate that the Petitioner was subject to a protection order relating to his ex-wife and stepdaughter from [ ] 2016 to [ ] 2018. The Petitioner did not disclose this protection order despite having multiple opportunities to do so.

Second, the record indicates that the Petitioner did not fully disclose all of his criminal charges and dispositions. The court documents he provided show the disposition of his eight disclosed criminal charges, as well as the two protective order cases. These documents number each proceeding from "01" through "12," but numbers "09" and "10" are missing from the record. The Petitioner has had multiple opportunities to provide his complete criminal history and has not done so. Beyond the decision of the Director, we therefore conclude that the Petitioner has not complied with IMBRA's criminal history disclosure requirements. For this additional reason, his petition cannot be approved. Section 214(d)(1) of the Act.

When adjudicating a waiver request for a noncitizen with a history of violent offenses, we may consider factors such as the circumstances of those offenses, the noncitizen's ties to the community, any rehabilitation, and records demonstrating good conduct and exemplary service in the uniformed services. Aytes Memorandum, *supra*, at 3-4. We acknowledge the positive factors in the Petitioner's case, such as his history of military service and the numerous support letters written on his behalf by friends and family members. However, the Aytes memo requires the consideration of a petitioner's history of domestic violence when deciding whether to grant a waiver of the IMBRA filing limitations in the exercise of discretion. *Id.* Furthermore, the burden is on the Petitioner to provide relevant, probative, and credible evidence to establish his eligibility for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. at 375-76.

None of the support letters in the record mention the Petitioner's criminal history or the behavior which led to it. It is therefore not apparent that the writers were aware of this history when attesting to the Petitioner's good character, which diminishes the weight of their testimony. Additionally, the Petitioner has provided no information about the circumstances of his arrests for domestic violence and child abuse or of the protection orders against him, despite being required to do so by the form

[5] *Instructions for Form I-129F, Petition for Alien Fiancé(e)* at 6-7, https://www.uscis.gov/sites/default/files/document/forms/i-129finstr.pdf, *see also* 8 C.F.R. §103.2(a)(1) (incorporating form instructions into regulations requiring that form's submission).

instructions. As long as the record lacks this information about the Petitioner's criminal and domestic violence history, which he was required to disclose, we cannot find that his favorable factors outweigh his unfavorable ones and that he should receive a waiver of the IMBRA filing limitations in the exercise of discretion.

III. CONCLUSION

The Petitioner has not established that he merits a waiver of the IMBRA filing limitations in the exercise of discretion. Furthermore, beyond the decision of the Director, we conclude that he has not complied with IMBRA's criminal history disclosure requirements. The petition will remain denied.

ORDER: The appeal is dismissed.