U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-E-B-

DATE: FEB. 19, 2016

APPEAL OF NEWARK 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 inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Newark, New Jersey, denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The Applicant is the beneficiary of an approved Form I-130, Petition for Alien Relative, which was filed on her behalf by her U.S. citizen spouse.

In a decision dated February 17, 2015, the Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, finding the record insufficient to establish that the Applicant's spouse would suffer extreme hardship in the event her waiver application was denied.

On appeal, the Applicant asserts that her spouse needs her because he has numerous health problems, and she includes extensive medical records of her spouse in support of her claim.

The record includes, but is not limited to: a statement from the Applicant in support of her appeal, identity and relationship documents, medical records, photographs and court records. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (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.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In assessing whether a conviction is a crime involving moral turpitude, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the crime committed. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra*; *Louissaint, supra; Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S.Ct. 815, 822 (2007).

Where a criminal statute does not contain a single, indivisible set of elements, but rather encompasses multiple distinct criminal offenses, "some . . . which involve moral turpitude and some which do not," we engage in a modified categorical inquiry. *Short*, supra, at 137-138. A statute is divisible only if it lists "potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant's conviction." *Descamps v. United States,* 133 S. Ct. 2276, 2283 (2013).

We conduct a modified categorical inquiry by reviewing the record of conviction to determine which offense within the divisible statute was the basis of the conviction, and then determine whether that statutory offense is categorically a crime involving moral turpitude. *See Short, supra*, at 137-38, *see also Descamps, supra,* at 2285-86. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Louissant, supra,* at 757; *see also Shepard v. U.S.,* 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

Article 42 of the Malicious Injury to Property Act provides:

> Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding ten dollars, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for a term not exceeding two years, with or without hard labour; and, in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable to be imprisoned for a term not exceeding five years, with or without hard labour.

The record reflects that on 2011, the Applicant was found guilty of a violation of Section 42 of the Malicious Injury to Property Act for malicious destruction of property in the The record reflects that she made full restitution to the complainant and then the case against her was "admonished and discharged."

As the Applicant has not contested her inadmissibility and the record does not show that determination to be in error, we will not disturb the Director's determination that the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for her conviction of a crime involving moral turpitude.

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

> (h) The Attorney General [now Secretary of the Department of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
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> . . . .
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> (1) (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 [Secretary] 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 . . .

The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, the qualifying relative is the Applicant's spouse. 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 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), but hardship "need not be unique to be extreme." *Matter of L-O-G-*, 21 I&N Dec. 413, 418 (BIA 1996). 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); *see also Matter of Shaughnessy,* 12 I&N Dec. 810 (BIA 1968) (separation of family members and financial difficulties alone do not establish extreme hardship); *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).

The Applicant asserts she is her spouse's sole support and she needs her to care for him; her spouse is very sick; he has had many surgeries, including knee surgeries; he has shaking hands and back problems; he forgets things and has post-traumatic stress disorder (PTSD); he has mental health problems; he had a carotid artery and spinal stenosis surgery; he needs help with putting his daily medication together, including insulin; and he cannot carry small grocery bags up the stairs. In support of her claim, she submits extensive medical records for her spouse. The medical records from December 20, 2010 include the following active problems: diabetes, hypertension, sleep apnea, osteoarthritis involving the knee, mixed hyperlipidemia, occlusion and stenosis of carotid artery, kidney diseases, gout, and PTSD. The records further indicate that the Applicant's spouse attends group counseling for PTSD veterans. Although these records are not recent, we note that the Applicant submits a letter, dated June 25, 2014, from the Department of Veterans Affairs, stating that the Applicant's spouse is "rated at 100% for a service-connected disability due to Individual Unemployability [sic] and is rated Permanent & Totally disabling [sic] effective 8/18/2004." In addition, the record includes a list, dated March 11, 2015, of over twenty medications that the Applicant's spouse is currently taking. As such, the record reflects that he is currently experiencing significant medical and psychiatric issues. The record reflects that the Applicant is her spouse's caretaker. A review of the documentation in the record, when considered in its totality, reflects that the Applicant has established that her U.S. citizen spouse would suffer extreme hardship if the application is denied.

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish 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). We must "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf 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). In evaluating whether to favorably exercise discretion,

> the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country'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 the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

Id. at 301 (citations omitted). We must also consider "[t]he underlying significance of the adverse and favorable factors." *Id.* at 302. For example, we assess the "quality" of relationships to family, and "the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of [removal] proceedings, with knowledge that the alien might be [removed]." *Id.* (citation omitted).

The unfavorable factors in this case include the Applicant's conviction for a crime involving moral turpitude in 2011, and two short periods of unauthorized stay. The favorable factors include the extreme hardship her spouse would suffer if the waiver application is denied, authorized residence of approximately four years, and the fact that she made full restitution for her crime. Upon review, the positive factors in this case outweigh the negative factors, such that a favorable exercise of discretion is warranted.

The Applicant has the burden to establish eligibility for a waiver of inadmissibility. *See* Section 291 of the Act, 8 U.S.C. § 1361. The Applicant has met that burden. Accordingly, we sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of N-E-B-*, ID# 14279 (AAO Feb. 19, 2016)