U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 34327676

Date: DEC. 20, 2024

Appeal of San Bernardino, California Field Office Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant has applied to adjust status to that of a lawful permanent resident and seeks a waiver under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h). The Director of the San Bernardino, California Field Office initially denied the Applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, after concluding he was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of crimes involving moral turpitude and that the record did not establish that his qualifying relative, his U.S. citizen spouse, would suffer extreme hardship if the Applicant was denied admission into the United States. The Applicant appealed that denial. We remanded the matter so that the Director could consider the extreme hardship faced by not just his spouse but his U.S. citizen children, as well as the additional evidence submitted on appeal. Thereafter, the Director determined that the Applicant established extreme hardship to his qualifying relatives but denied the waiver application because he did not merit a favorable exercise of discretion.

The matter is now before us on appeal. 8 C.F.R. § 103.3. The Applicant 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.

Section 212(a)(2)(A)(i)(I) of the Act provides that any noncitizen 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. A discretionary waiver for this ground of inadmissibility is available under section 212(h)(l)(B) of the Act if denial of admission would result in extreme hardship to the noncitizen's U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.[1] If a noncitizen seeking a waiver under this section of the Act demonstrates the existence of the required hardship, they must also show they merit a favorable exercise of discretion on their waiver request. Section 212(h) of the Act.

[1] Additional discretionary waivers of inadmissibility are available under subsections 212(h)(1)(A) and (C) of the Act that are inapplicable in this case.

A. Criminality and Inadmissibility

In [redacted] 2017, the Applicant was twice convicted of Petty Theft under section 488 of the California Penal Code (Cal. Penal Code), which constituted crimes involving moral turpitude, and was therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. *See also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009) (holding petty theft under Cal. Penal Code § 488 is a crime involving moral turpitude). The record also reflects that in [redacted] 2019, the Applicant was convicted of Unlawful Intercourse with a Minor Less Than 3 Years Younger under Cal. Penal Code § 261.5(c), a crime which is an adverse factor but not one that leads to inadmissibility because this offense has not been found to involve moral turpitude. *See Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007); *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017).

B. Extreme Hardship

As noted above, the Director determined that based on the totality of the evidence submitted, the Applicant established extreme hardship to his qualifying U.S. citizen relatives should they be separated. We do not question the Director's conclusion in that regard, and we incorporate their findings by reference.

C. Discretion

After establishing hardship to his qualifying U.S. citizen relatives, the Director determined that the Applicant did not merit an exercise of discretion when considering all the positive equities. The Director noted the Applicant's criminal history was "extremely severe" and his conviction for Cal. Penal Code § 261.5 (c) significantly impacted his moral character. Specifically, the Director stated as follows:

> . . . the negative equities outweigh the positive equities in the record. This is due to your severe criminal conviction for Unlawful Sexual Intercourse with a Minor, which significantly impacts your moral character and nullifies the other positive attributes you provided with your application. The record does not establish credible evidence of measurable reformation of character. Your criminal tendencies are reflected by the severity of your criminal record, particularly the nature, scope, seriousness, and recent occurrence of your criminal activity. Although you have avoided living a life of crime in the last seven (7) years, it is not a reliable indicator of either rehabilitation or future abstinence from recidivism. You did not provide probative evidence of rehabilitation or community service beyond any imposed by the courts.

On appeal, the Applicant argues that it was only after the matter was remanded that the Director characterized the convictions as "very serious," and in the first decision, the Director "seemed to forgive the crimes," and thus the only issue the Applicant had to overcome was proving hardship. The Applicant contends that the Director's determination that his unlawful presence is a negative factor that weighed heavily against him was an abuse of discretion, especially where applicants filing for adjustment of status under sections 245(a) and 245(i) of the Act are usually unlawfully present. However, we note that adjustment of status under 245(a) and 245(i) of the Act is granted as a matter

of discretion, rather than a right. *See Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970) ("In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion."). Moreover, when considering the length of a noncitizen's presence in the United States, the nature of that presence during this period must be evaluated. *Mendez*, 21 I&N Dec. at 302. *See also Dragon v. INS*, 748, F. 2d 1304, 1307 (9th Cir. 1984); *Matter of Tin*, 14 I&N Dec. 371, 374 (BIA 1973); *Matter of Buscemi*, 19 I&N Dec. 628, 633 (BIA 1988) (*citing Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1990) (finding that violations of immigration laws, such as residing in the country in an unlawful status, are an adverse factor); 1 *USCIS Policy Manual* E.8(C)(2), and *7 USCIS Policy Manual* A.10(B)(2), https://www.uscis.gov/policymanual (requiring that a noncitizen's residence in the United States be in a lawful status to qualify as a positive factor). Therefore, we may properly consider the Applicant's immigration violations in the discretionary analysis.

The Applicant proffers that his removal proceeding was terminated by the immigration judge without opposition, and that would not have occurred if he was considered a security threat or a threat to public safety. Additionally, the Applicant claims that shoplifting is a minor crime; and regarding his conviction under Cal. Penal Code § 261.5(c), he posits that he is not a pedophile, he was not required to register as a sex offender, and it was a strict liability crime. Regardless, the nature of statutory rape indicates that it is a dangerous crime. The Applicant was convicted of violation of Cal. Penal Code § 261.5(c), unlawful sexual intercourse with a minor. Cal. Penal Code § 261.5(c) provides: Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison. Thus, the statute involves a minor, who by definition was not capable of consenting to the sexual act.

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.*

In this case, the unfavorable factors are the Applicant's unlawful presence and three criminal convictions. The Applicant has two convictions for Petty Theft under Cal. Penal Code § 488, constituting crimes involving moral turpitude, and Unlawful Intercourse with a Minor Less Than 3 Years Younger under Cal. Penal Code § 261.5(c). Here, the Applicant's favorable factors include his U.S. citizen spouse and two children, hardship to his spouse and children, his steady employment, and his long residence in the United States since he was 5 years old. However, these favorable factors are

insufficient to warrant an exercise of discretion in his favor. We note that although the Applicant claims to own an auto-detailing business, he did not submit adequate evidence to support that contention. While the Applicant submitted his Form W-2, Wage and Tax Statements, they were not accompanied by documentation that he filed federal tax returns on his income. In addition, the sole letter of support, signed by two individuals, attests to his integrity and work ethic, but did not discuss his criminal history. Therefore, it is not clear that the writers were aware of the Applicant's criminal conduct. We recognize that the Applicant has expressed remorse for the seriousness of his criminal record. However, the Applicant's immigration violation and criminal record are significant negative factors. We acknowledge that 7 years have passed since his last conviction, and he has satisfied the terms and conditions imposed by the court. However, the Petitioner has not submitted sufficient evidence to establish rehabilitation and reformation in that time. Thus, when the favorable factors, in particular the hardship to his qualifying U.S. citizen relatives are considered together, they do not outweigh the negative equities such that a favorable exercise of discretion is warranted. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.