U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 29300397

Date: JAN. 5, 2024

Appeal of Des Moines, Iowa Field Office Decision

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

The Applicant seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), for having accrued unlawful presence in the United States.

The Director of the Des Moines, Iowa Field Office denied the application, concluding that the record did not establish that the Applicant's U.S. citizen spouse would experience extreme hardship if the waiver application was denied.[1] The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant submits a brief reasserting his eligibility for the benefit sought.

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.

I. LAW

A foreign national who has been unlawfully present in the United States for 1 year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act. A foreign national is deemed to be unlawfully present in the United States if present in the United States after the expiration of the period of authorized stay or if present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act.

This inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

[1] The Director also considered whether the Applicant's children would experience extreme hardship if the waiver application was denied. However, the Applicant's children are not qualifying relatives for a waiver for unlawful presence under section 212(a)(9)(B)(v) of the Act.

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

II. ANALYSIS

The Applicant does not contest admissibility on appeal. Accordingly, the sole issue on appeal is whether the Applicant has established extreme hardship to a qualifying relative as required for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act.

The record indicates that the Applicant entered the United States without inspection or admission in 2003 and remained in the country for three years. He subsequently departed the United States and reentered the country with a tourist visa in February 2015. He remained in the country until May 2018. As a result, the Director determined that the Applicant was inadmissible under section 212(a)(9)(B)(i)(II) for departing the United States after having been unlawfully present for one year or more.

The Applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status based on a Form I-130, Petition for Alien Relative filed by his spouse. The Director subsequently issued a notice of intent to deny (NOID) informing the Applicant of his inadmissibility and instructing him to file a Form I-601, Waiver of Grounds of Inadmissibility,[2] (Form I-601) and any supporting documentation establishing extreme hardship to a qualifying relative. In response, the Applicant submitted a waiver application and copies of his Mexican passport biographic page, Mexican birth certificate with an English translation, his spouse's certificate of naturalization, his certificate of marriage, a copy of the birth certificates for his U.S. citizen children and stepchildren, documents from the Indiana Department of Child Services, one page from his 2020 federal income tax return, and a copy of the 2022 Department of Health Human Services Poverty Guidelines.

The Director acknowledged the Applicant's NOID response. However, she determined that it was insufficient to establish that his U.S. citizen spouse would experience extreme hardship if the waiver application was denied. Regarding financial hardship, the Director noted that a copy of his 2020 federal income tax return only listed his spouse as head of household. She also noted that a copy of his 2021 federal income tax return was not an official transcript or signed by him or his spouse.

[2] The Director incorrectly stated in the NOID that the Applicant should file a Form I-601A, Application for Provisional Unlawful Presence Waiver instead of Form I-601, Application for Waiver of Grounds of Inadmissibility. However, the error did not affect the Director's discussion of the requirements for a waiver.

On appeal, the Applicant references the USCIS Policy Manual and Policy Alert,[3] which indicate that an officer should only deny a benefit request without issuing a request for evidence (RFE) or notice of intent to deny (NOID) if there is no possibility that additional information or explanation would establish a legal basis for approval. He argues that USCIS could not conclude that he had no possibility of demonstrating his eligibility for a waiver without giving him a chance to respond to a request for evidence (RFE). He maintains that USCIS' failure to adhere to its own policy has resulted in the exact situation that it sought to avoid—denying requests for immigration benefit even though an applicant could have established their eligibility if given a chance to provide additional evidence.

We acknowledge the Applicant's arguments on appeal. However, nothing in the USCIS Policy Manual requires the agency to issue multiple NOIDs and RFEs requesting additional evidence. Rather, the policy manual states that "an officer should issue an RFE *or* NOID when the facts and law warrant" and that "USCIS should generally issue an RFE *or* NOID if there is a possibility the benefit requestor could overcome a finding of ineligibility for the benefit sought by submitting additional evidence." Consistent with that policy, the Director issued a NOID informing the Applicant that he could file a Form I-601 if he believed that he met the requirements for the waiver. She also informed the Applicant that "[he] should submit all documentation in support of [his] waiver application at the time he filed the Form I-601A" and that "failure to submit supporting documentation establishing extreme hardship [would] result in the denial of [his] waiver application. In response to the NOID, the Applicant failed to submit supporting documentation establishing that his U.S. citizen spouse would experience extreme hardship if he is not allowed to remain in the United States. Accordingly, we agree with the Director's decision and the waiver application will remain denied.

ORDER: The appeal is dismissed.

[3] 1 *USCIS Policy Manual* E.6(F), https://www.uscis.gov/policymanual and USCIS Policy Alert, PA-2101-11, *Requests for Evidence and Notices of Intent to Deny* 1 (Jun. 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-RFEs%26NOIDs.pdf.