U.S. Department of Justice

Executive Office for Immigration Review

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Name: F[redacted], E[redacted] J[redacted]

A [redacted]-382

Date of this notice: 12/14/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.
Donovan, Teresa L.
Greer, Anne J.

Userteam: Docket

File: A[redacted]-382 – Los Angeles, CA Date: DEC 14 2018

In re: E[redacted] J[redacted] F[redacted] a.k.a. [redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nancy E. Miller, Esquire

APPLICATION: Waiver of inadmissibility under section 212(h) of the Act

The respondent, a native and citizen of the Philippines and a lawful permanent resident of the United States,[1] appeals from the Immigration Judge's August 1, 2017, decision finding him removable as an alien convicted of a crime involving moral turpitude and denying his application for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h). The appeal will be sustained and the record will be remanded.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted on December 8, 2000, for robbery under section 211 of the California Penal Code and for assault with a deadly weapon under section 245(a)(1) of the California Penal Code (IJ at 1). For these offenses, the respondent was sentenced to 365 days in county jail and 3 years of probation (*Id.*). The respondent does not dispute the Immigration Judge's determination that these convictions involve moral turpitude or that they categorically involve violent conduct that would trigger the requirement that he show a "heightened standard" of hardship to establish eligibility for a waiver of inadmissibility under section 212(h)(1)(B) of the Act (IJ at 6-10).[2] Rather, he argues that because his application for a waiver of inadmissibility arises under section 212(h)(1)(A) of the Act and is based on the passage of at least 15 years since his convictions, he need not show any hardship to a qualifying relative. *See* Respondent's Br. at 7-9.

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[1] The respondent indicated below that he adjusted his status to that of a lawful permanent resident in April 2000 after previously entering the United States on a visitor's visa. *See* Respondent's "Eligibility Brief" in support of his application for a waiver of inadmissibility.

[2] Accordingly, we do not address the questions whether either robbery under section 211 of the California Penal Code or assault with a deadly weapon under section 245(a)(1) of the Penal Code would qualify as violent crimes or aggravated felonies. The latter question has no impact on the respondent's eligibility for a waiver under section 212(h) of the Act because he was not admitted to the United States as a lawful permanent resident but rather adjusted his status after an admission as a visitor. *Cf. Matter of J-H-J-*, 26 I&N Dec. 563, 564-65 (BIA 2015).

We are unpersuaded by the respondent's appellate argument. In *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992), we stated that a waiver of inadmissibility under section 212(h) of the Act extends to two categories of applicants. The "first category includes any immigrant who meets eligibility criteria which largely concern the type of exclusion ground involved or when the excludable activity occurred, as well as issues of the alien's rehabilitation and the national welfare, safety, or security of the United States." *Matter of Alarcon*, 20 I&N Dec. at 563. The respondent argues that this category is relevant to his case, as opposed to the "second category [that] includes immigrants who demonstrate the requisite relationship to a United States citizen or lawful permanent resident and establish that their exclusion would result in extreme hardship to that citizen or lawful permanent resident." *See id.*

Aliens seeking a waiver of inadmissibility under the first category, i.e., subsection 212(h)(1)(A) of the Act, must demonstrate that "the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status." The respondent argues that his application for admission to the United States is a "continuing application," and that since his convictions occurred in December 2000, more than 15 years had passed by the time the Immigration Judge considered his application for a waiver of inadmissibility in August 2017 (Respondent's Br. at 4, 6-7). Therefore, he contends that he was not required to show any hardship to a qualifying relative under section 212(h)(1)(A) of the Act, including the heightened standard of hardship, that the Immigration Judge required to be shown. *Id.* at 8-9.

We disagree with this construction. Aliens with violent crime convictions seeking a waiver under section 212(h) of the Act are required by regulation to show "heightened" hardship before the Attorney General will grant a discretionary waiver of inadmissibility under section 212(h)(2) of the Act. 8 C.F.R. § 1212.7(d); *Mejia v. Gonzales*, 499 F.3d 991, 995 (9th Cir. 2007). This regulation applies without regard to the subparagraph of section 212(h)(1) under which the applicant claims eligibility for relief, since satisfying one of the statutory standards for determining an alien's threshold eligibility for seeking a waiver is only the first part of the waiver process. *Mejia v. Gonzales*, 499 F.3d at 996. Even after the waiver applicant has met the required showing of extreme hardship, or one of the other threshold standards, the law also provides, in section 212(h)(2) of the Act, that the Attorney General has discretion to decide whether to grant the requested relief. The regulation at 8 C.F.R. § 1212.7(d) governs only the exercise of discretion under section 212(h)(2) of the Act, after the alien has met the threshold requirements of section 212(h)(1) of the Act. *Mejia v. Gonzales*, 499 F.3d at 996. As such, it was properly found to apply to the respondent.

Notwithstanding the above, we agree with the respondent that the record demonstrates that his lawful permanent resident wife would suffer exceptional and extremely unusual hardship if he is removed from the United States. Given the Immigration Judge's findings that they co-own and operate a business together, the removal of the respondent's support would cause significant economic hardship. *See* IJ at 8 (wife's testimony that respondent's income brings in 50% of household income, and that she may lose their family business if the respondent is removed because of an inability to make mortgage payments on properties owned by business). When combined with the extreme emotional hardship a separation would cause the respondent's wife of

23 years, the cumulative hardship to her reaches the required heightened level of hardship on our de novo review of this question.

The Immigration Judge found that the respondent had demonstrated rehabilitation and that, but for his inability to show the heightened level of hardship to his qualifying relatives, the respondent would merit a waiver under section 212(h) as a matter of discretion (IJ at 10-11). In view of these findings, which the Department of Homeland Security does not challenge on appeal, we will vacate the Immigration Judge's order and determine that the respondent is eligible for and deserving of a waiver of inadmissibility. The respondent therefore will be restored to lawful permanent resident status via the stand-alone entry of the waiver of inadmissibility, as he was a returning lawful permanent resident at the time he was issued the Notice to Appear (IJ at 1, 6). *Matter of Abosi*, 24 I&N Dec. 204, 205-06 (BIA 2007). Accordingly, on the entry of the following orders, the record will be remanded for the completion and updating of background and security investigations.

ORDER: The appeal is sustained. The respondent is found eligible for and deserving of a waiver of inadmissibility.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

Temporary Board Member Teresa L. Donovan respectfully dissents without opinion.