U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: VO, QUAN H

A 076-745-476

Date of this notice: 5/2/2019

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:
Mullane, Hugh G.
Liebowitz, Ellen C
Malphrus, Garry D.

Userteam: Docket

File: A076-745-476 – Atlanta, GA Date: MAY - 2 2019

In re: Quan H VO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Tien G. Nguyen, Esquire

ON BEHALF OF DHS: Blake Doughty
Assistant Chief Counsel

APPLICATION: Waiver of inadmissibility

The respondent, a native and citizen of Vietnam and a lawful permanent resident of the United States, appeals the Immigration Judge's June 14, 2018, decision 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 Department of Homeland Security ("DHS") moved for summary affirmance of the Immigration Judge's decision. On December 14, 2018, we requested supplemental briefing, and both the respondent and the DHS submitted supplemental briefs. The record will be remanded to the Immigration Judge.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the respondent is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude (IJ at 1-2). The respondent sought a waiver of inadmissibility under section 212(h) of the Act. The Immigration Judge found that the respondent is statutorily eligible for a waiver of inadmissibility under section 212(h)(1)(A) of the Act (IJ at 2-3). However, the Immigration Judge concluded that the respondent is subject to the requirements of 8 C.F.R. § 1212.7(d) because he has been convicted of a violent or dangerous crime, and could not establish the necessary "exceptional and extremely unusual hardship" to his qualifying relatives (IJ at 3-6). He therefore denied the respondent's request for a waiver under section 212(h).

On appeal, the respondent argues that the Immigration Judge erred by only considering the hardship to his qualifying relatives and not his own hardship under the regulation, and that he has established the requisite "exceptional and extremely unusual hardship" as required (Respondent's Br. at 5-26).

In its supplemental brief, the DHS withdraws its request for summary affirmance of the Immigration Judge's decision, agreeing with the respondent that the "exceptional and extremely unusual hardship" standard under 8 C.F.R. § 1212.7(d) applies both to qualifying relatives and to

the applicant personally (DHS's Supp. Br. at 6 n.5, 23-26). The DHS also argues, however, that the respondent is statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act because he was convicted of an aggravated felony after having been admitted to the United States as an applicant lawfully admitted for permanent residence (DHS's Supp. Br. at 6-23). In response, the respondent argues that the DHS waived this argument regarding statutory eligibility, and alternatively that he was not initially admitted as a lawful permanent resident when he first entered the United States by virtue of his adjustment under section 209(a) of the Act, 8 U.S.C. § 1159(a) (Respondent's Supp. Br. at 3-12).

We first address the issue of statutory eligibility as now raised by DHS. The Board sought supplemental briefing on the scope of the hardship requirement under the regulation and did not intend to seek briefing on issues the parties had not disputed below. Here, the Immigration Judge specifically found that "[n]either party disputes that Respondent has met the statutory criteria to be eligible for a 212(h) waiver." (IJ at 3). Moreover, DHS initially sought summary affirmance of the Immigration Judge's decision, and did not raise any issue regarding eligibility until we requested supplemental briefing on another issue. Under these circumstances, the DHS has waived the issue of the respondent's statutory eligibility under section 212(h) of the Act, and the issue is not before us. *See Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1145-46 (11th Cir. 2010); *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005) ("When an appellant fails to offer argument on an issue, that issue is abandoned.") (citations omitted).

Regarding the issue set out for supplemental briefing, the parties agree that although section 212(h)(1)(B) of the Act limits the requisite hardship to qualifying relatives, the plain language of the hardship standard in 8 C.F.R. § 1212.7(d) is not so limited. The parties agree that in evaluating hardship under the regulation, the potential hardship to the applicant should be considered. *See also Rivera–Peraza v. Holder*, 684 F.3d 906, 910–11 (9th Cir. 2012). Therefore, we will remand the record to the Immigration Judge because he did not consider whether the respondent himself would suffer exceptional and extremely unusual hardship if removed to Vietnam. 8 C.F.R. § 1212.7(d).

On remand, the Immigration Judge should allow both parties to submit arguments and evidence concerning whether the respondent can meet the hardship standard under the regulation and if so, whether he can establish that he merits a favorable exercise of discretion. *See* 8 C.F.R. § 1212.7(d). We express no opinion regarding the outcome of the proceedings on remand. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings and for the entry of a new decision consistent with this opinion.

FOR THE BOARD

Board Member Hugh G. Mullane dissents without separate opinion.