[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14395
Non-Argument Calendar

Agency No. A077-832-124

MARIE ALCIDE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(August 15, 2018)

Before ED CARNES, Chief Judge, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

Marie Alcide, a native and citizen of Haiti proceeding pro se, seeks review of the Board of Immigration Appeals' decision affirming the immigration judge's order denying her applications for adjustment of status under 8 U.S.C. § 1255(a) and a waiver of inadmissibility under 8 U.S.C. § 1182(h).

I.

Alcide entered the United States in February 1999 as a visitor. In 2003 she married Ossman Desir, a United States citizen, and in 2007 she became a lawful permanent resident based on her marriage. A year later Desir and Alcide were indicted for: conspiracy to defraud the United States and the Internal Revenue Service, in violation of 18 U.S.C. § 286; filing false, fictitious, or fraudulent tax claims, in violation of 18 U.S.C. § 287; misusing social security numbers, in violation of 42 U.S.C. § 408(a)(8) and 18 U.S.C. § 2; and aggravated identity theft under 18 U.S.C. §§ 1028A(a)(1), (c)(11), and 2. According to the 45-count indictment, Desir and Alcide obtained identifying information, such as names and social security numbers, from living and deceased individuals and used that information to prepare and file false tax returns so that they could receive tax refunds. They received about $400,000 in refunds as a result of their fraudulent conduct.

In 2009 Alcide pleaded guilty to a single count of conspiracy to defraud the United States and the Internal Revenue Service, in violation of 18 U.S.C. § 286. As part of her guilty plea, the government agreed to recommend a two-level reduction to her offense level based on acceptance of responsibility and another two-level reduction because of her minor role in the fraudulent tax refund scheme. She was sentenced to 14 months in prison and three years of supervised release.

In April 2010 the Department of Homeland Security issued Alcide a notice to appear, alleging that she was subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) because her tax fraud conviction qualified as an aggravated felony under that statute. See 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). At a removal hearing in May 2010, Alcide conceded that she was removable as an aggravated felon, waived all relief from removability, and the immigration judge ordered that she be removed to Haiti.

In September 2012 Alcide filed a motion to reconsider on the ground that her counsel in the tax fraud case was ineffective because he did not advise her of the immigration consequences of her guilty plea, in violation of Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010). She also asked the IJ to consider the circumstances she faced if removed to Haiti, pointing to the massive earthquake in January 2010 that had devastated the country; her husband's inability

to travel to Haiti because of his probation conditions; her strong family ties to the United States and lack of family in Haiti; and significant health issues that she and her husband faced.

The IJ denied her motion as untimely because Alcide did not file it within 30 days of her May 13, 2010 removal order. And the IJ stated that even if the motion were timely, it would still be denied because she failed to establish any factual or legal error in her removal order; there was no evidence that her tax fraud conviction had been vacated; and she failed to specify what type of relief she was seeking. Alcide filed an appeal with the Board, which dismissed her appeal but, in light of the circumstances Alcide had presented in her motion, reopened her case and remanded it to the IJ so that she could apply for a waiver of inadmissibility under 8 U.S.C. § 1182(h).[1]

Alcide filed an application for a waiver of inadmissibility under § 1182(h). She indicated on her application that she had been convicted of an aggravated felony, and she submitted a copy of her plea agreement and a letter from a probation officer stating that she had been assigned a low level of supervision because of her positive characteristics.

[1] Alcide also filed an application for adjustment of status under 8 U.S.C. § 1255(a) in conjunction with her application for a waiver of inadmissibility. Because she argues only that the Board erred in denying her application for a waiver of inadmissibility, that is the only application we address.

A hearing was held in September 2016. Alcide conceded that she was removable because of her aggravated felony conviction. She testified that her parents, siblings, and her husband's children (she did not have children of her own) all lived in the United States, and that she did not have any family in Haiti. She stated that she had high blood pressure and arthritis. She testified that her husband had serious health problems, including seizures and end-stage kidney failure, and that he depended on her for care. She explained that if she were deported, he would have to go with her, she would not be able to find a job or housing in Haiti, and he would not be able to receive the necessary medical care.

Alcide also testified about her tax fraud conviction. She stated that she played a minor role in the offense, explaining that she signed other people's tax returns when the person was present and authorized her to do so, that the tax refunds were deposited into her accounts, and that she signed checks from those accounts. She testified that she had received credit for acceptance of responsibility and that she had made a bad choice and regretted her actions. She also stated that she had successfully completed her probation. Her husband also testified about the tax fraud scheme, explaining that he had organized it and that Alcide signed tax returns only when he asked her to and that she sometimes signed the tax returns when the people whose names she was signing were not present.

In October 2016 the IJ issued an oral decision denying Alcide's application. Because the grant of a § 1182(h) waiver is a discretionary form of relief, the IJ weighed the negative factors showing Alcide's undesirability as a permanent resident with the positive factors in favor of her remaining in the United States. See In re Mendez-Moralez, 21 I. & N. Dec. 296, 300 (BIA 1996) ("[The IJ] must balance the [negative] factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on [her] behalf to determine whether the grant of relief [under § 1182(h)] appears to be in the best interests of this country.").

The IJ credited Alcide's testimony that her husband had serious medical problems and that there would be hardship for her and him if she were deported. But the IJ noted that despite her family ties in the United States, only her husband had appeared at the hearing. The IJ acknowledged her testimony that she was only a minor participant in the tax fraud scheme but found that her testimony about her level of involvement was not credible. Despite Alcide's claim that she did not know what was going on, the IJ found that she knew that a lot of money was going into her accounts. The IJ also pointed out that her husband had contradicted Alcide's testimony that she signed the tax returns only in the presence of the people for whom she was signing. The IJ emphasized the seriousness of her offense, noting that the scheme lasted several years, and she still owed thousands

of dollars in restitution. Based on those fact findings, the IJ denied Alcide's application and ordered her removed to Haiti.

Alcide appealed the IJ's order to the Board, which dismissed her appeal. It reviewed the IJ's fact findings and ruled that the IJ gave sufficient weight to the positive and negative factors. As for the positive factors, the Board acknowledged the IJ's findings about Alcide's lengthy presence in the United States, her family ties in the United States, and the hardship she would face if deported to Haiti. But it agreed with the IJ that Alcide's criminal conduct outweighed those positive factors, because she had conspired to defraud the government of nearly $400,000 and did not demonstrate rehabilitation, as evidenced by her attempt to minimize her role in the offense. This is Alcide's appeal.

II.

Because the Board issued its own decision and did not expressly adopt the IJ's opinion or reasoning, we review only the Board's decision. Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001). The Attorney General has discretion to grant a waiver of inadmissibility under § 1182(h), and we lack jurisdiction to review "any judgment regarding the granting of relief" for waivers of inadmissibility. 8 U.S.C. § 1252(a)(2)(B)(i); see also id. at § 1182(h) ("No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection."). Despite that jurisdictional bar, we retain

jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." Id. § 1252(a)(2)(D). "A question of law involves the application of an undisputed fact pattern to a legal standard." Bedoya-Melendez v. U.S. Att'y Gen., 680 F.3d 1321, 1324 (11th Cir. 2012). By contrast, a discretionary decision "requires an adjudicator to make a judgment call." Id.

To begin with, we lack jurisdiction over two of Alcide's contentions because they do not raise constitutional claims or questions of law. See 8 U.S.C. § 1252(a)(2)(B)(i), (a)(2)(D). Alcide contends that the Board erred in weighing the positive and negative factors, and that the Board also erred in finding that she had not adequately demonstrated rehabilitation. But neither of those determinations involves the application of undisputed facts to a legal standard. Id. Instead, they involved "factfinding and factor-balancing," which means they are discretionary and not subject to review. Bedoyo-Melendez, 680 F.3d at 1325 (quotation marks omitted).[2]

Alcide's remaining contentions do raise questions of law, but they are without merit. First, she contends that the Board did not consider the positive factors in her case. But the record shows that the Board did. Second, she contends that the Board misapplied its precedent by going beyond her plea agreement and

[2] Alcide also argues that her guilty plea violates the Supreme Court's Padilla decision, but we lack jurisdiction to consider that argument because, although she raised it in her motion to reconsider, she did not raise it before the Board after her case was remanded. See Sundar v. INS, 328 F.3d 1320, 1323 (11th Cir. 2003) ("[W]e lack jurisdiction to consider claims that have not been raised before the BIA.").

judgment of conviction to determine whether she played a minor role in the tax fraud scheme. See In re Mendez-Moralez, 21 I. & N. Dec. at 303 n.1 ("[The IJ and the Board] may not go beyond the record of conviction to determine the guilt or innocence of the alien."). But the Board did not go beyond the record of conviction to determine her guilt in the tax fraud scheme; instead, it considered the evidence at the hearing to determine whether her role in the scheme warranted a grant of discretionary relief, which it was allowed to do. See id. ("[I]t is proper to look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted.").[3] Third, her contention that the Board misapplied its precedents in In re Jean, 23 I. & N. Dec. 373, 381–84 (BIA 2002), and In re H-N-, 22 I. & N. Dec. 1039, 1040 (BIA 1999), fails because those decisions involved waivers of inadmissibility under 8 U.S.C. § 1159 (adjustment of status for refugees), not § 1182(h). Fourth and finally, there is no support for her argument that the Board should not have considered rehabilitation.

[3] Alcide refers to the Board's decision in Matter of Silva-Trevino III, 26 I. & N. Dec. 826 (BIA 2016), to argue that the Board misapplied its precedent, but that decision is off point. In Silva-Trevino the Board stated that it could not look outside the record of conviction to conclude that an alien's conviction was for a crime of moral turpitude. Id. at 829; see also Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1311 (11th Cir. 2011) ("[W]e hold that the [Board] and the IJ erred by considering evidence beyond the record of [the alien's] false imprisonment conviction to determine that he had been convicted of a crime involving moral turpitude."). But that is not an issue in this case, and in any event the Board in Silva-Trevino stated that in balancing the positive and negative factors it may "examine the actual nature of the crime by considering evidence outside of the record of conviction." 21 I. & N. Dec. at 837.

See In re Mendez-Moralez, 21 I. & N. Dec. at 305 ("[R]ehabilitation or the lack thereof is a factor to be considered in the exercise of discretion [for waivers of inadmissibility under § 1182(h)].").

PETITION DISMISSED IN PART AND DENIED IN PART.