U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18802052

Date: MAR. 21, 2022

Appeal of Oakland Park, Florida Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident and seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Oakland Park, Florida Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the Applicant is inadmissible under section 212(a)(1)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The Director further determined that the Applicant's conviction for assault in the third degree was for a violent or dangerous crime, which requires a showing of extraordinary circumstances for a discretionary waiver to be granted. The Director concluded that the record did not establish that the Applicant's qualifying relatives, his U.S. citizen spouse and child, would experience extreme hardship if he were denied the waiver or establish that a favorable exercise of discretion is warranted.

The matter is now before us on appeal. On appeal, the Applicant asserts that the Director did not address his argument that his conviction for third degree assault is not a crime involving moral turpitude, and as such, cannot serve as the basis for applying the heightened discretionary standard applicable to those who have been convicted of violent or dangerous crimes.

The Administrative Appeals Office reviews 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

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. Section 212(a)(2)(A)(i) of the Act.

Noncitizens who are inadmissible under section 212(a)(2)(A)(i) may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a discretionary waiver is available if admission to the United States would not be contrary to the national welfare, safety, or security of the

United States and the noncitizen has been rehabilitated. Section 212(h)(1)(A) of the Act. A discretionary waiver is also available 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. Section 212(h)(1)(B) of the Act.

A noncitizen who establishes statutory eligibility for a waiver under section 212(h)(1)(A) or (B) of the Act must also demonstrate that U.S. Citizenship and Immigration Services (USCIS) should favorably exercise its discretion and grant the waiver. The regulation at 8 C.F.R. § 212.7(d), however, limits the favorable exercise of discretion with respect to noncitizens who are inadmissible under section 212(a)(2)(A)(i) of the Act for violent or dangerous crimes. Specifically, 8 C.F.R. § 212.7(d) generally precludes a favorable exercise of discretion in these cases except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which the noncitizen clearly demonstrates that the denial of the waiver application would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the noncitizen's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

The only issue raised by the Applicant on appeal is whether his 2001 assault conviction is for a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i) of the Act.[1] He asserts that the Director incorrectly determined that this conviction renders him inadmissible, and as a result, erroneously required him to meet the heightened discretionary standard at 8 C.F.R. § 212.7(d), which applies to those whose convictions are for violent or dangerous crimes.

A. Crime Involving Moral Turpitude

The Act does not define the term "crime involving moral turpitude." However, the Board of Immigration Appeals held in *Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007), that "moral turpitude" generally refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."

In assessing whether a conviction is a crime involving moral turpitude, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979); *see also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). We then engage in a categorical inquiry of the statute, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,*

[1] The Applicant does not contest the Director's determination that he is inadmissible under section 212(a)(2)(A)(i) of the Act based on his 2007 conviction for Fraudulent Use of a Credit Card in violation of Florida Statutes Section 817.481, or that he requires a waiver under section 212(h) of the Act. The record supports the Director's determination that this conviction renders the Applicant inadmissible for a crime involving moral turpitude.

495 U.S. 575, 599-600 (1990)). This categorical approach focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S. Ct. 815, 822 (2007)).

Where a criminal statute is divisible (encompasses multiple distinct offenses not all of which are crimes involving moral turpitude), we conduct a modified categorical inquiry by reviewing the record of conviction to discover which offense within the divisible statute formed the basis of the conviction, and then to determine whether that offense is categorically a crime involving moral turpitude. *See Short,* 20 I&N Dec. at 137-38, *see also Descamps v. U.S.*, 133 S. Ct. 2276, 2285-86 (2013). A divisible statute "(1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a "categorical match" to the relevant generic standard." *Chairez*, 26 I&N Dec. at 822 (citing *Descamps,* 113 S. Ct. at 2283).

B. Applicant's Conviction for Assault in the Third Degree

The record reflects that the Applicant was convicted of Assault in the Third Degree in violation of New York Penal Law (N.Y.P.L.) section 120.00 in 2001. At the time of the Applicant's conviction, this statute stated, in pertinent part:

> A person is guilty of assault in the third degree when:
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> 1. With intent to cause physical injury[2] to another person, he causes such injury to such person or to a third person; or
> 2. He recklessly causes physical injury to another person; or
> 3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

The Applicant's certificate of disposition issued by the City of [redacted] Court indicates his conviction under N.Y.P.L. section 120.00 but does not identify under which of the three subsections he was convicted.[3] The statute identifies three types of conduct: intentionally causing physical injury to another; recklessly causing physical injury to another; and criminally negligently causing physical injury to another by means of a deadly weapon on dangerous instrument. The Board of Immigration Appeals has previously determined that a conviction under N.Y.P.L. section 120.00(1) is a crime involving moral turpitude. *See Matter of Solon*, 24 I&N Dec. 239, 245 (BIA 2007).

In cases involving assault or battery, a finding of moral turpitude involves "an assessment of both the state of mind and the level of harm required to complete the offense." *Solon* I&N Dec. at 242. Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a

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[2] Under N.Y.P.L Section 10.00(9), "physical injury" means "impairment of physical condition or substantial pain."

[3] The Director stated in the decision that the Applicant was convicted under N.Y.P.L. Section 120.00(1), but the evidence does not support that statement.

resulting meaningful level of harm, constitute crimes involving moral turpitude, but "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required" for a finding of moral turpitude. *Id.* "[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm." *Id.* Recklessness, defined generally as "a conscious disregard of a substantial and unjustifiable risk, constituting a gross deviation from the standard of conduct a reasonable person would observe under the circumstances," can be a sufficient mental state for moral turpitude purposes for crimes also involving significant harm or aggravating factors. *Matter of Leal*, 26 I&N Dec. 20, 22-23 (BIA 2012).

Under N.Y.P.L section 120.00(2), reckless behavior that causes physical injury to another person may result in a conviction for assault in the third degree, but such conviction does not require more serious resulting harm (i.e., causing more severe physical injury) than the intentional act prohibited by section 120.00(1), nor does it require any aggravating factors. As such, the reckless conduct that must be proven for a conviction under N.Y.P.L. section 120.00(2) would not be considered a crime involving moral turpitude. Therefore, the Applicant was convicted under a divisible statute, with some conduct involving moral turpitude and some not.

The Applicant maintains on appeal that since the statute identifies three separate offenses, not all of which involve moral turpitude the Director did not have sufficient basis for concluding that his conviction renders him inadmissible under section 212(a)(1)(A)(i) of the Act. In support of this claim, he cites and provides copies of two unpublished summary orders issued by the Second Circuit of Appeals in which the court remanded the cases of respondents in removal proceedings. The respondents in these matters had also been convicted under N.Y.P.L. section 120.00 and the Board of Immigration Appeals had determined that such conviction is for a crime involving moral turpitude. The Second Circuit determined that the Board had not supported its conclusion that the respondents' convictions for third degree assault in New York were under section 120.00(1), which the Board had previously determined constitutes a crime involving moral turpitude, nor had the Board analyzed whether a conviction under another subsection of N.Y.P.L. section 120.00 constitutes a crime involving moral turpitude.

The Applicant argues that similarly, the Director should not have concluded that his conviction under N.Y.P.L. section 120.00 is for a crime involving moral turpitude without evidence that he was either convicted under subsection 1 of that statute, or without reaching a conclusion that all three subsections involve moral turpitude, under a modified categorical approach.

The cited cases involve respondents in removal proceedings, in which the government bears the burden of establishing, by clear and convincing evidence, that a respondent is deportable. *See* 8 C.F.R. § 1240.8(a). In this proceeding, the applicant bears the burden of establishing admissibility clearly and beyond doubt. *See Matter of Bett*, 26 I&N Dec. 437, 440 (BIA 2014) ("an applicant has the burden to show that he is clearly and beyond doubt entitled to be admitted to the United States and is not inadmissible under section 212(a) of the Act.") (citations omitted). *See also Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)(holding that the non-citizen bears the burden of resolving ambiguities in their criminal record and demonstrating that they were not convicted of a disqualifying offense).

The current record does not include a complete record of the Applicant's conviction, and it does not indicate under which section of the divisible statute the Applicant was convicted. Therefore, it is the

Applicant's burden to demonstrate that his conviction under N.Y.P.L. Section 120.00 does not render him inadmissible, and he cannot meet this burden without providing documentation clearly establishing under which section of this statute he was convicted. Because the Applicant has not met this burden, we conclude that his assault conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

C. Violent or Dangerous Crime

The Applicant also maintains on appeal that the Director improperly determined that the heightened discretionary standard at 8 C.F.R. § 212.7(d) applies in his case. However, his argument is based on his claim that his assault conviction is not for a crime involving moral turpitude that renders him inadmissible, rather than a claim that the underlying conduct does not render the offense "violent or dangerous." For the reasons discussed above, the Applicant has not overcome the Director's determination that his conviction for assault in the third degree renders him inadmissible under section 212(a)(2)(A)(i) of the Act.

The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation or case law. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002) (explaining that defining and applying the "violent or dangerous crime" discretionary standard is distinct from determination that a crime is an aggravated felony). Pursuant to our discretionary authority, we understand "violent or dangerous" according to the ordinary meanings of those terms. Black's Law Dictionary (9th ed. 2009), for example, defines *violent* as 1) "[o]f, relating to, or characterized by strong physical force," 2) "[r]esulting from extreme or intense force," or 3) "[v]ehemently or passionately threatening." It defines *dangerous* as "perilous, hazardous, [or] unsafe," or "likely to cause serious bodily harm." In determining whether a crime is a violent or dangerous crime for purposes of discretion, we are not limited to a categorical inquiry but may consider both the statutory elements and the nature of the actual offense. *See Torres-Valdivias v. Lynch*, 786 F. 3d 1147, 1152 (9th Cir. 2015); *Waldron v. Holder,* 688 F.3d 354, 359 (8th Cir. 2012).

Here, the record contains sufficient information regarding the nature of the assault offense committed by the Applicant to support the Director's conclusion that the heightened discretionary standard at 8 C.F.R. § 212.7(d) is applicable in this case.[4]

D. Extreme Hardship and Heightened Discretionary Standard

Based on the foregoing, the Applicant is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of two crimes involving moral turpitude, and he has not overcome the Director's determination that his assault offense, which involved the infliction of bodily harm, is also a violent crime.

Therefore, the Applicant must first establish his statutory eligibility for a waiver by demonstrating extreme hardship to a qualifying relative under section 212(h)(1)(B) of the Act, or demonstrating his rehabilitation and satisfying the other requirements under section 212(h)(1)(A) of the Act, before

[4] The arresting police officer's incident report indicates that the Applicant was arrested after intentionally striking a victim with a broken bottle, causing bodily harm to the victim's face.

USCIS must determine whether the application merits a favorable exercise of discretion. As stated above, a favorable exercise of discretion is not warranted for applicants who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application would result in exceptional and extremely unusual hardship. 8 C.F.R. § 212.7(d).

The Applicant stated that he is eligible under section 212(h)(1)(B) of the Act because his U.S. citizen spouse and child would experience extreme hardship if his waiver application is denied. 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 denying the application, the Director acknowledged and evaluated the Applicant's claims and supporting evidence related to the financial, medical, emotional and psychological challenges his spouse and child would experience if the waiver application is denied, but determined that, when considered in the aggregate, these challenges did not rise to the level of extreme hardship. The Director therefore concluded that, since the Applicant had not established the requisite extreme hardship, he could not meet his burden to show that he and his family would meet the heightened discretionary standard imposed by 8 C.F.R. § 212.7(d), which requires a showing of exceptional and unusually extreme hardship or other extraordinary circumstances. Finally, the Director concluded that a favorable exercise of discretion would not be warranted in this case even if the Applicant had established his statutory eligibility, due to the Applicant's additional arrests and criminal convictions, which include multiple drinking and driving offenses and habitual violations of restrictions placed on his driver's license.

On appeal, the Applicant does not contest the Director's conclusions that he has not established: (1) the presence of extreme hardship under as required under section 212(h)(1)(B) of the Act; (2) the presence of exceptional and extremely unusual hardship or other extraordinary circumstances required under 8 C.F.R. § 212.7(d); and (3) that his application merits a favorable exercise of discretion. As the record supports the Director's decision, we affirm the Director's conclusions with respect to these uncontested issues.

III. CONCLUSION

The Applicant, having been convicted of a crime involving moral turpitude that is also a violent and dangerous crime, has not demonstrated extraordinary circumstances to warrant a favorable exercise of discretion. The Applicant is consequently ineligible for a waiver of his inadmissibility under section 212(h) of the Act and the waiver application will remain denied.

ORDER: The appeal is dismissed.