U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12332904

Date: MAR. 31, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied abroad for an immigrant visa and was found inadmissible to the United States for being convicted of a "crime involving moral turpitude" (CIMT). *See* Immigration and Nationality Act (the Act) Section 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). The Applicant does not contest this ground of inadmissibility. He has filed a Form I-601, Application for Waiver of Grounds of Inadmissibility, seeking to waive the CIMT ground of inadmissibility under Section 212(h) of the Act.[1]

The Director of the Nebraska Service Center denied the Form I-601 waiver application, finding that the Applicant's [redacted] 2003 conviction for conspiracy to commit arson, in violation of Sections 12.1-21-01 and 12.1-06-04 of the North Dakota Century Code (N.D.C.C.), for which he was sentenced to a three-year imprisonment term (part of which was suspended), constituted a CIMT conviction. *See* Section 212(a)(2)(A)(i)(I) of the Act. The Director also determined that the Applicant's 2003 conviction constituted a conviction for a "violent or dangerous" crime, as referenced in 8 C.F.R. § 212.7(d). The Director then denied the Form I-601 waiver application on the ground that, based on the Applicant's 2003 conviction, he did not merit a favorable exercise of discretion.

The Applicant appeals, asserting that he is eligible for a waiver under Section 212(h) of the Act. First, he contends that he is eligible for the waiver under Section 212(h)(l)(A) of the Act because the activities that led to his 2003 conviction occurred more than 15 years, that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and that he has been rehabilitated. In the alternative, he maintains that he is eligible for the waiver under Section 212(h)(l)(B) of the Act because he has demonstrated that the denial of his waiver application "would result in extreme hardship" to his qualifying relatives, who are his five United States citizen or lawful permanent resident children.

In addition, the Applicant argues that his crime of conspiracy to commit arson was not a "violent or dangerous" crime, and that even if it were, he had demonstrated that the denial of his Form I-601 waiver application "would result in exceptional and extremely unusual hardship" to him and his family

[1] The Applicant has also filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, which the Director denied. The appeal of the Applicant's Form I-212 application is discussed in a separate decision.

members in the United States, which include his spouse, his five children, and his one grandchild. Moreover, he maintains that the positive factors outweigh the negative ones in this case, and as such, he merits a favorable exercise of discretion.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361; *see also Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015).[2] Upon *de novo* review, we will withdraw the Director's decision, and remand the matter for the entry of a new decision.

I. LAW

A noncitizen convicted of (or who admits having committed, or who admits committing acts which constitute the essential elements of) a crime involving moral turpitude (CIMT) (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A)(i)(I) of the Act. Section 212(h)(1)(A) of the Act provides for a discretionary waiver where the activities that led to the conviction occurred more than 15 years before the date of the application 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)(l)(B) of the Act provides for a waiver if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. If a noncitizen demonstrates his or her eligibility under Section 212(h)(l)(A) or (B) of the Act, U.S. Citizenship and Immigration Services (USCIS) must then decide whether to exercise its discretion favorably and consent to the noncitizen's admission to the United States. Section 212(h)(2) of the Act.

With respect to the discretionary nature of a waiver, the burden is on the noncitizen to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the noncitizen's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300. However, a favorable exercise of discretion is not warranted for noncitizens who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as cases involving national security or foreign policy considerations, or when a noncitizen "clearly demonstrates that the denial . . . would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board of Immigration Appeals determined that exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." In assessing exceptional and extremely unusual hardship, the hardship factors used in determining extreme hardship should be considered and all hardship factors should be considered in the aggregate. *Id.* at 63-64.

Even if the noncitizen were able to show the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d), that alone would not be enough to warrant a favorable exercise of discretion.

[2] If an applicant submits relevant, probative, and credible evidence that leads us to believe that the claim is "more likely than not" or "probably" true, it has satisfied the preponderance of the evidence standard. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

See Matter of Jean, 23 I&N Dec. 373, 383 (A.G. 2002) (providing that depending on the gravity of the underlying criminal offense, a showing of exceptional and extremely unusual hardship might still be insufficient to grant the immigration benefit as a matter of discretion).

II. ANALYSIS

As explained in the Director's decision, the Applicant was admitted to the United States as a refugee in 1997. He then adjusted status to that of a lawful permanent resident (LPR) in 2000.[3] After he became an LPR, he was convicted for conspiracy to commit arson in North Dakota. The Information that an assistant state's attorney filed with the State Court of North Dakota states that the Applicant and his spouse "agreed . . . to start or maintain a fire . . . with intent to destroy an entire or any part of a building . . . for the purpose of collecting insurance for the loss . . . ." As a result of his conviction, in [redacted] 2006, U.S. Immigration and Customs Enforcement (ICE) initiated removal proceedings against the Applicant. In [redacted] 2006, an immigration judge ordered the Applicant removed from the United States for having been convicted of an aggravated felony under Section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). *See also* Section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (defining "aggravated felony" to mean "a crime of violence (as defined in [18 U.S.C. § 16,] but not including a purely political offense) for which the term of imprisonment [is] at least one year"). In [redacted] 2008, the Applicant was removed from the United States to Serbia, his place of birth, pursuant to the immigration judge's removal order.

We will remand the matter to the Director to consider the following issues. First, while the Director's decision specifies that the Applicant's 2003 conviction for conspiracy to commit arson constitutes "a "violent or dangerous" crime, as referenced in 8 C.F.R. § 212.7(d), the decision does not include an analysis of the facts surrounding the crime in support of this conclusion. The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not defined in the regulation or case law. *See* 67 Fed. Reg. 78675, 78677-78 (Dec. 26, 2002). 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 an offense is a violent or dangerous crime for purposes of discretion, the Director is 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). Upon remand, the Director should analyze and discuss factors that support the conclusion that the Applicant's offense qualifies as a violent or dangerous crime, such that the matter warrants the application of a heightened discretionary standard of "exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d).

Second, if the Director concludes on remand that the Applicant's offense qualifies as a "violent or dangerous" crime, then the Director should determine if the Applicant has demonstrated extraordinary

[3] While the 212(h) waiver is not available to an individual "who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if . . . since the date of such admission the alien has been convicted of an aggravated felony," the Applicant is statutorily eligible to seek such waiver, as he was admitted to the United States as a refugee, then adjusted status to that of an LPR, rather than admitted to the United States as an LPR. *See Matter of J-H-J-*, 26 I&N Dec. 563, 564-65 (BIA 2015).

circumstances, such as if he has shown that his case involves national security or foreign policy considerations, or if he has "clearly demonstrate[d] that the denial . . . would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). As noted, exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country," and that all hardship factors should be considered in the aggregate. *See Matter of Monreal-Aguinaga*, 23 I&N Dec. at 62-64.

Finally, the Director should consider whether the Applicant merits a favorable exercise of discretion. The Director's decision focuses primarily on the Applicant's conspiracy to commit arson offense, without including a discussion on any positive factors in this case. On appeal, the Applicant alleges that he merits a favorable exercise of discretion, noting on page 30 of his appellate brief that "[t]he single negative factor in [his] case is his 2003 conviction" and that "[a]lthough it is a serious crime . . . the fire did not cause injury to anyone and did not damage any property other than that of [the Applicant] and his family." The Applicant also states that "since that time, [he] has had no other criminal issues." The Applicant's appellate brief alleges that he has articulated social and humane considerations in the case. The purported considerations include the Applicant's spouse, his United States citizen and LPR children, and his United States citizen grandchild all live in the United States; his spouse and children have health and psychological issues stemming, in part, from the mistreatment they experienced prior to being admitted to the United States as refugees; his family members in the United States have experienced emotional and financial hardship due to the Applicant's absence; and that the Applicant has experienced difficulties abroad since removal from the United States and has been living in Germany as a refugee since 2012. Upon remand, the Director should balance the gravity of the Applicant's underlying criminal offense with other purported positive factors discussed in the Applicant's appellate brief to determine if a favorable exercise of discretion is warranted. *See Matter of Jean*, 23 I&N Dec. at 383.

III. CONCLUSION

In light of the issues described above, we will withdraw the Director's decision and remand the matter for further consideration of the Applicant's eligibility for his Form I-601 waiver application. If a determination is made that the Applicant is not eligible for the waiver, the Director shall issue a new decision containing a more comprehensive and proper analysis of the evidence and an explanation of the basis for denial of the waiver application.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.