U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20241790

Date: MAY 4, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied to adjust status to that of a lawful permanent resident and seeks a waiver of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v).

The Director of the Nebraska Service Center denied the application, concluding that the Applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of at least one crime involving moral turpitude (CIMT) as well as section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for one year or more and seeking admission within 10 years of the date of removal from the United States. The Director additionally held that the Applicant committed a violent or dangerous crime as contemplated in 8 C.F.R. § 212.7(d) and as such he must be held to a heightened discretionary standard. The Director then found that the Applicant did not meet that standard. On appeal, the Applicant argues that the Director erred in not applying the petty offense exception to his inadmissibility for a CIMT and in finding that his spouse and children would not suffer exceptional and extremely unusual hardship if he is not allowed to return to the United States.

The burden of proof in these proceedings rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal because the Applicant has not met this burden.

I. LAW

A foreign national who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act. A discretionary waiver is available if denial of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national. Section 212(a)(9)(B)(v) of the Act.

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 (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. Individuals found inadmissible under section 212(a)(2)(A)(i) of the Act may seek a

discretionary waiver of inadmissibility under section 212(h) of the Act. A discretionary waiver is available if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act.

This inadmissibility does not apply to a noncitizen who committed only one crime if the maximum penalty possible for the crime did not exceed imprisonment for one year and the noncitizen was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed). Section 212(a)(2)(A)(ii) of the Act.

With respect to the discretionary nature of a waiver, when a noncitizen has been convicted of a violent or dangerous crime, the regulations governing the exercise of discretion are set forth in 8 C.F.R. § 212.7(d), and generally preclude a favorable exercise of discretion except in extraordinary circumstances, which include situations in which the noncitizen has established "exceptional and extremely unusual hardship" if the benefit is denied, or situations in which overriding national security or foreign policy considerations exist. However, even if an applicant can demonstrate the existence of these extraordinary circumstances, depending on the gravity of the applicant's offense, consent to his or her admission as a matter of discretion may still be denied.

II. ANALYSIS

The issues on appeal are whether the Applicant is eligible for the petty offense exception[1] to inadmissibility for a CIMT, and if not, whether he is eligible for a waiver under section 212(h)(1)(B) of the Act under the heightened discretionary standard for having been convicted of a violent or dangerous crime pursuant to 8 C.F.R. § 212.7(d).[2] We find that the record establishes that the Applicant has a conviction for a CIMT for which the maximum possible sentence exceeds one year and the sentence imposed was over six months, and he is therefore ineligible for the petty offense exception. We further find that the Applicant has not demonstrated that the claimed hardships to himself, his spouse, or children rises to the level of exceptional and extremely unusual hardship as required under 8 C.F.R. § 212.7(d).

A. Inadmissibility

The petty offense exception applies where the noncitizen has committed only one CIMT, the maximum possible sentence for the offense does not exceed one year, and the sentence imposed for the offense was six months or less. Section 212(a)(2)(A)(ii) of the Act. Here, the record reflects that on [redacted] 2003, the Applicant pleaded guilty to domestic violence with injury in violation of section 273.5(a) of the California Penal Code (CPA) and was sentenced to two days imprisonment as well as three years of probation. The Applicant does not contest that his conviction under section 273.5(a) of the CPA was a CIMT. On [redacted] 2018, the Superior Court of California, reduced

[1] An applicant may be eligible for a "petty offense" exception if only one crime involving moral turpitude was committed, the maximum possible sentence for the offense does not exceed one year, and the sentence imposed for the offense was six months or less. Section 212(a)(2)(A)(ii) of the Act.

[2] The Applicant does not contest that he is inadmissible for unlawful presence, a finding supported by the record, which establishes that on or about February 1990, the Applicant entered the United States without inspection, remained unlawfully present until he was removed from the United States on [redacted] 2014, and sought admission to the United States prior to remaining abroad for 10 years after the date of his last departure or removal.

the Applicant's felony conviction to a misdemeanor under section 17(b)(1-5) of the CPA and then vacated and dismissed the conviction pursuant to section 1203.4 of the CPA.

The Applicant asserts that the petty offense exception applies because his conviction was reduced to a misdemeanor, the maximum sentence for a misdemeanor violation of section 273.5 of the CPA cannot exceed one year, and the conviction was ultimately vacated. However, under the current statutory definition of "conviction" set forth in section 101(a)(48)(A) of the Act, "a state action that purports to abrogate what would otherwise be considered a conviction, as the result of the application of a state rehabilitative statute, rather than as the result of a procedure that vacates a conviction on the merits or on grounds relating to a statutory or constitutional violation, has no effect in determining whether [a noncitizen] has been convicted for immigration purposes." *Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, does not expunge a conviction for immigration purposes. *See Id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (reiterating that if a conviction is vacated for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the noncitizen remains "convicted" for immigration purposes), *reversed on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

In the present case, the record contains a minute order from the Superior Court of California indicating that the Applicant's felony domestic violence with injury conviction was reduced to a misdemeanor per section 17(b) of the CPA then dismissed under section 1203.4 of the CPA. Section 17(b) of the CPA provides for reducing a felony conviction to a misdemeanor after being granted probation while section 1203.4 of the CPA provides for setting aside a guilty plea and dismissing the charges after the defendant has fulfilled the conditions of their probation or has been discharged prior to the termination of the period of probation. The Applicant asserts his felony conviction was reduced to a misdemeanor and dismissed because he fulfilled his sentence of probation.

On appeal, the Applicant argues he was charged under a California "wobbler" statute, under which an offense is classified as either a misdemeanor or a felony at sentencing, and that his felony sentence was never altered because his sentence was ultimately classified as a misdemeanor pursuant to section 17(b) of the CPA. The Applicant cites to case law from the 9th Circuit to argue that "once the offense was classified as a misdemeanor after a violation of parole, it was nonetheless properly considered a misdemeanor for purposes of the petty offense exception to the criminal grounds of inadmissibility." *See Velasquez-Rios v. Barr*, 979 F.3d 690, 696 (9th Cir. 2020). However, the Applicant misconstrues the findings in *Velasquez-Rios* which involved two foreign nationals originally convicted of misdemeanor offenses with a possible sentence of one year or more who then argued section 18.5 of the CPA, reducing the maximum sentence of all California misdemeanors to 364 days, should apply retroactively to crimes involving moral turpitude. The Applicant's case is distinguished from *Velasquez-Rios* because he was initially convicted of a felony offense that was later reduced to a misdemeanor after serving his three years of probation. As such, the record indicates the Applicant's felony conviction for domestic violence with injury was reduced to a misdemeanor and dismissed as the result of the application of a state rehabilitative statute, rather than a procedural or substantive defect in the underlying criminal proceedings. Thus, the Applicant has not met his burden to show that he is no longer convicted of domestic violence with injury for immigration purposes or that the maximum possible sentence was less than one year. As the Applicant has a conviction for a CIMT

with a possible sentence exceeding one year and the sentence imposed was greater than six months, he is ineligible for the petty offense exception.

B. Violent or Dangerous Crimes

The Director found that the Applicant's conviction under section 273.5(a) of the CPA constitutes a violent and dangerous crime as set forth in 8 C.F.R. § 212.7(d), and the Applicant was therefore subject to a heightened discretionary standard. In 2003, when he was first convicted, a violation of this statute occurred when a person "willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition."

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); *see also Cisneros v. Lynch*, 834 F.3d 857, 865 (7th Cir. 2016); *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408, 413 n.9 (BIA 2014). The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not defined in 8 C.F.R. § 212.7(d), and we are aware of no precedent decision or other authority containing a definition of these terms as used in the regulation. We therefore interpret the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms. Black's Law Dictionary (11th ed. 2019), 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."

As a conviction for inflicting corporal injury on a spouse or cohabitant under section 273.5(a) of the CPA requires a showing that an individual "willfully inflicts . . . corporal injury resulting in a traumatic condition," we find that the Applicant's crimes involved strong physical force and were likely to cause serious bodily harm. We therefore affirm the Director's finding that the Applicant committed violent or dangerous crimes, and must therefore establish extraordinary circumstances for a favorable exercise of discretion. 8 C.F.R. § 212.7(d)

B. Discretion

We now turn to whether the Applicant merits a favorable exercise of discretion. As noted above, when a noncitizen has been convicted of a violent or dangerous crime, the regulation at 8 C.F.R. § 212.7(d) generally precludes a favorable exercise of discretion except in extraordinary circumstances, which include situations in which the noncitizen has clearly established "exceptional and extremely unusual hardship" if the benefit is denied, or situations in which overriding national security or foreign policy considerations exist. In this case, the Applicant does not assert that his case involves national security or foreign policy considerations. Therefore, we must determine if he has clearly demonstrated that denying his admission would result in exceptional and extremely unusual hardship. Exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001).

On appeal, the Applicant asserts that if he is denied admission, his U.S. citizen spouse and seven U.S. citizen children would experience exceptional and extremely unusual hardship upon separation or relocation. With his Form I-601, the Applicant submitted various United States Citizenship and Immigration Services (USCIS) documents, a brief, affidavits for the Applicant and the spouse, character reference letters, identity documents, country condition documents for Mexico, a psychiatric evaluation of the spouse, in-patient psychiatric documents for a U.S. citizen son, and school records for a U.S. citizen daughter. On appeal, the Applicant submitted a brief and argues that the spouse and children would experience exceptional and extremely unusual hardship if he is not allowed to return to the United States.

In her declaration, the spouse states that she will continue to suffer emotional hardship if the Applicant is unable to return to the United States. She stated that she began having psycho-emotional issues when the Applicant was removed from the United States in 2014 and the family moved to [redacted] California, in order to be near the Applicant while he remained abroad in a border town in Mexico. Her psychiatric evaluation diagnosed her with anxiety and moderate depression and recommends she continue receiving treatment. In her declaration, she asserts that her anxiety and depression have increased while she has been separated from the Applicant. The spouse also adds that she will suffer financial hardship if she continues to be separated from the Applicant. In her declaration, the spouse explains that she and the seven children moved into an apartment near the border and is a homemaker. She also claims she receives public assistance benefits. Financial records indicate that the spouse pays rent and utilities but the Applicant did not provide documents indicating the level of financial support he provides the family while he is living abroad. The Applicant stated he has been working as a vendor in Mexico earning less than the U.S. minimum wage and so is unable to contribute much to his family living in the United States.

The Applicant also asserts his U.S. citizen children, aged 2 to 19, would experience exceptional and extremely unusual hardship if he is denied the waiver. He contends that his daughter has a learning disability and received special education services for 10 years. Additionally, one of his sons was diagnosed with schizoaffective disorder with suicidal ideation and was involuntarily committed to a psychiatric facility in March 2021. The submitted evidence indicates the children live with the spouse who has immediate family members living nearby in California. The Applicant asserts his children would suffer hardship if they relocated to Mexico with him or visited him due to the levels of violence endemic to Mexico.

We acknowledge the hardships demonstrated in the record, particularly the medical diagnoses of the Applicant's spouse and two children. However, the record does not demonstrate exceptional and extremely unusual hardship as a result of the Applicant's inadmissibility, as required. The submitted evidence does not provide detail concerning the ongoing impact of the spouse's emotional hardship on her daily life that clearly demonstrates exceptional and extremely unusual hardship that would be alleviated by the Applicant's admission. Regarding the Applicant's daughter, the record contains insufficient documentation regarding what level of assistance, if any, that would be required of or provided by the Applicant, to manage her learning disabilities as the submitted documentation indicates the local school system has successfully accommodated her disabilities for over 10 years and

as of May 2019, she was deemed no longer in need of special education services.[3] Turning to the Applicant's son, we recognize his medical diagnoses and recent involuntary commitment to a facility. However, the record does not contain evidence such as medical documents or psychiatric assessments explaining the impact of his conditions on his daily life to establish that the Applicant's continued absence causes hardship rising to the level of exceptional and extremely unusual. The record similarly does not establish extraordinary hardship to the Applicant himself.

As noted above, exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001). The hardships present in the Applicant's case are not so egregious or unusual as to meet the heightened standard of exceptional and extremely unusual hardship required by 8 C.F.R. § 212.7(d).

The Applicant also requests, for the first time on appeal, his application be remanded in order for the Director to consider a rehabilitation waiver under section 212(h)(1)(A) of the Act since his criminal activity occurred more than 15 years ago. However, we decline to do so in this case as he committed a violent or dangerous crime and even if we were to find him rehabilitated, the Applicant has not established that he has demonstrated extraordinary circumstances that warrant a favorable exercise of discretion.

The Director also denied the Applicant's Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal at the same time as the Applicant's Form I-601 denial. An application for permission to reapply for admission is properly denied, in the exercise of discretion, to an applicant who is mandatorily inadmissible to the United States under another section of the Act, as no purpose would be served in granting the application. *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg'l Comm'r 1964). Because the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and has not been granted a waiver of this inadmissibility, we will dismiss the Applicant's appeal of the Director's decision denying the application for a waiver in a separate decision as no purpose would be served in granting the Applicant's Form I-212.

ORDER: The appeal is dismissed.

[3] The Applicant indicates his daughter's learning disability requires extra care and attention outside of school but does not provide documentation indicating the level of care or assistance required in her daily life.