U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23651106

Date: FEB. 10, 2023

Appeal of Las Vegas, Nevada 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) Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Las Vegas, Nevada Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the record did not establish, as required, that denial of admission would result in extreme hardship to a qualifying relative. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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 withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), provides that 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.

Individuals found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(1)(A) of the Act provides for a waiver where the activities 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 if the noncitizen has been rehabilitated. Section 212(h)(1)(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.

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). 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 determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

II. ANALYSIS

On appeal, the Applicant asserts that the Director erred in the analysis of extreme hardship. The Applicant emphasizes that he has multiple qualifying relatives and a clear finding was not made with respect to each. The Applicant contends that a meaningful level of analysis is missing from the decision, which makes it difficult to determine what evidence the Director considered, including whether the Director acknowledged the existence of more than one qualifying relative; the Applicant contends that extreme hardship should have been considered with respect to his U.S. citizen daughter and his lawful permanent resident mother.

The Director determined that the Applicant required a waiver after finding the Applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for conviction of a crime involving moral turpitude. We note that the Applicant's criminal history reveals multiple convictions; however, the Director's decision failed to specify which of these convictions constituted a crime involving moral turpitude and did not analyze why any of the convictions met the criteria for this ground of inadmissibility. To clarify the record regarding this threshold matter, we will review the Applicant's criminal history and determine whether the Applicant is inadmissible for a conviction of a crime involving moral turpitude.

The Applicant provided paperwork to the Director indicating that seven criminal cases were opened against him in Wisconsin between 1994 and 1997. The records of judgment and sentence provided by the Applicant show that he was ultimately convicted of two counts of financial transaction card crimes,[1] battery, witness intimidation, bailjumping, two counts of driving while license revoked, operating a vehicle without a license, not carrying a driver's license, and disorderly conduct. We turn first to the financial card transaction crimes. Wis. Stat. Ann. § 943.41 (1995)

A. The Applicant is Inadmissible for Conviction of a Crime Involving Moral Turpitude

Although it is a ground of inadmissibility, moral turpitude is not defined in the Act. The Board of Immigration Appeals (the Board) has analyzed moral turpitude in its decisions, describing it as "conduct that shocks the conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992). To reach this level, the statute must involve knowing or intentional conduct, or at least criminally reckless conduct. *Id.* Crimes involving fraud have long been considered turpitudinous. See Jordan v. De George, 341 U.S. 223, 229 (1951) (considering fraud "such a contaminating component in any crime that American courts have, without

[1] The financial transaction card case contains two judgments of conviction and sentence. These documents reflect that the Applicant was initially placed on probation for two years. This sentence was later modified as part of an omnibus plea to six months of imprisonment per count.

exception, included such crimes within the scope of moral turpitude."); Matter of Kochlani, 24 I&N Dec. 128, 130-31 (BIA 2007) ("crimes that have a specific intent to defraud as an element have always been found to involve moral turpitude");

To determine whether the Applicant has been convicted of a crime involving moral turpitude, we begin by employing the categorical approach and focus only on the elements of the offense, not on the facts surrounding the commission of the crime. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010); *Matter of Silva-Trevino* ("Silva-Trevino III"), 26 I&N Dec. 826, 830 (BIA 2016) The categorical inquiry requires a comparison between the elements of the crime and the generic definition of moral turpitude. *Id.* Under this categorical approach, an offense qualifies only if all conduct covered by the criminal statute would fall under the definition of an act of moral turpitude. *Nunez*, 594 F.3d at 1129. The categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Silva-Trevino III*, 26 I&N Dec. at 826.

If a statute contains some elements that do not require moral turpitude and some that do, we determine whether the statute lists alternative elements and is divisible. *Descamps v. United States*, 133 S. Ct. 227, 2283 (2013). This requires an analysis of the statute underlying the criminal conviction to determine whether it lists multiple, alternative ways to commit the crime. *Id.*

Where a statute is divisible and lists alternative versions of an offense with different elements, we engage in a modified categorical inquiry into the record of conviction. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015). The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). The modified categorical approach is intended only as tool to apply the categorical inquiry to the relevant element from a statute with multiple alternatives, not to evaluate the facts underlying the conviction. *Descamps*, 133 S. Ct. at 2287. We look at the record of conviction to determine what section of the statute was violated and determine if this section qualifies as a crime involving moral turpitude. *Lopez-Valencia*, 798 F.3d at 868.

Turning to the Applicant's conviction for financial transaction card crimes, at the time of conviction, section 943.41 of the Wisconsin Statutes Annotated (Wis. Stat. Ann.) criminalized varying conduct related to financial transaction cards. Wis. Stat. Ann. § 943.41 (1995). This included knowingly making false statements to procure a card, theft by taking of a card, forgery of a card, fraudulent use of a card, or fraudulent furnishing of goods, services, or other items of value. *Id.* While many of the prohibited acts involve knowing or intentional conduct, subsection six of the statute includes conduct that does not require this level of fraudulent intent. Wis. Stat. Ann. § 943.41(6) (1995) (criminalizing, *inter alia*, obtaining a discounted fare from a third party without reasonably confirming the issuer had a legal right to possess it). Because the required level of intent is not present for all conduct under the statute, the statute is overbroad and does not categorically involve moral turpitude. However, the financial transaction card crime statute is divisible; different elements are required to support a conviction under the different subsections. For instance, theft by taking under subsection three requires the acquisition of a card without the cardholder's consent, while subsection four prohibits alteration or counterfeiting of a card with intent to defraud. Wis. Stat. Ann. § 943.41(3)(a), (4)(a).

A review of Wisconsin's standard jury instructions supports the conclusion that the statute is divisible. The statute is separated into four separate pattern jury instructions. In each of these instructions, a jury must unanimously find that a defendant committed differing acts; the different instructions also require a jury to find varying types and levels of intent. For instance, to sustain a conviction under subsection three, a jury must find that the defendant acquired a financial transaction card without consent and with the intent to use, sell, or transfer it. § 943.41(3)(A), Wis. JI-Criminal JI-1496. To sustain a conviction under subsection (5)(a)1.A., a jury must find that the defendant used a stolen financial card with the intent to defraud another. § 943.41(5)(A)1.A., Wis. JI-Criminal JI-1497.

Wisconsin case law also supports the conclusion that section 943.41 of the Wis. Stat. Ann. is divisible, as Wisconsin state courts have treated the different subsections as requiring different elements. *See State v. Mason*, 918 N.W.2d 78, 84 (describing the "elements" of the crime under (5)(a)1.B. as obtaining something of value by representing oneself as the holder of the card with intent to defraud another); *see also State v. Krueger*, 586 N.W.2d 700 Wis. Ct. App. 1998 (listing the elements of theft of a financial transaction card under subsection (3)(a)).

As the statute of conviction is divisible, we may conduct a modified categorical analysis of the record of conviction. The judgment of conviction and sentence provided by the Applicant specifies that he was convicted under subsection five of section 943.41 of the Wis. Stat. Ann.[2] The record of conviction does not clearly indicate which portion of subsection five was violated. However, any conviction under subsection five requires an intent to defraud or knowledge that the instrument or financial transaction card being used is stolen, forged, expired, or revoked. *Id.* Therefore, the Applicant's conviction under subsection five was necessarily for knowing or intentional fraud, which qualifies as a crime involving moral turpitude. *See Blanco v. Mukasey*, 518 F.3d 714, 718 (9th Cir. 2008) (affirming that crimes

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[2] **(5) Fraudulent use.**

> (a) 1. No person shall, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value or any other person: a. Use, for the purpose of obtaining money, goods, services or anything else of value, a financial transaction card obtained or retained in violation of sub. (3) or a financial transaction card which the person knows is forged, expired or revoked; or b. Obtain money, goods, services or anything else of value by representing without the consent of the cardholder that the person is the holder of a specified card or by representing that the person is the holder of a card and such card has not in fact been issued. . . .
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> (b) No cardholder shall use a financial transaction card issued to the cardholder or allow another person to use a financial transaction card issued to the cardholder with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value or any other person.
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> (c) No person may deposit a stolen or forged instrument by means of an automated financial service facility with knowledge of the character of the instrument.
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> (d) No person may, with intent to defraud anyone: 1. Introduce information into an electronic funds transfer system. 2. Transmit information to or intercept or alter information from an automated financial service facility.
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> (e) No person may knowingly receive anything of value from a violation of par. (c) or (d).

Wis. Stat. Ann. § 943.41(5).

involving fraud meet the definition of crimes involving moral turpitude). The Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

B. The Applicant's Eligibility for a Waiver Under 212(h) of the Act

The Director found the Applicant ineligible for a waiver of this ground of inadmissibility, indicating that extreme hardship to a qualifying relative was not established as required under section 212(h)(1)(B) of the Act.[3]

On appeal, the Applicant asserts that the decision fails to clearly articulate the evidence that the Director relied on in reaching this determination. The Applicant further contends that the Director's decision does not reflect acknowledgement or consideration of his two qualifying relatives. The Applicant reiterates that he has two qualifying relatives, a U.S. citizen daughter and a lawful permanent resident parent.

The Applicant did not initially file a waiver application. After receiving a notice of intent to deny, the Applicant filed the waiver application along with supporting documentation attesting to hardship. The Applicant listed his daughter as a qualifying relative in part 5 of the waiver application, and he also listed his mother in part 10. The Applicant provided an affidavit where he indicated he has two U.S. citizen children. He also indicated that his mother became a lawful permanent resident since 1995. In the affidavit, he noted that if he were unable to remain in the United States, his mother would not have help and would have to attend her doctor's visits without assistance. He further argued that it would be out of the question for his mother or children to move with him to Mexico. He noted that his mother would lack medical care and his children were born and raised in the United States. The waiver application and affidavit provided to the Director indicated that extreme hardship was being raised with respect to multiple qualifying relatives.

Upon de novo review, the Director's decision does not clearly outline why extreme hardship was not found and does not specify which qualifying relatives were considered. While the decision outlines the factors generally considered in evaluating extreme hardship, it does not reflect which factors were present and considered in the Applicant's particular case. We acknowledge that the decision indicates that the entire record was carefully examined and recognizes the Applicant's situation as "unfortunate." However, the decision includes no additional details to indicate how extreme hardship was evaluated and why it was found to be unsupported. As such, we agree with the Applicant that the Director's decision does not provide sufficient analysis to allow for a meaningful response on appeal. Therefore, we remand to the Director for a complete analysis of whether the Applicant has established eligibility for a waiver under section 212(h) of the Act.

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

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[3] While not addressed on appeal, we note that section 212(h)(1)(A) of the Act contains an alternative discretionary waiver provision for criminal activity occurring more than 15 years prior to the date of the application if an applicant can demonstrate rehabilitation and can show that admission is not contrary to the national interest. It is unclear from the decision whether this waiver ground was previously considered by the Director.