U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26160916

Date: MAY 24, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant has applied for a nonimmigrant fiancé visa and seeks a waiver of inadmissibility under sections 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h), for a crime involving moral turpitude, and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), for accruing more than one year of unlawful presence in the United States.

The Director of the Nebraska Service Center denied the application, finding that although the Applicant had established rehabilitation for purposes of a waiver of inadmissibility for a crime involving moral turpitude, the Applicant had not established extreme hardship to a qualifying relative for purposes of a waiver of inadmissibility for unlawful presence.[1] On appeal, the Applicant submits a brief and contends that he has established that his U.S. citizen fiancé will experience extreme hardship if he is denied admission and that he merits a favorable exercise of discretion.

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, as explained below, we will remand the matter to the Director for the entry of a new decision.

I. LAW

A noncitizen who has been unlawfully present in the United States for 1 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) of the Act. This inadmissibility may be waived as a matter of discretion if refusal of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. Section 212(a)(9)(B)(v) of the Act.

[1] The Director also determined that the Applicant's 1998 conviction for felony assault in the second agree with intent to cause physical injury to a policy officer, in violation of section 120.05 subjection 3 of the New York Penal Code, constituted a conviction for a violent or dangerous crime, as contemplated by 8 C.F.R. § 212.7(d), and thus, had the Applicant established extreme hardship to a qualifying relative, which he had not, the heightened discretionary standard of exceptional and extremely unusual hardship would need to be established.

Section 212(a)(2)(A) of the Act 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. 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) of the Act for a crime involving moral turpitude may seek a discretionary waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a 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 foreign national has been rehabilitated. Section 212(h)(1)(A) of the Act. A waiver is also 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.

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 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

The Applicant, a native and citizen of Honduras, was found inadmissible under section 212(a)(2)(A) of the Act, for a crime involving moral turpitude, and under section 212(a)(9)(B)(i) of the Act, for unlawful presence. The Applicant does not contest inadmissibility on appeal. Thus, the Applicant must seek a waiver of inadmissibility. The issues on appeal therefore are whether the Applicant has established extreme hardship to a qualifying relative and if so, whether he merits a favorable exercise of discretion. We find that on appeal the Applicant has established extreme hardship to a qualifying relative. We will remand the matter to the Director to determine if the Applicant merits a favorable exercise of discretion.

A. Extreme Hardship to a Qualifying Relative

An applicant may show extreme hardship in two scenarios: 1) if the qualifying relative remains in the United States separated from the applicant and 2) if the qualifying relative relocates overseas with the applicant. Demonstrating extreme hardship under both of these scenarios is not required if an applicant's evidence establishes that one of these scenarios would result from the denial of the waiver. The Applicant may meet this burden by submitting a statement from the qualifying relative certifying under penalty of perjury that the qualifying relative would relocate with the Applicant, or would remain in the United States, if the applicant is denied admission. 9 *USCIS Policy Manual* B.4(B),

https://www.uscis.gov/policymanual. In the present case, the record establishes that the Applicant's fiancé intends to remain in the United States while the Applicant resides abroad due to his inadmissibility. The Applicant must therefore establish that if he is denied admission, his fiancé would experience extreme hardship upon separation.

The Applicant's fiancé asserts that he will experience emotional, medical, and financial hardship were he to remain in the United States while the Applicant continues to reside abroad. He states that he met the Applicant in 2004 and had been living together until the Applicant was removed in 2014 and long-term separation has caused him emotional hardship; he maintains that he has been diagnosed with depression and anxiety. The Applicant's fiancé also contends that the Applicant is living with HIV in Honduras and is not receiving proper medical care and such a predicament is causing him, as his fiancé, extreme hardship. The Applicant's fiancé also maintains that he is HIV positive and while he has been traveling to Honduras two times a year to see the Applicant, the travel is causing him financial hardship and concerns for his safety due to homophobia in Honduras.

The record contains documentation to establish that the Applicant's fiancé has been diagnosed with anxiety and depression as a result of long-term separation from the Applicant and would benefit from regular psychotherapy and psychotropic medications. Medical documentation in the record also establishes that the Applicant's fiancé is being treated for long-term HIV infection, diabetes mellitus, and hypertension, and his "health outcomes are complicated by his current living situation being separated from his long-term partner and making multiple trips to Honduras to visit him." Letters of support have been provided by the Applicant's fiancé's colleague, sibling, and friend establishing the hardships the Applicant's fiancé is experiencing as a result of long-term separation from the Applicant. Regarding country conditions, the record contains documentation from the U.S. Department of State referencing the problematic country conditions in Honduras, including violence or threats of violence against same sex couples. The record also establishes that the Department of State has urged U.S. citizens to "reconsider travel" to Honduras due to violent crime, such as homicide, armed robbery, and kidnapping, and violent gang activity, including extortion, violent street crime, rape, and narcotics and human trafficking.

On appeal, we find that the record is sufficient to establish that the fiancé's hardships, considered individually and cumulatively, go beyond the common results of inadmissibility or removal and rise to the level of extreme hardship due to separation from the Applicant.

B. Violent or Dangerous Crime

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.

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."

On appeal, the Applicant contests the Director's finding that his conviction is for a violent or dangerous crime which subjects him to a heightened discretionary standard because he "recklessly" caused serious physical injury and "intentional interference with the operations of a police officer" are not inherently violent or dangerous. Moreover, the Applicant was sentenced to "only 60 days incarceration and five years probation" and thus, his conviction cannot be deemed "violent or dangerous."

We find that the Applicant does not establish that the Director erred in finding that his conviction for second degree assault against a police officer is a violent or dangerous crime. As discussed by the Director, the Applicant's actions resulting in physical injury to a police officer attempting to arrest the Applicant were "at a minimum, perilous, hazardous, or unsafe." In addition, a violation of section 120.05 is deemed to be a class D felony, which, pursuant to the New York Penal Code, is a "violent" felony offense. We thus concur with the Director that the Applicant's conviction for second degree assault against a police officer is a conviction for a violent and dangerous crime. Therefore, the heightened discretionary standard of 8 C.F.R. § 212.7(d) is applicable in this case.

C. 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, the Applicant must establish 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).

As we have determined that extreme hardship to a qualifying relative has been established, as detailed above, we find it appropriate to remand the record for the Director to determine in the first instance

whether the Applicant merits a favorable exercise of discretion under the heightened standard of "exceptional and extremely unusual hardship."

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