U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27468389

Date: SEP. 15, 2023

Appeal of Nebraska Service Center Decision

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

The Applicant 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 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 a crime involving moral turpitude (CIMT). The Director determined that the Applicant committed a violent or dangerous crime as contemplated in 8 C.F.R. § 212.7(d) and as such, a heightened discretionary standard applied to his application. The Director then found that the Applicant did not meet that standard. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant argues he qualifies for a petty offense exception, and he further disputes the Director's finding that he had committed a violent and dangerous crime, asserting that he has otherwise established his eligibility for the waiver of inadmissibility.

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 dismiss the appeal.

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 CIMT (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible. An exception to this ground of inadmissibility exists where the maximum possible penalty for the crime of which the noncitizen was convicted (or admitted to having committed or of which they admitted having committed the essential elements) did not exceed one year, and if the noncitizen was convicted of such crime, the noncitizen was not sentenced to a term of imprisonment of more than 6 months. Section 212(a)(2)(A)(ii)(II) of the Act; 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

Individuals found inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a CIMT 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 discretionary 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 the noncitizen has been rehabilitated. Alternatively, a waiver is available for individuals who demonstrate that denial of admission would result in extreme hardship to a U.S. citizen or LPR spouse, parent, son, or daughter. Section 212(h)(1)(B) of the Act.

If a foreign national demonstrates their eligibility under section 212(h)(1)(A) or (B) of the Act, USCIS must then decide whether to exercise its discretion favorably and consent to the foreign national's admission to the United States. Section 212(h)(2) of the Act. A favorable exercise of discretion is not warranted for foreign nationals 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 an applicant "clearly demonstrates that the denial . . . would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). Even if the foreign national 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. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (providing that if the foreign national's underlying criminal offense is grave, 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 an initial issue on appeal, counsel contests the Director's finding of inadmissibility, asserting that the Applicant's offense now falls within the petty offense exception due to a change in his conviction record from a felony to a misdemeanor, such that the maximum possible sentence is less than a year due to a change in California law. *See* Section 212(a)(2)(A)(ii)(II) of the Act; 8 U.S.C. § 1182(a)(2)(A)(ii)(II). The Applicant has not provided evidence in support of this assertion by counsel, such as updated conviction records. Without more, counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) (explaining that "statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). Where he has not shown that his conviction was amended or that it was amended for a procedural or substantive defect in the underlying criminal proceedings, the record is insufficient to establish an exception might apply. *See Matter of Pickering*, 23 I&N Dec. 621, 625 (BIA 2003) (holding if "a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted' for immigration purposes."); *see also Matter of Thomas and Thompson*, 27 I&N Dec. 674, 680 (A.G. 2019) (extending the *Pickering* test "to state-court orders that modify, clarify, or otherwise alter the term of imprisonment"). Also of note, the Applicant alleges this change occurred in 2016 – before his Form I-601 was filed, before the Director issued a request for evidence, and before the filing of his appeal; yet, he has not previously raised this issue.

Consistent with how the Board analyzes issues involving state law in the immigration context, we look at the statute at the time of conviction to determine whether a crime falls within the petty offense exception. For example, in *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016), the Board looked to the language of section 21.11(a)(1) of the Texas Penal Code as it existed in 2004 when the

noncitizen was convicted to determine whether such conviction was for a CIMT. Similarly, in *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017), the Board looked at the statutory language of section 3-307(a) of the Maryland Criminal Law "at the time of the respondent's offense" to perform its CIMT analysis. Here, in 1991, the Applicant was found to have assaulted another individual with a beer bottle and was convicted of assault with a deadly weapon or force likely to produce great bodily injury, a felony under California Penal Code section 245(a)(1), for which he received a sentence of 188 days imprisonment, 36 months' probation, and restitution. At the time the Applicant was convicted, the sentencing guidelines for assault under California Penal Code section 245(a)(1) was "imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment." Thus, he received a sentence of a term of imprisonment greater than six months, for an offense for which the maximum possible sentence was greater than a year at the time of conviction. Also, we note that even if the maximum possible sentence was less than a year, the Applicant still received a sentence of greater than six months imprisonment, rendering him ineligible for the petty offense exception under Section 212(a)(2)(A)(ii)(II) of the Act; 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Thus, the Applicant has not established the petty offense exception applies to his conviction.

The Applicant further argues that his offense was not "violent or dangerous" such that the heightened standard for an exercise of discretion under 8 C.F.R. § 212.7(d) would apply in his case. Specifically, the Applicant argues the facts of his conviction are not as egregious as those in controlling case law related to "violent or dangerous" convictions, such as *Matter of Jean*. 23 I&N Dec. at 374-75. He also asserts that because this is his sole conviction, it is "not indicative of [his] inherent non-violent and non-dangerous nature."

We disagree with the Applicant's arguments. As an initial matter, we need not consider the Applicant's nature when determining the nature of his conviction; rather, we look to the statutory elements and the offense to analyze whether the crime is violent or dangerous. It is not an inquiry into the nature of the Applicant's character but the nature of his crime. Specifically, the Applicant was convicted of assault with a deadly weapon or force likely to produce great bodily injury under California Penal Code section 245(a)(1). At the time of the Applicant's conviction, a violation of the statute occurred when a person "commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury."

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 no precedent decision or other authority contains 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 stated, the Applicant was convicted under California Penal Code section 245(a)(1) which renders guilty any person who "commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury." Applying the plain meanings of the terms "violent" and "dangerous" as found in Black's Law Dictionary, the use of "force likely to produce great bodily injury" comports with the definition of "dangerous" as "likely to cause serious bodily harm." Likewise, such force could be described as "relating to, or characterized by strong physical force," within the definition of "violent." The Applicant was charged with violating section 245(a)(1) for attacking another individual with a beer bottle. Although he argues now that the facts were not egregious and the crime not violent or dangerous, the facts were sufficient for him to be convicted of assaulting another person with a deadly weapon or force likely to cause great bodily injury. We cannot go behind the Applicant's conviction to assess his guilt or innocence. *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996). Further, the consideration is not whether the harm or conduct was egregious, it is whether the crime was "violent or dangerous." Considering the facts and circumstances of the offense, as well as the language of the statute of conviction, we agree with the Director's finding that the Applicant's conviction was for a violent or dangerous crime, as those terms are commonly understood. Thus, we find no error with the Director's conclusion that the heightened discretionary standard is applicable.

Lastly, the Applicant asserts that, contrary to the Director's determination, he and his U.S. citizen children would experience exceptional and extremely unusual hardship if he is denied admission. In support of this assertion, he references documentation previously reviewed and considered by the Director in rendering the decision to deny the application. The Applicant does not submit additional documentation on appeal to address the deficiencies raised by the Director with respect to exceptional and extremely unusual hardship or otherwise support his assertions. Upon thorough review of the record, we concur with the Director's finding that the Applicant did not establish he and his qualifying relatives would suffer exceptional and extremely unusual hardship if his application were denied. While we are sympathetic to the emotional difficulties faced by the family over the past 17 years they have been separated, as well as their concerns for the future, the record does not support a finding that they would suffer hardship beyond that which is expected following the separation from a loved one. Accordingly, we do not upset the Director's determination that the Applicant has not met the exceptional and extremely unusual hardship standard and, accordingly, does not warrant approval of his application in the exercise of discretion.

III. CONCLUSION

The Applicant has been found inadmissible for a crime of moral turpitude that is also a violent and dangerous crime, and he has not demonstrated his conviction qualifies for a petty offense exception nor extraordinary circumstances that warrant a favorable exercise of discretion. The Applicant is consequently ineligible for a waiver of his inadmissibility under section 212(h) of the Act.

ORDER: The appeal is dismissed.