U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12800529

Date: FEB. 14, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has been found inadmissible for crimes involving moral turpitude and seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Director of the Nebraska Service Center denied the application, concluding that the Applicant's convictions, for sexual assault in the fourth degree and assault in the third degree, were for violent or dangerous crimes and that he did not merit a favorable exercise of discretion. The Applicant filed a combined motion to reopen and reconsider, which was dismissed, and the matter is now before us on appeal.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. 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

Section 212(a)(2)(A) of the Act provides that any foreign national 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.

This inadmissibility does not apply to a foreign national who committed only one crime if the maximum penalty possible for the crime did not exceed imprisonment for one year and the alien 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)(II) 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. 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. If, however, the foreign national's conviction is for a violent or dangerous crime, USCIS may

not grant a waiver unless the foreign national also shows "extraordinary circumstances" with the final stipulation that, even if such a showing is made, the waiver can still be denied because of the gravity of the offense. 8 C.F.R. § 212.(7)(d).

II. ANALYSIS

The issues raised on appeal are whether the Applicant is eligible for the petty offense exception to inadmissibility for a crime involving moral turpitude, and if not, whether he is eligible for a waiver under section 212(h) of the Act and merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d).

The record reflects that in 1990, the Applicant was convicted of sexual assault in the fourth degree in violation of section 53a-73a(1)(B) of the General Statutes of Connecticut and assault in the third degree in violation of section 53a-61 of the General Statutes of Connecticut. The Applicant received a six-month sentence for the former offense and a five-month consecutive sentence for the latter offense, with execution of both sentences suspended. The Applicant was also sentenced to three years of probation. A consular officer of the U.S. Department of State determined that these convictions were for crimes involving moral turpitude and that the Applicant was inadmissible under section 212(a)(2)(A)(i)(I). On appeal, the Applicant asserts that his conviction for assault in the third degree is not a crime involving moral turpitude. Therefore, he contends that as he was only sentenced to six months for the sexual assault offense, he is eligible for the petty offense exception under section 212(a)(2)(A)(ii) of the Act.

A. Crime Involving Moral Turpitude

In assessing whether a conviction is a crime involving moral turpitude, it is necessary to "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979); *see also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016). We then engage in a categorical inquiry of the statute, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short,* 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States,* 495 U.S. 575, 599-600 (1990)).

Alternatively, where a criminal statute is not categorically a crime involving moral turpitude but is divisible, we conduct a modified categorical inquiry by reviewing the record of conviction to discover which offense within the divisible statute formed the basis of the conviction, and then to determine whether that offense is categorically a crime involving moral turpitude. *See Short,* 20 I&N Dec. at 137-38; *see also Descamps v. U.S.,* 133 S. Ct. 2276, 2285-86 (2013). A statute is divisible as to moral turpitude if it lists "multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,'" where at least one of those offenses or sets of elements, but not all, involves moral turpitude. *See Chairez,* 26 I&N Dec. at 822 (citing *Descamps,* 113 S. Ct. at 2283).

At the time of the Applicant's conviction for assault in the third degree, Connecticut General Statutes section 53a-61 stated:

> (a) A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon.

As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau,* 21 I&N Dec. 475, 477 (BIA 1996). However, assault or battery offenses involving some aggravating dimension, such as the use of a deadly weapon or serious bodily harm, have been found to be crimes involving moral turpitude. *See, e.g., Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (finding that second degree assault with a knife is a crime involving moral turpitude); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon); *Matter of S-*, 5 I&N Dec. 668 (BIA 1954) (assault with a .38-caliber revolver); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (intentional infliction of serious injury).

The Applicant was convicted under Connecticut General Statutes section 53a-61, which prohibits three types of conduct: intentionally causing physical injury to another; recklessly causing serious physical injury to another; and criminally negligently causing physical injury to another by means of a deadly weapon or dangerous instrument. A finding of moral turpitude may also involve "an assessment of both the state of mind and the level of harm required to complete the offense." *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but "as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required" for a finding of moral turpitude. *Id.* "[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm." *Id.*; *see also Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude).

At the time of the Applicant's conviction, Connecticut General Statutes section 53a-3 stated that "physical injury" means impairment of physical condition or pain, and "serious physical injury" means physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ. Under Connecticut General Statutes section 53a-61(a)(2), recklessly causing serious physical injury to another is thus a crime involving moral turpitude because it involves serious physical harm and a sufficient mental state for a finding of moral turpitude, while conduct under Connecticut General Statutes sections 53a-61(a)(1) and 53a-61(a)(3) does not involve moral turpitude.[1] A review of the Connecticut Criminal Jury Instruction indicates that the statute is divisible, as each of these statutory alternatives "defines an independent 'element' of the offense, as opposed to . . . various means or

[1]Connecticut General Statutes section 53a-61(a)(1) is akin to simple assault where although intentional conduct is involved, a meaningful level of harm is not. In addition, although Connecticut General Statutes section 53a-61(a)(3) involves a dangerous or deadly weapon, it involves criminally negligent conduct, which is not intentional conduct and does not involve an awareness of a substantial risk.

methods by which the offense can be committed." *See Chairez,* 26 I&N Dec. at 822 (citing *U.S. v. Mathis,* 136 S. Ct. 2243, 2248 (2016)).[2]

If the convicting statute is divisible, we may look to a non-citizen's record of conviction to determine whether their conviction was for a crime involving moral turpitude. The current record does not include the complete record of conviction for this offense, and it does not establish under which section of Connecticut General Statutes section 53a-61 the Applicant was convicted. The burden of proof in these proceedings is on the Applicant to establish his admissibility. Section 291 of the Act. *See also Pereida v. Wilkinson*, 141 S. Ct. 754 (2021) (holding that the non-citizen bears the burden of resolving ambiguities in their criminal record and demonstrating that they were not convicted of a disqualifying offense). As the record does not indicate under which section of the divisible statute he was convicted, the Applicant has not established that his conviction for assault in the third degree was for an offense that did not involve moral turpitude. Therefore, the Applicant has two convictions for crimes involving moral turpitude. As such, he is not eligible for the petty offense exception and is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

B. Waiver

Section 212(h) provides a discretionary waiver of inadmissibility under 212(a)(2)(A) of the Act if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter, or if the activities resulting in inadmissibility occurred more than 15 years before the date of the application and 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. If, however, the foreign national's conviction is for a violent or dangerous crime, USCIS may not grant a waiver unless the foreign national also shows "extraordinary circumstances" with the final stipulation that, even if such a showing is made, the waiver can still be denied because of the gravity of the offense. 8 C.F.R. § 212.(7)(d).

Here, the Director concluded that the Applicant's convictions were for violent or dangerous crimes and that he did not merit a favorable exercise of discretion. A favorable exercise of discretion is not warranted for applicants who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application 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 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." The Board stated that 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.

[2] "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' At trial, they are what the jury must find beyond a reasonable doubt to convict the defendant . . . ; and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Mathis,* 136 S. Ct. at 2248. Means or methods are extraneous to the crime's legal requirements; they are circumstances or events that need neither be found by a jury nor admitted by a defendant. *See id.*

On appeal, the Applicant does not contest the Director's finding that he has not established the presence of exceptional and extremely unusual hardship in his case, and he has not submitted any new evidence on appeal to address the issues raised by the Director with respect to discretion.

III. CONCLUSION

The Applicant, having been convicted of crimes involving moral turpitude that are also violent and dangerous crimes, has not demonstrated extraordinary circumstances to warrant a favorable exercise of discretion. The Applicant is consequently ineligible for a waiver of his inadmissibility under section 212(h) of the Act and the application will remain denied.

ORDER: The appeal is dismissed.