U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20244447

Date: MAR. 8, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant applied for an immigrant visa 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 I-601, determining that the Applicant is inadmissible under section 212(a)(6)(C)(i) for seeking an immigration benefit through fraud or misrepresentation, section 212(a)(2)(A)(i)(I) for conviction of a crime involving moral turpitude (CIMT); and under section 212(a)(9)(B)(v) of the Act, for unlawful presence. The Director concluded that although the Applicant's U.S. citizen spouse, a qualifying relative, would experience extreme hardship if he were denied admission, he did not establish extraordinary circumstances per the heightened discretionary standard for a violent or dangerous crime under 8 C.F.R. § 212.7(d). The Director denied the waiver "as a matter of statutory ineligibility and discretion."

On appeal, the Applicant submits new evidence and a brief, asserting that the Director erred in denying the application. The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss the appeal.

I. LAW

Any foreign national who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act, is inadmissible. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the noncitizen. Section 212(i) of the Act.

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. Section 212(a)(2)(A) 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. A waiver is available if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. Section 212(h)(1)(B) 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

On appeal, the Applicant does not contest the finding of inadmissibility for unlawful presence, a determination supported by the record. In addition, we will not disturb the Director's finding that the Applicant has shown extreme hardship to a qualifying relative.[1] The remaining issues on appeal are whether the Applicant is inadmissible for seeking an immigration benefit through fraud or misrepresentation, and for committing a CIMT - and if so, whether that crime is violent or dangerous requiring a heightened discretionary finding for a waiver under section 212(h) of the Act.[2]

A. Immigration History

In 2015, the Applicant applied for a B-2 visa with the Department of State (DOS). In his nonimmigrant visa application, he attested that he had never been arrested or convicted for any offense or crime. A consular officer approved the application and DOS issued the visa. The Applicant was admitted to the United States in February 2015 for a six-month period of stay as a B-2 nonimmigrant. He overstayed his approved period of admission for over two years by the time he departed the U.S. in December 2017. In January 2018, the Applicant withdrew his application for admission as a B-2 nonimmigrant upon his attempted return to the United States after U.S. Customs and Border Patrol (CBP) determined, based on DHS records and the Applicant's sworn statement, that he had previously overstayed his nonimmigrant visa and was currently an intending immigrant without a visa. He departed the United States, and his B-2 visa was revoked by DOS.

In [redacted] 2017, he married his U.S. citizen spouse, who then filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved. In May 2019, he applied for an immigrant visa with DOS. During the processing of his immigrant visa application DOS determined that he had been arrested and convicted in Tonga in 2011 for assault causing bodily harm during a bar fight. In July 2019, DOS refused to issue his immigrant visa determining that he was inadmissible for unlawful presence and a CIMT for his 2011 conviction.

[1] On appeal, the Applicant asserts that he is statutorily eligible for a waiver on all three grounds and the Director misapplied *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg'l Comm'r 1963). We agree. The Director erred in stating "if an applicant would remain inadmissible even if a waiver is granted, the remaining [grounds of inadmissibility] may themselves support denial of the waiver application as a matter of discretion." In doing so, the Director cited *Matter of J-F-D-*, which involved an applicant who had a nonwaivable inadmissibility ground and would remain inadmissible even if USCIS waived another inadmissible ground. Since the Applicant's inadmissibility grounds are waivable, we withdraw the Director's statement in this regard.

[2] While we may not discuss every document submitted, we have reviewed and considered each one.

B. Inadmissibility

1. Fraud or Willful Misrepresentation

The Applicant contends he is not inadmissible because he did not willfully misrepresent a material fact in his nonimmigrant visa application. He rightly points out that the Director erred in his denial concluding that DOS found him inadmissible for fraud or willful misrepresentation. DOS did not include this inadmissibility ground within the Applicant's immigrant visa refusal notice.

The Director informed the Applicant in a request for evidence (RFE) that he was inadmissible under section 212(a)(6)(C)(i) of the Act because he sought to procure an immigration benefit by fraud or willfully misrepresenting a material fact. However, the Director did not provide any details about the Applicant's conduct that constitutes as fraud or willful material misrepresentation in pursuit of an immigration benefit. Later, in denying the waiver application the Director explained that the Applicant did not disclose his 2011 arrest and conviction for assault causing bodily harm as required by the nonimmigrant visa application; a material factual omission which, if known to DOS, might have adversely impacted the Applicant's eligibility for his B-2 visa.

While the Director did not provide the Applicant with sufficient notice and an opportunity to respond to this adverse information prior to the denial of the waiver application, as required by 8 C.F.R. § 103.2(b)(16)(i), as we will discuss below, the Applicant has not established eligibility for waivers on other inadmissibility grounds. Therefore, we reserve the issue and will not further address the Director's separate determination that the Applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. See *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

2. CIMT

On appeal, the Applicant contests his finding of inadmissibility and asserts that his 2011 conviction is not a CIMT. Based on Tongan records regarding his arrest and conviction and statements made by the Applicant during his immigrant visa interview, a consular officer determined that the Applicant is inadmissible under section 212(a)(2)(A)(i) of the Act. While we acknowledge the Applicant's arguments on his inadmissibility, because the Applicant resides overseas and is applying for an immigrant visa, DOS makes the final determination regarding his inadmissibility with respect to the visa. As a result, the Applicant requires a waiver of inadmissibility under section 212(h) of the Act.

C. Violent or Dangerous Crime

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).

On appeal, the Applicant maintains that his conviction did not involve a violent or dangerous crime, pointing to a legal opinion by a Tongan attorney presented in a 2021 report submitted in response to

the Director's RFE. The attorney references the Applicant's "previous record of conviction" and states the Applicant was "convicted of Bodily Harm [in] 2011," noting "at the time of [the Applicant's] conviction, Bodily Harm carried a maximum sentence of 5 years imprisonment." She further notes the Applicant was fined "$75 [] in lieu of 2 months imprisonment." She asserts:

> No weapon was used during the offending and no permanent disfigurement or serious bodily harm was suffered. This is a one-off isolated incident which was very unfortunate for both [the Applicant] and his victim [] they have long [since] reconciled. [The Applicant] was convicted of Bodily Harm and having assessed the summary of facts and the sentence imposed, it can only be concluded that the extent of the harm caused was negligible and so his offending did not meet the criteria for a 'violent' and 'dangerous' which is why he was tried summarily and given a very light sentence."

We have carefully considered the attorney's legal opinion but determine the Applicant's reliance on this documentation is misplaced. The attorney acknowledges in her analysis that she did not "have access to a copy of the [Applicant's] summons and concludes "based only on [the Applicant's] recollection, it can only be presumed he was charged with Bodily Harm, contrary to section 107(1)(2)(c)." It appears that the attorney largely relied upon the Applicant's recollections (conveyed to her in 2021) as the basis to determine not only the underlying Tongan criminal offense for his conviction in 2011 but also for her analysis of the nature of the actual offense. She concludes based on the Applicant's recollections that the victim merely "sustained a black eye and a bruised face" from his altercation with the Applicant during the bar fight, which without more, is insufficient to show that his offense was not violent or dangerous.

We recognize that the attorney may have relied on documents not included in the record, such as the Applicant's "previous record of conviction" referenced in her analysis; however, such documentation was not provided in support of the waiver. Importantly, the Applicant did not submit a full record of conviction analyzed by the attorney in her legal opinion. When relying on foreign law to establish eligibility, the application of foreign law is a question of fact which must be proved by the [applicant]. *Matter of Kodwo,* 24 I&N Dec. 479, 482 (BIA 2008) (citing *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). Based on the evidence discussed above, the Applicant has not met his burden to establish that the statutory elements and the nature of his crime were not violent and dangerous. *Matter of Chawathe*, 25 I&N Dec. at 376.

For the reasons discussed, we find that the attorney's opinion letter lends little probative value to the matter here. In our discretion, we may use opinion statements submitted by the applicant as advisory. *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we will reject an opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Id.* We are ultimately responsible for making the final determination regarding an individual's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'"). For the sake of brevity, we will not address other deficiencies within the attorney's legal analysis.

The Applicant also asserts that "the violent and dangerous crime classification is reserved only for the most egregious offenses, such as killing a baby by violently striking and shaking it." While such an offense could be construed as meeting the requirements for a "violent or dangerous crime" under 8 C.F.R. § 212.7(d), the Applicant misinterprets the threshold for determining whether a crime is a violent or dangerous crime for purposes of discretion under the regulation. 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 explains that when he attended his immigrant visa interview, he told the consular officer that at the time of his arrest he thought he had broken the victim's jaw. In other statements submitted in support of the waiver he reiterates that he suspected he had broken the victim's jaw during the assault, and also explains that the victim was taken by police to seek medical attention for his injuries after the assault. Notably, the Applicant has not submitted documentary evidence to show the extent of the injuries sustained by the victim during the crime. Regardless, we conclude that punching a person in the face with such force that it causes the Applicant, the victim, or others to suspect the victim's jaw is broken strongly suggests that the act was violent (for instance, characterized by the use of strong physical force), and that assaulting a person in this manner is dangerous (perilous, hazardous, or unsafe, and is likely to cause serious bodily harm.) We therefore affirm the Director's finding that the Applicant committed a violent or dangerous crime, and determine the Applicant is subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d).

D. Discretion

When a foreign national 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. 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 the denial of his waiver application would result in exceptional and extremely unusual hardship to himself, a qualifying relative, or qualifying relatives.

1. Rehabilitation

Foreign nationals who are inadmissible under section 212(a)(2)(A)(i) 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 discretionary 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 alien has been rehabilitated. Section 212(h)(1)(A) of the Act.

On appeal, the Applicant provides additional evidence to show his "good moral character" indicating that he has performed "a critical caretaker role for [his] family and extended family, village, and national Red Cross emergency responder, [and is a] dedicated community and church member." He

emphasizes that "he is willing and serious about continuing rehabilitation." However, as the Applicant's crime occurred less than 15 years ago, he is ineligible for the discretionary waiver under section 212(h)(1)(A) of the Act.

2. Determining Exceptional and Extremely Unusual Hardship

When assessing exceptional and extremely unusual hardship, it is useful to view the factors considered in determining the lower standard of extreme hardship. See *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62-64 (BIA 2001) (discussing exceptional and extremely unusual hardship factors in the context of cancellation of removal under section 240A(b) of the Act, 8 U.S.C. 1229b(b)). Factors deemed relevant in determining whether a foreign national has established the lower standard of extreme hardship include the presence of a lawful permanent resident or U.S. citizen qualifying relative in this country; the financial impact of departure from this country; and the age, health, and circumstances of qualifying relatives. See *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999).

"As with extreme hardship, all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship." *Matter of Monreal-Aguinaga*, supra., at 62. Exceptional and extremely unusual hardship, however, 'must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Id.* While a fact pattern that is common and not substantially different from the hardships which would normally be expected upon removal might be adequate to meet the "extreme hardship" standard, these are not the types of hardship that would meet the significantly higher "exceptional and extremely unusual hardship standard. *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002) (discussing exceptional and extremely unusual hardship factors in the context of cancellation of removal under section 240A(b) of the Act.)

3. Exceptional and Extremely Unusual Hardship Upon Separation

On appeal, the Applicant asserts the exceptional and extremely unusual hardship to his spouse upon separation or relocation constitutes an extraordinary circumstance. His spouse indicates upon penalty of perjury in her most recently submitted statement that relocating to Tonga with the Applicant "is not an option for me because my family here in the United States, especially my parents, depends on me for support." She mentions, among other things, her financial obligations to her parents, the medical care assistance she provides to them, as well as the support she provides to her older sister, by helping her take care of her baby. A sworn statement certified under the penalty of perjury from the qualifying relative of his or her intent to relocate or separate would generally suffice to demonstrate what the qualifying relative plans to do. *See generally*, 9 *USCIS Policy Manual* B.4(B), https://www.uscis.gov/policymanual. Based on the spouse's statement, we conclude that she does not intend to relocate to Tonga and will stay separated from the Applicant if the waiver application remains denied.

The record of proceeding includes a brief, statements from the Applicant, his spouse, and other family members, character reference letters, identity documents, country condition documents for Tonga, evidence of employment and living expenses for the spouse, medical records for the spouse and her

parents, mental health reports for the spouse, evidence of her financial support for the Applicant in Tonga, and photographs.

The spouse states that she will continue to suffer emotional hardship if the Applicant is unable to return to the United States. Her therapist indicates in mental health reports that she meets the criteria for major depressive disorder, and that she has seen a psychiatrist who has prescribed medications for her for depression and sleep issues. However, the Applicant has not provided information from her psychiatrist discussing the exact nature and severity of her mental health conditions and a description of any treatment or specific family assistance needed. In her declaration, the spouse asserts that she experiences panic attacks, frequently cries, has difficulty sleeping, and feels like she has "lost her life" without the Applicant. The spouse also indicates that she will suffer medical hardship if she continues to be separated from the Applicant. She discusses how in the Applicant's absence she has taken to eating unhealthy foods, and as a result has gained weight causing her to newly suffer from hypertension and pre-diabetic conditions.

While we recognize the spouse's emotional and medical hardships from being separated from the Applicant, we also observe that the evidence provided reflects she is very close to her family who provide her with substantial emotional support and are willing to assist her in resolving her medical difficulties. For example, the spouse explains in her declaration that she receives ongoing emotional support from her parents and sibling in the United States. Her parents also indicate in their letter that the spouse has moved in with them in the home that they purchased together, that they frequently vacation together, and that when she is distressed, they comfort her and spend time with her.

Considering financial hardship, the record contains insufficient and inconsistent evidence regarding the financial impact of separation upon the Applicant's spouse. She discusses that with the Applicant's financial assistance she earned her master's degree, but that her plans to obtain her PhD and become a dean at a college or university have been put on hold without his financial support. According to information she gave to her therapist for her 2019 mental health report, the Applicant "was providing financial support, approximately 40 percent of her household expenses and monthly payments, when he was living and working in the United States," but "now he is no longer able to contribute financially to support her." While the Applicant provided a copy of his spouse's 2019 Form W-2, he has not provided sufficient evidence of his own finances to substantiate his spouse's assertions that he financially supported her through his work in the United States. The lack of evidence needed to illustrate a complete picture of the couple's financial situation raises questions about the level of financial impact of separation upon the Applicant's spouse.

We also note that while seeking admission to the United States with a B-2 visa in January 2018, the Applicant attested to CBP officers in a sworn statement that he had not been previously employed in the United States. He told CBP that the last time he had worked was for the "Red Cross [in Tonga], 2015 before I left." When asked if he had ever obtained employment in the United States, he answered "no," stating that he had spent his time in the United States playing rugby, as well as cooking and cleaning for his relatives. The information provided by the Applicant to CBP is contrary to his spouse's assertions that the Applicant financially supported her.

On appeal, the Applicant asserts that his spouse is currently unemployed and was forced to take out loans to support her parents and the Applicant. According to her parents, she has moved in with them,

which suggests that she is no longer maintaining a separate residence. The Applicant did not supplement the record on appeal with evidence to establish the current state of his spouse's financial situation. For example, the Applicant has not documented the level of unemployment compensation she receives or submitted evidence of her current living expenses as she house-shares with her parents. Collectively considering the inconsistent and insufficient evidence in the record, we are unable to determine the full extent of the financial impact on the Applicant's spouse upon separation.

Having considered the evidence of record in the aggregate, we acknowledge the claims of hardship made by the Applicant with respect to his spouse. Although the Director found that the spouse will experience extreme hardship, the record does not contain sufficient probative evidence to establish the extent or severity of the claimed hardships to the spouse that is necessary in showing the exceptional and extremely unusual hardship required by 8 C.F.R. § 212.7(d). Further, while the Applicant may also establish exceptional and extremely unusual hardship to himself, he has not made any claims or submitted evidence concerning hardship that he would experience if his waiver application is denied.

III. CONCLUSION

The Applicant has been found inadmissible for unlawful presence, and for a crime involving moral turpitude that is also a violent and dangerous crime, and he has not demonstrated 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.