U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22917686

Date: NOV. 16, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has 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), for criminal activity. The Applicant also seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), for unlawful presence. U.S. Citizenship and Immigration Services (USCIS) may grant a discretionary waiver under these provisions if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives.

The Nebraska Service Center Director denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application). The Director concluded the Applicant did not establish the requisite level of hardship to his U.S. citizen mother, his only qualifying relative. We summarily dismissed the Applicant's appeal, and the matter is now before us on a motion to reopen and reconsider. Upon review, we will grant the motion to reopen and remand the matter to the Director for the entry of a new decision.[1]

I. LAW

A motion to reopen is based on new facts that are supported by documentary evidence, and a motion to reconsider is based on an incorrect application of law or policy. The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). If warranted, we may grant requests that satisfy these requirements, then make a new eligibility determination.

A 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 (CIMT) (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. There is a discretionary waiver of this inadmissibility ground if refusal 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. If the foreign national demonstrates the existence of the required hardship, then they must also show they merit a favorable exercise of discretion. *Id.*

[1] The motion to reconsider is therefore moot and we will not address it further.

Additionally, a foreign national who has been unlawfully present in the United States for one 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)(II) of the Act. To establish eligibility for a waiver of unlawful presence under section 212(a)(9)(B)(v) of the Act an alien must show, as a preliminary matter that refusal of admission would result in extreme hardship to the alien's U.S. citizen or lawful permanent resident spouse or parent.

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).

Once the foreign national demonstrates the requisite extreme hardship, they must show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act. The burden is on the foreign national to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Moralez,* 21 I&N 296, 299 (BIA 1996). We must balance the adverse factors evidencing an applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted).

The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country while in compliance with our immigration laws (particularly where residency began at a young age), evidence of hardship to the foreign national and their family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

With respect to the discretionary nature of a waiver, when a foreign national 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 foreign national 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 their admission as a matter of discretion may still be denied.

II. ANALYSIS

A. Unlawful Presence Inadmissibility Ground

First, we address the Applicant's unlawful presence inadmissibility ground. During the pendency of the Applicant's appeal, USCIS issued policy guidance clarifying inadmissibility under section 212(a)(9)(B) of the Act. *See* 8 *USCIS Policy Manual* O.6, https://www.uscis.gov/policymanual; *see also* Policy Alert PA-2022-15, *INA 212(a)(9)(B) Policy Manual Guidance* (June 24, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates.

The policy guidance clarifies that the statutory 3- or 10-year bar to readmission under section 212(a)(9)(B) begins to run on the day of departure or removal (whichever applies) after accrual of the period of unlawful presence, but a foreign national subject to the 3- or 10-year bar is not inadmissible to the United States under section 212(a)(9)(B) unless they depart or are removed and seek admission within the 3- or 10-year period following their departure. *See* 8 *USCIS Policy Manual*, *supra*, at O.6(B).

The policy guidance further clarifies that a foreign national determined to be inadmissible under section 212(a)(9)(B) but who again seeks admission more than 3 or 10 years after the relevant departure or removal is no longer inadmissible under section 212(a)(9)(B) even if they sought admission during the statutory 3- or 10-year period because the statutory period after that departure or removal has ended. *See id.*

The Applicant is no longer inadmissible under section 212(a)(9)(B) because more than 10 years have elapsed between his 2011 departure from the United States, and he made this request for admission in 2018. Because the Applicant is no longer inadmissible under section 212(a)(9)(B), we withdraw the Director's determination to the contrary. However, the remaining inadmissibility grounds the Director raised appear to remain an issue and the Applicant continues to require the approval of this waiver application.

B. The Director's Decision

First, we address the Applicant's criminal history, then the standard he must meet. The record reflects the following convictions relating to the Applicant:

- 1986 conviction (Fla. Stat. Ann. § 316.1931) for felony driving an automobile while intoxicated (DWI) manslaughter, for which he was sentenced to five years of incarceration to be followed by five years of probation; and
- 1990 conviction in New York for driving while ability impaired by alcohol with two or more convictions within ten years, for which he was required to pay a fine and his driver's license was suspended for three months.

We note the following possible issues were raised in the Director's decision:

1. Unlawful presence under section 212(a)(9)(B)(i)(II);
2. CIMT conviction under section 212(a)(2)(A) relating to his 1986 conviction,

3. Multiple criminal convictions under section 212(a)(2)(B) of the Act, and
4. Discretion under section 212(h)(2), because the 1986 conviction was a violent or dangerous crime, which elevated the discretionary hurdle to demonstrate the Applicant warranted a waiver of these activities.

We begin our analysis noting the Director committed two errors. First, the Director mentioned both the rehabilitation waiver under section 212(h)(1)(A) of the Act and extreme hardship to a qualifying relative under section 212(h)(1)(B) as possible means to demonstrate eligibility, but they did not provide analysis on the rehabilitation provision to determine whether the Applicant satisfied those requirements. Second, the Director erred in their determination that the Applicant must "show how your mother is suffering from exceptional and extremely unusual hardship due to your visa refusal," and in their statement that "it cannot be concluded that the hardships asserted on behalf of your mother rise to the level of exceptional and extremely unusual hardships . . . ."

We correct the record and note that the Director should have followed a two-step process in this case. Each "step" is independent of the other and may be applied in any order. But both steps must be completed for a waiver application to be approved. Stated differently, the Director could have only performed step two (in a proper manner), and if the outcome was adverse to the Applicant, the Director is not required to then analyze what we characterize as "step one" below.

Within step one, the Applicant was required to first satisfy the requirements under section 212(h)(1)(A), (B), or (C) (e.g., rehabilitation, extreme hardship to a qualifying relative, etc.). Then in the second step, he must demonstrate that he warrants a favorable exercise of discretion under section 212(h)(2). And because the Director determined the Applicant's 1986 conviction was a violent or dangerous crime, the Director would perform the discretionary analysis applying the elevated standard described in the regulation at 8 C.F.R. § 212.7(d) (exceptional and extremely unusual hardship).

The Director failed to follow that process and essentially conflated both steps, factoring in the elevated standard of exceptional and extremely unusual hardship in step one (hardship to the qualifying relative). We further note that within step two, the Applicant is allowed to claim exceptional and extremely unusual hardship will generally be present if he is denied admission to the United States, not just that level of hardship to his qualifying relative. *See* 8 C.F.R. § 212.7(d). Based on these errors, we will remand the matter to the Director.

C. Florida DWI Manslaughter as a CIMT

Based on the current record, we are unable to determine whether the Applicant's 1986 conviction was for a CIMT. "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)). "Conduct is 'reprehensible' if it is 'inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,' while a 'culpable mental state' requires deliberation or

consciousness, such as intent, knowledge, willfulness, *or recklessness*." *Matter of Vucetic*, 28 I&N Dec. 276, 277 (BIA 2021) (emphasis added).

A culpable mental state requires some degree of scienter, either specific intent, deliberateness, willfulness, *or recklessness*. *Matter of Louissaint*, 24 I&N Dec. 754, 756–57 (BIA 2009). Recklessness is a sufficiently "culpable mental state for moral turpitude purposes where it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct." *Matter of Leal*, 26 I&N Dec. 20, 23 (BIA 2012).

The offense of driving while intoxicated or under the influence is dangerous and reckless by its very nature. *Matter of Castillo-Perez*, 27 I&N Dec. 664, 670–71 (A.G. 2019). Additional aggravating elements can transform an offense that otherwise would not be a CIMT into one that is. *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1196 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). Here, the Applicant operated a vehicle while intoxicated, and did so in a manner with a conscious disregard that caused the death of another person.

Depending on the full version of the relevant Florida law as it existed in 1986—the record only contains portions of that statute—if the statute contained a reckless element, the Applicant's 1986 conviction could constitute a CIMT. Criminally reckless conduct can support a finding that a conviction is for a CIMT. *Matter of Torres-Varela*, 23 I&N Dec. 78, 89 (BIA 2001). For such a determination, recklessness—or a conscious disregard for a substantial risk—must be an element of the statute under which the foreign national is convicted, and a crime resulting in injury to a victim already must have occurred. *Id.*

Here, it is the applicant who bears the burden of establishing admissibility clearly and beyond doubt. *See Matter of Bett*, 26 I&N Dec. 437, 440 (BIA 2014). Therefore, in the context of demonstrating admissibility under the Act, the burden rests with an applicant to show that a conviction does not have any adverse effects on their eligibility. In line with that requirement is their responsibility to provide any documentation that illustrates all the elements of the crime that they were convicted of under a statute of conviction that contained some disqualifying crimes. *Pereida v. Wilkinson*, 141 S. Ct. 754, 763–64 (2021).

The failure to provide the statute in full, could result in the Applicant falling short of satisfying his burden relating to this conviction. But, because of our analysis below relating to multiple criminal convictions under section 212(a)(2)(B), whether the Applicant is inadmissible for committing a CIMT based on the 1986 conviction is no longer a controlling question. In other words, because he is inadmissible under a separate criminal ground, it is unnecessary that USCIS determine whether the 1986 conviction was a CIMT.

D. Multiple Criminal Convictions

Next, the Applicant contests the Director's application of section 212(a)(2)(B) to his convictions because the current version of the statute differs from the one that existed when he was convicted.[2]

[2] A previous version of the statute included the phrase "actually imposed" as it related to a foreign national's sentences of confinement.

We do not agree. Congress used specific language signaling that it clearly intended this provision to apply to past conduct. They directly addressed this issue in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208 § 322(c), 110 Stat. at 3009–629. There, Congress stated: "EFFECTIVE DATE.—The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act." So, Congress intended convictions and sentencing that predated IIRIRA to be subject to the revised version of section 212(a)(2)(B) as it currently exists.

Where the statute in question unambiguously applies to pre-enactment conduct, we should apply the law as it currently exists. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 245 (1994). Similarly, admissibility is determined on the basis of the facts and the law at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992) (considering various versions of the section 212(h) waiver provisions and finding it is the version of the law that exists on the date of adjudication to which we should apply an applicant's facts). We therefore do not agree with the Applicant that his 1986 and 1990 convictions predating IIRIRA do not subject him to the current version of the statute.

And based on that determination, we conclude that when considering both the 1986 and 1990 convictions, the Applicant is inadmissible under section 212(a)(2)(B) of the Act.

E. Violent or Dangerous Crime Elevated Discretionary Standard

All the materials submitted to this office contend that the Applicant's waiver application "should have been analyzed strictly under rehabilitation, and even if a hardship determination were to be analyzed, it should be under extreme hardship and not through the lens of the more rigorous exceptional and extremely unusual standard."[3] In the briefs, the Applicant incorrectly characterizes the Director's decision as focusing on "a crime of violence within the meaning of the aggravated felony definition." The only reference to an aggravated felony definition in the Director's decision was in the attachments page that simply provided statutory citations. The Director's focus was on violent or dangerous crimes within the regulatory provisions of 8 C.F.R. § 212.7(d).

We note additional incorrect information in the briefs in which the Applicant characterizes two of the Director's citations to circuit court opinions as supporting the position that his 1986 offense "was an aggravated felony as a crime of violence." A review of the Director's decision does not bear this out. The Director stated:

> In determining whether a crime is a violent or dangerous crime for purposes of the exercise of discretion under 212(h)(2) of the Act, we are not limited to a categorical inquiry but may consider both the statutory elements and the nature of the actual

[3] We already addressed the Director's error as it relates to not offering analysis for the rehabilitation waiver under section 212(h)(1)(A).

offense. *See Torres-Valdivias v [L]ynch*, 786 F. 3d 1147, 1152 (9th Cir. 2015); *Waldron v Holder*, 688 F 3d 354, 359 ([8]th Cir. 2012).

With no mention of an aggravated felony or the term "crime of violence" anywhere in the Director's decision, it is unclear what led Applicant's counsel to make such a leap.

Here, it appears the Applicant does not understand the provisions of law that apply to his case. The Director did not solely focus on the 1986 offense being a CIMT, or his multiple criminal convictions. Instead, the Director also determined that the 1986 offense was a violent or dangerous crime and based on 8 C.F.R. § 212.7(d) he must demonstrate the refusal of his immigrant visa would result in exceptional and extremely unusual hardship. Again, we acknowledge the Director's error in pulling in the elevated discretionary standard—exceptional and extremely unusual hardship—into their "step one" analysis.

The exceptional and extremely unusual hardship discretionary analysis applies to the Applicant's case even if the 1986 offense was not a CIMT because he remains inadmissible under section 212(a)(2)(B) for his multiple criminal convictions resulting in five years or more of confinement, and those crimes are not required to be CIMTs. The waiver for section 212(a)(2)(B) is found under section 212(h) of the Act for which the Applicant must first meet the requirements of section 212(h)(1). If he meets those requirements, only then is it required that we evaluate the heightened discretionary standard—exceptional and extremely unusual hardship based on the regulation at 8 C.F.R. § 212.7(d)—that applies to his case.

III. CONCLUSION

The Director should reexamine the Applicant's waiver eligibility claims whether it is via section 212(h)(1)(A)(i)–(iii), or extreme hardship to his qualifying relative under section 212(h)(1)(B). Separately, the Director should perform a discretionary analysis under section 212(h)(2) in which he must not only demonstrate that the positive factors outweigh the negative ones, but he must also show exceptional and extremely unusual hardship to himself and anyone else, not just to his qualifying relative. *See* 8 C.F.R. § 212.7(d).

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