U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17603120

Date: OCT. 31, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident (LPR) and seeks a waiver of inadmissibility under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude (CIMT).

The Director of the Nebraska Service Center denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that the record did not establish that the Applicant is eligible for a rehabilitation waiver pursuant to section 212(h)(1)(A) of the Act, and that his qualifying relatives, his U.S. citizen spouse, would experience extreme hardship if he were denied the waiver under 212(h)(1)(B) of the Act.[1] The matter is now before us on appeal. On appeal, the Applicant submits additional evidence and asserts that he is not inadmissible under 212(a)(2)(A)(i)(I) of the Act since he has not been convicted of a CIMT. In the alternative, he contends that he is eligible for a rehabilitation waiver under 212(h)(1)(A) of the Act, and that his spouse would experience extreme hardship if his waiver were denied. The Administrative Appeals Office reviews 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 withdraw the Director's decision and remand the matter for the entry of a new decision consistent with the following analysis.

I. LAW

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. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A).

Individuals found inadmissible under section 212(a)(2)(A) of the Act for a CIMT 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,

[1] Although the Director initially determined that one of the crimes for which the Applicant convicted was both a CIMT and a violent or dangerous crime pursuant to 8 C.F.R. § 212.7(d), he did not apply the heightened discretionary standard for such crimes in his analysis.

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 noncitizen 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). In these proceedings, it is the applicant's burden to establish by a preponderance of the evidence eligibility for the requested benefit. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

With respect to the discretionary nature of a waiver, where a noncitizen has been convicted to a violent or dangerous crime, the regulations governing the exercise of discretion are set forth in 8 C.F.R. § 212.7(d). A favorable exercise of discretion under this regulation is precluded except in extraordinary circumstances, including where the noncitizen has established "exceptional and extremely unusual" hardship if the waiver is denied, or where overriding national security or foreign policy considerations exist.

II. ANALYSIS

The initial issue raised by the Applicant on appeal is whether his 2001 conviction for assault on police was for a crime involving moral turpitude that renders him inadmissible under section 212(a)(2)(A)(i) of the Act. He asserts that the Director failed to conduct a complete analysis, and that his crime is not considered to involve moral turpitude.

A. Crime Involving Moral Turpitude

The Act does not define the term "crime involving moral turpitude." However, the Board of Immigration Appeals provided the following general definition in *Matter of Perez-Contreras*:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. . . .
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. . . .

20 I&N Dec. 615, 617-18 (BIA 1992)(citations omitted). "[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992).

In assessing whether a conviction is a crime involving moral turpitude, we must first "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)). This categorical approach focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S. Ct. 815, 822 (2007)).

Where a criminal statute is divisible (encompasses multiple distinct offenses not all of which are crimes involving moral turpitude), 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 divisible statute "(1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a "categorical match" to the relevant generic standard." *Chairez,* 26 I&N Dec. at 822 (citing *Descamps,* 113 S. Ct. at 2283).

If the statute is divisible, we then conduct a modified categorical inquiry by reviewing the record of conviction to determine which statutory phrase was the basis for the conviction. *See Matter of Short*, 20 I&N Dec. at 137-38. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissant*, 24 I&N Dec. at 757; *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

B. Assault on Police

The record shows that the Applicant was convicted of two crimes in the United Kingdom in [redacted] 2001: "assault on police" and two counts of "destroy or damage property," for which he was sentenced to conditional discharge for 12 months and total fines of £380. While the documents related to his arrest and conviction in the record do not cite the sections of law under which he was convicted, the Applicant submits evidence on appeal showing that the applicable section of law for assault on police at the time of his conviction was chapter 16, part V, section 89 of the Police Act 1996, the relevant portion of which states as follows:

89.— Assaults on constables.

(1) Any person who assaults a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

(2) Any person who resists or willfully obstructs a constable in the execution of his duty, or a person assisting a constable in the execution of his duty, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both.

As noted above, the Director determined that assault on police is a CIMT. On appeal, the Applicant asserts this crime is not a CIMT, and notes that the Board of Immigration Appeals ("Board") has held that assault may or may not involve moral turpitude. He also submits evidence regarding the three levels of assault in United Kingdom law, and showing that the crime for which he was convicted involved common assault, the lowest level of the three and which does not require physical violence.

In cases involving assault or battery, a finding of moral turpitude involves "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.* Recklessness, defined generally as "a conscious disregard of a substantial and unjustifiable risk, constituting a gross deviation from the standard of conduct a reasonable person would observe under the circumstances," can be a sufficient mental state for moral turpitude purposes for crimes also involving significant harm or aggravating factors. *Matter of Leal,* 26 I&N Dec. 20, 22-23 (BIA 2012).

Assault on a law enforcement officer has been found to be a crime involving moral turpitude where the perpetrator knows the victim to be a law enforcement officer performing his official duty and the assault involves some additional aggravating factor, such as bodily injury to the officer. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988) (distinguishing cases in which knowledge of the police officer's status was not an element of the crime and where bodily injury or other aggravating factors were not present to elevate offense beyond "simple" assault); *Matter of Logan*, 17 I&N Dec. 367, 368-69 (BIA 1980) (holding that a conviction for interference with a law enforcement officer rose above the level of simple assault because the defendant had "knowingly threatened to employ deadly physical force" by pulling a knife on the officer.); *Matter of O-*, 4 I&N Dec. 301 (BIA 1951) (finding that violation of a German law involving an assault on a police officer was not a crime involving moral turpitude because knowledge that the person assaulted was a police officer engaged in the performance of his duties was not an element of the crime); *Matter of B-*, 5 I&N Dec. 538 (BIA 1953) (*as modified by Matter of Danesh*, 19 I&N Dec. at 672-73.) (concluding that assault on prison guard was not a crime involving moral turpitude because offense charged appeared to be only "simple" assault and no bodily injured was alleged); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass 1926) (finding that assault on an officer was not a crime involving moral turpitude in spite of fact that

defendant was armed with a razor because the razor was not used in the assault). The Board found in *Matter of B-* that a defendant who was convicted of assaulting a prison guard with knowledge that the guard was engaged in his lawful duties had not been convicted of a crime involving moral turpitude because the offense was similar to simple assault and did not involve the use of a weapon. 5 I&N Dec. at 541.

In this case, because the record does not indicate which subsection of section 89 of the Police Act 1996 the Applicant was convicted under, we must conduct a categorical inquiry of the entirety of section 89, which involves both assault of a constable in subsection (1) and resisting a constable in subsection (2). Only if the full range of the conduct prohibited in section 89 involves moral turpitude can it found to be categorically a CIMT. Subsection (1) does not include a requirement for a particular mental state, but evidence in the record from the Sentencing Council in the United Kingdom, which produces sentencing guidelines for the judiciary (https://www.sentencingcouncil.org.uk/), indicates that common assault "covers both intentional and reckless acts." Recklessness, defined generally as "a conscious disregard of a substantial and unjustifiable risk, constituting a gross deviation from the standard of conduct a reasonable person would observe under the circumstances," can be a sufficient mental state for moral turpitude purposes for crimes also involving significant harm or aggravating factors. *Matter of Leal*, 26 I&N Dec. 20, 22-23 (BIA 2012); *see also Knapik v. Ashcroft*, 384 F.3d 84, 89-90 (3d Cir. 2004); *Matter of Franklin*, 20 I&N Dec. 867, 869-71 (BIA 1994) (finding that a conviction for involuntary manslaughter to be a crime involving moral turpitude because the statute requires "recklessly caus[ing] the death of another person."); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553-54 (BIA 2011) (a conviction for driving in "wanton or willful disregard for the lives or property of others while attempting to elude a pursuing police vehicle" is a crime involving moral turpitude because "wanton or willful disregard" connoted recklessness); *Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (moral turpitude attached to an Illinois aggravated assault statute that required the use of a deadly weapon and a *mens rea* of recklessness.) While subsection (1) therefore has the requisite *mens rea* for a crime involving moral turpitude, again the evidence from the Sentencing Council states that a common assault need not involve any physical violence, and thus does not require bodily injury to a law enforcement officer as was the case in *Danesh*. The conduct prohibited by subsection (1) therefore does not rise to the level of a crime involving moral turpitude. As the minimum possible conduct for which a person could be prosecuted under subsection (1) does not rise to the level of a crime involving moral turpitude, then section 89 as a whole does not categorically involve a crime involving moral turpitude.

Where a criminal statute is divisible (encompasses multiple distinct offenses not all of which are crimes involving moral turpitude), 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). The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *See Louissant*, 24 I&N Dec. at 757; *see also Shepard v. U.S.,* 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.")

A divisible statute "(1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a "categorical match" to the relevant generic standard." *Chairez*, 26 I&N Dec. at 822 (citing *Descamps,* 113 S. Ct. at 2283). However, disjunctive statutory language only renders a statute divisible where "each statutory alternative defines an independent "element" of the offense, as opposed to a mere "brute fact" describing various means or methods by which the offense can be committed." *Id.* (citing *U.S. v. Mathis*, 136 S. Ct. 2243, 2248 (2016)). "Elements" are what the prosecution must prove to sustain a conviction: at trial, they are what the jury must find beyond a reasonable doubt to convict, and at a plea hearing, they are what the defendant necessarily admits when pleading 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. *Id.*

There are various sources for confirming whether alternatives are elements or means. First, the statute on its face may dictate that alternatives are elements because they carry different punishments or are identified as things that must be charged. *Mathis,* 136 S. Ct. at 2256. On the other hand, it may be clear from the statute that they are means because they are listed as "illustrative examples." *Id.* Second, a court decision or other source of law in the jurisdiction may provide the answer. *See Mathis,* 136 S. Ct. at 2256 (finding that the Iowa Supreme Court had previously determined that the listed premises in Iowa's burglary law were just alternative methods and a jury did not need to agree on the location); *see also Chairez*, 26 I&N Dec. at 824 (determining that separately enumerated mental states for the crime of discharge of a firearm in Utah were not elements partly because the Utah Supreme Court did not require jury unanimity for the different mental states listed in the crime of second-degree murder). Third, we can look at the record of conviction itself for the sole and limited purpose (at this stage of the analysis) of resolving the divisibility question. *Mathis*, 136 S. Ct. at 2257. For example, the indictment or jury instructions might just reiterate all the alternatives, or use a single umbrella term for various alternatives, indicating that these alternatives are means of commission for which the jury did not need to make a unanimous decision. *Id.* On the other hand, the record of conviction could indicate "by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements . . . ." *Id.*

In this case, section 89 of the Police Act 1996 includes two subsections which list discreet offenses carrying different punishments: subsection (1) which involves assaulting a constable and for which a conviction leads to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both; and subsection (2), resisting or willfully obstructing a constable in the execution of their duty, for which a conviction leads to imprisonment for a term not exceeding one month or to a fine not exceeding level 3 on the standard scale, or to both. As noted above, subsection (1) does not involve a crime involving moral turpitude, as it requires only recklessness as a mental state, does not require knowledge that the person being assaulted was a police officer, and does not require bodily harm to the police officer assaulted.

Regarding subsection (2), we note that the offense of resisting or willfully obstructing a police officer does not require any level of violence. Although the term "willfully" shows a higher mental state requirement than that present in subsection (1), per *Solon* this is insufficient to elevate the crime to one involving moral turpitude absent any requirement of meaningful harm.

While the statute thus indicates on its face that these are discrete offenses with different levels of punishment, neither rises to the level of a crime involving moral turpitude. Therefore, section 89 is not divisible with respect to moral turpitude, and the Applicant's conviction under that section of law does not make him inadmissible under section 212(a)(2)(A)(i) of the Act. Accordingly, we withdraw the Director's finding.

C. Destroy or Damage Property

While not addressed by the Director in his decision, it is the Applicant's convictions for destroy or damage property that the U.S. Department of State found to be responsible for his inadmissibility under section 212(a)(2)(A)(i) of the Act. We note that as with his conviction for assault on police, the court and police records submitted do not indicate the section of law under which he was convicted. In addition, the Applicant has not submitted any other evidence which demonstrates the appropriate section of law to be considered. It is the Applicant's burden to demonstrate that his conviction for destroy or damage property does not render him inadmissible, and he cannot meet this burden without providing documentation establishing the section of law under which he was convicted. However, because the Director's decision did not touch on this ground of inadmissibility, we are remanding this matter so that the Applicant may be provided with notice and an opportunity to respond.

III. CONCLUSION

The Applicant has established that he is not inadmissible under section 212(a)(2)(A)(i) of the Act as a result of his conviction for assault on police, and we therefore withdraw the Director's decision and remand the matter so that the Applicant may be provided with notice and an opportunity to respond to his inadmissibility for his remaining convictions.

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