U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25951454

Date: APR. 27, 2023

Appeal of Hialeah, Florida Field Office 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 Hialeah, Florida Field Office 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 additionally held 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. On appeal, the Applicant disputes the Director's finding that he had committed a violent and dangerous crime and asserts that he has otherwise established his eligibility for the waiver of inadmissibility. The matter is now before us on appeal.

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

A noncitizen 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)(i) 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, 8 U.S.C. § 1182(h). 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. 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.

With respect to the discretionary nature of a waiver, when a noncitizen 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 noncitizen 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 his or her admission as a matter of discretion may still be denied.

II. ANALYSIS

The record shows that the Applicant was convicted of attempted capital sexual battery in violation of Florida Statute section 794.011, and he was therefore found inadmissible under section 212(a)(2)(A)(i) of the Act as this crime involves moral turpitude. In our review of the related court records and police reports, the Applicant was arrested in 1981 and charged under Florida Statute section 794.011(2), sexual assault. The police report indicates that the Applicant was visiting the home of a relative. When the Applicant arrived, he observed the victim, and carried the victim to a bedroom where the Applicant removed his and the victim's clothing and inserted his penis into the victim's anus. After this, the victim's cousin arrived to the home and observed the victim crying and nude on the bed. The victim's brother observed blood coming from the victim after the assault, and an examination at the rape treatment center indicated that the victim had been sexually assaulted recently.

Regarding his conviction, the Applicant was initially convicted of sexual assault in violation of Florida Statute section 794.011(2) in [redacted] 1982. He stated that he relied on bad advice from his court-appointed attorney. He further stated that his court-appointed attorney did not allow him to explain his side of the story or inform him of the immigration consequences of his guilty plea. The Applicant filed a motion for post-conviction relief in 1989, which allowed him to plead nolo contendere to the lesser charge of attempted capital sexual battery in violation of Florida Statute section 794.011. His life sentence was subsequently reduced to 15 years, and he was credited with time served.

The Director reviewed the record and determined that the Applicant was ineligible for a waiver under section 212(h)(l)(A) of the Act, as he had not established that he was rehabilitated from his criminal activity, or that granting the waiver would not be contrary to the national welfare, safety, or security of the United States. The Director further determined that the Applicant was not eligible for a waiver under section 212(h)(1)(B) of the Act, as he had not established that his lawful permanent resident spouse or United States citizen son would experience extreme hardship as a result of a denial of his admission. Finally, the Director determined that the crime the Applicant was convicted of is considered violent or dangerous, as set forth in 8 C.F.R. § 212.7(d), which is described above.

We adopt and affirm the Director's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS,* 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS,* 87 F3d 5, 8 (1st Cir. 1996) (joining eight U.S. Courts of Appeals in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case.")

The Applicant argues on appeal that the Director erred in their determination that the Applicant committed a violent or dangerous crime and erred in their assessment of the crime when the Director conducted a categorical approach analysis and not a fact specific analysis. The Applicant asserts that in order to determine that a crime is violent or dangerous, only a fact specific analysis should be used, and the Director should not have included analysis of the statute under which the Applicant was convicted. However, in determining whether a crime is a violent or dangerous crime for purposes of discretion, we 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). In making this determination, we note that 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."

In our review, we find that the Director conducted an analysis of both the facts in the record regarding the incident, as well as the statute under which the Applicant was convicted, and as such, determine that the Director did not err in their determination that the Applicant was convicted of a violent or dangerous crime.[1] The Applicant states that the Director's decision indicating that "[t]he crime [he was] convicted of and the circumstances surrounding the case show the violent nature and depravity of [his] crime . . . A crime of this nature has the potential of permanently traumatiz[ing] and stigmatiz[ing] any victim," and "[b]ased on the violent nature of [his] criminal acts during [his] stay . . ." [emphasis removed] indicated that the Director was only analyzing the language of the statute, and not the underlying acts. We disagree. The Director stated in the quoted text that the analysis relates to "the circumstances surrounding the case" and the "depravity of [the Applicant's] crime" as they relate to the facts discussed earlier in the decision. Further, as noted above, in making a determination that a crime is considered violent or dangerous, we may consider the statutory elements and the nature of the offense.

The Applicant further asserts that the Director should not have relied upon arrest reports to obtain facts from the Applicant's conviction. However, it is appropriate for us to consider the factual information contained in police reports, as all relevant factors concerning an arrest and conviction should be taken

[1] At the time of his motion for post-conviction relief in 1989, the Applicant's charge was plead nolo contendere to attempted capital sexual battery under Florida Statute section 794.011. The term "sexual battery" was defined under Florida Statute 794.011(h) as, "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." The crime of sexual battery under Florida Statute section 794.011 was defined at that time as, "a person 18 years of age or older who commits sexual battery upon, or injures the sexual organs of, a person less than 12 years of age in an attempt to commit sexual battery upon such person commits a capital felony, punishable as provided in ss. 775.082 and 921.141." *Florida State University College of Law Research Center*, 1989 Florida Statutes, Title XLVI, Chapter 794. http://library.law.fsu.edu/Digital-Collections/FLStatutes/docs/1989/1989TXLVIC794.pdf (accessed April 20, 2023).

into account in exercising our discretion. *Matter of Grijalva*, 19 I&N Dec. 713, 722 (BIA 1988). The Applicant claims that without the use of the arrest reports, the underlying facts surrounding his conviction are absent, and his statements of innocence should be granted greater weight. The Applicant was initially convicted of sexual assault, which was vacated and later plead nolo contendere to the charge of attempted capital sexual battery. Further, the Applicant requests that his statements of innocence and reasons for his plea of nolo contendere be given greater weight in the "absence of facts." We note that the Director's decision discussed the Applicant's statements provided in the record and during his interview regarding his innocence; however, we cannot go behind a conviction to assess an applicant's guilt or innocence. *See Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996).[2]

III. CONCLUSION

The Applicant has been found inadmissible for a crime of moral turpitude that is also a violent and dangerous crime, and with his appeal, he has not claimed extraordinary circumstances that warrant a favorable exercise of discretion.[3] The Applicant is consequently ineligible for a waiver of his inadmissibility under section 212(h) of the Act.

ORDER: The appeal is dismissed.

[2] We acknowledge the Applicant's renewed assertions that he is eligible for a section 212(h)(1)(A) waiver based on his claimed rehabilitation. However, even if we were to find him rehabilitated, the Applicant has not overcome the Director's determination that he was convicted of a violent and dangerous crime, and he has not claimed extraordinary circumstances that warrant a favorable exercise of discretion under the heightened discretionary standard of 8 C.F.R. § 212.7(d) that therefore applies to his waiver application.

[3] As the Applicant has not claimed extraordinary circumstances that warrant a favorable exercise of discretion with his appeal, we need not reach a decision on them here. *See INS v. Bagamasbad,* 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).