U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23773044

Date: FEB. 8, 2023

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied for an immigrant visa and seeks a waiver of inadmissibility under the section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h), for his 1997 conviction of assault by dangerous weapon and assault and battery under the Massachusetts General Laws (M.G.L.) chapter 265, sections 15A(b) and 13A(a) respectively.

The Director of the Nebraska Service Center denied the waiver application, concluding that the Applicant's conviction was a CIMT under section 212(a)(2)(A)(i)(I), making him inadmissible to the United States. The Director further determined that the Applicant did not qualify for a waiver under sections 212(h)(1)(A) or 212(h)(1)(B). We agreed with the Director's decision and dismissed the Applicant's appeal. We determined that Applicant's conviction was a CIMT because he did not meet the burden of showing that he was convicted of reckless, as opposed to intentional, assault. We further concluded that he did not establish eligibility for a waiver of inadmissibility: the Applicant's supporting evidence did not demonstrate rehabilitation since his CIMT conviction in 1997 and the Applicant did not show how hardship on qualifying relatives would rise to the level of extreme hardship. The matter is now before us on combined motions to reopen and reconsider the proceeding.

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). Upon review, we will dismiss the motions and affirm our prior decision.

I. LAW

A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration; be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or policy; and establish that the decision was incorrect based on the evidence in the record at the time of the decision. 8 C.F.R. § 103.5(a)(3).

A waiver is not available to a noncitizen who has previously been admitted to the United States as lawfully admitted for permanent residence if since the date of such admission the noncitizen has been convicted of an aggravated felony. Section 212(h)(2) of the Act.

II. ANALYSIS

A. Motion to Reopen

On motion, the Applicant submits an affidavit from his post-conviction attorney as a new documentary evidence. The affidavit states that the Applicant is in the process of filing a motion to vacate his criminal convictions with the [redacted] District Court in [redacted] Massachusetts. The Applicant asserts that once his convictions are vacated, he will no longer need a waiver of inadmissibility. However, the court's vacatur of his convictions has not happened yet. The Applicant's evidence indicates that a motion to vacate his convictions will be filed, but it is not an actual court decree granting the vacatur. Therefore, the Applicant has not met the burden of showing that his conviction is vacated for immigration purposes and that the vacated grounds are due to substantial procedural defect or merit-based reasons. *In re Pickering*, 23 I&N Dec. 621 (BIA 2003), rev'd on other grounds, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *see also Matter of Roldan*, 22 I&N Dec. 512, 527 (BIA 1999).

B. Motion to Reconsider

The Applicant continues to claim on motion that his convictions of assault and battery and assault by a dangerous weapon are not crimes involving moral turpitude. However, the Applicant does not identify any incorrect application of law or policy in our prior decision, incorporated here by reference. We settled that assault and battery are generally not a CIMT. The contested issue at hand is whether the Applicant's conviction of assault by a dangerous weapon is a CIMT. Previously, we delineated the legal authority in determining whether a conviction is a CIMT – that we need to examine the statute at question to see if it fits the definition of a CIMT using the categorical approach. We agreed that the M.G.L. chapter 265, section 15A(b) is not a categorically CIMT because it contains both the elements of intentionality and recklessness. *See Coelho v. Sessions*, 854 F.3d 56 (1st Cir. 2017). In *Coelho*, the Court of Appeals remanded a case to the Board for further consideration of whether a 1996 conviction in Massachusetts of assault and battery with a dangerous weapon was a CIMT. *Id.* at 63. However, it is the Applicant's burden to show that he was convicted with reckless mens rea. Here, the record does not establish that the Applicant's assault by a dangerous weapon was a conviction of recklessness opposed to intentionality and the Applicant does not identify relevant case law or other authority that would recharacterize his mental state. Therefore, we conclude that our prior decision was correctly decided.

In addition, the Applicant does not identify any incorrect application law or policy in our prior decision regarding his eligibility for waivers under sections 212(h)(1)(A) or 212(h)(1)(B). The Applicant's claim that we "mischaracterized" the copy of police certificate obtained in Haiti is insufficient to show rehabilitation. We cannot make a finding on the Applicant's rehabilitation unless we review a police certificate with information on his criminal record, or the lack thereof, during the time he had resided in Haiti. Also, the Applicant's blanket statement that the evidence on record establishes extreme hardship would not compel us to reconsider our prior decision absent other pertinent precedent decisions, statutes, regulations or USCIS policy statements. Even if we determine that the Applicant established eligibility for a waiver based on extreme hardship, a heightened discretionary standard of 8 C.F.R. § 212.7(d) would apply for classifying the Applicant's conviction as a violent and dangerous crime. On motion, the Applicant does not argue that his offense is not a violent and dangerous crime

or that a heightened discretionary standard should not apply. Such submission does not meet the requirements of a motion to reconsider, and the waiver application remains denied.

III. CONCLUSION

The Applicant's submission of new evidence does not establish that he is admissible. Additionally, he has not demonstrated any error of law or policy in our decision dismissing his appeal.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.