U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

In Re: 20969195

Date: MAY 15, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of Canada currently residing in Canada, has applied for an immigrant visa. A noncitizen seeking to be admitted to the United States as an immigrant must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a crime involving moral turpitude and seeks a waiver of that inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives, or because the activities for which the noncitizen is inadmissible occurred at least 15 years ago, if the noncitizen's admission would not be contrary to the national welfare, safety, or security of the United States and the noncitizen has been rehabilitated.

The Director of the Nebraska Service Center denied the application, concluding that the Applicant was subject to a heightened discretionary standard because he was convicted of a violent or dangerous crime, and he did not merit a favorable exercise of discretion. The Applicant filed a motion to reconsider, and the Director concluded that the grounds of denial were not overcome. The matter is now before us on appeal. 8 C.F.R. § 103.3.

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 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)(i) of the Act. A discretionary waiver is available if the activities occurred more than 15 years before the date of the application 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, or 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)(A), (B) of the Act.

Finally, if a foreign national demonstrates their eligibility under section 212(h)(1) of the Act, USCIS must then decide whether to exercise its discretion favorably and consent to the foreign national's admission to the United States. Section 212(h)(2) of the Act.

With respect to the discretionary nature of a waiver, the burden is on the Applicant 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 the 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). However, a favorable exercise of discretion is not warranted for foreign nationals who have been convicted of a violent or dangerous crime, except in extraordinary circumstances, such as cases involving national security or foreign policy considerations, or when an applicant "clearly demonstrates that the denial . . . would result in exceptional and extremely unusual hardship." 8 C.F.R. § 212.7(d). Even if the foreign national were able to show the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d), that alone would not be enough to warrant a favorable exercise of discretion. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002) (providing that if the gravity of the foreign national's underlying criminal offense is grave, a showing of exceptional and extremely unusual hardship might still be insufficient to grant the immigration benefit as a matter of discretion).

## II. ANALYSIS

The Applicant was found to be inadmissible by a U.S. Department of State (DOS) consular officer under section 212(a)(2)(A)(i) of the Act for being convicted of two crimes involving moral turpitude. Specifically, the Applicant was convicted in [redacted] 1974 of causing a disturbance under section 171 of the Criminal Code of Canada (CCC) and in [redacted] 1996 of forcible confinement under section 279(2) of the CCC.[1] The Director determined that the Applicant met the requirements for a waiver under section 212(h)(1)(A) of the Act. However, the Director concluded that the Applicant is subject to the heightened discretionary standard because he was convicted of a violent or dangerous crime, forcible confinement, and he did not establish the presence of exceptional and extremely unusual hardship as required for a favorable exercise of discretion. The issues on appeal are whether the Applicant's forcible confinement conviction is a violent or dangerous crime, subjecting him to the heightened discretionary standard, and whether he merits a favorable exercise of discretion. We determine that the Applicant was convicted of a violent or dangerous crime. Furthermore, the record does not establish the presence of exceptional and extremely unusual hardship and therefore he does not merit a favorable exercise of discretion. Our decision is based on a review of the record, which includes, but is not limited to, statements from the Applicant and his spouse, several Canadian and U.S. legal decisions, financial records, medical records, criminal records, character letters, and information on conditions in Canada.

### A. Violent or Dangerous Crime

The Applicant asserts on appeal that he was not convicted of a violent or dangerous crime. The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not defined in the regulation, and we are aware of no precedent decision or other authority containing a definition of

[1] We note that the DOS determines inadmissibility for individuals applying for immigrant visas.

these terms as used in 8 C.F.R. § 212.7(d). We therefore interpret the phrase "violent or dangerous crimes" in accordance with the plain or common meaning of its terms. Black's Law Dictionary (9th ed. 2009), 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 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).

Under section 279(2) of the CCC a person commits forcible confinement when he or she "without lawful entry, confines, imprisons or forcibly seizes another person." The Applicant's charging document reflects that he "did without lawful authority confine [victim's name] contrary to Section 279(2) of the [CCC]." The Applicant cites a non-precedent AAO decision in which we addressed a Florida manslaughter conviction by reviewing the conduct required for conviction and the facts of the individual's case in determining whether he committed a violent or dangerous crime.[2] In this decision, we referenced a Florida state decision which found that the conduct necessary to prove manslaughter includes a grossly careless disregard of the safety and welfare of the public, or of the safety of persons exposed to its dangerous effects, a conscious indifference to consequences, or reckless indifference to the rights of others. We also determined that the individual's behavior that led to his conviction involved a substantial risk of harm to others. As such, the Applicant asserts that his conviction was not for a violent or dangerous crime as the forcible confinement statute does not require a substantial risk of bodily harm. However, we note that manslaughter and forcible confinement are different crimes with different elements, and therefore we would not require a forcible confinement conviction to have the same elements as a manslaughter conviction in order to determine that it is a violent or dangerous crime. The Applicant cites to several Board of Immigration Appeals and federal cases in asserting that the crimes in those cases, which include drug trafficking, aggravated assault, sexual misconduct, violence with a weapon, and criminal restraint, are violent or dangerous and his crime lacks common elements with them. Again, these are different crimes than the one the Applicant committed. We will use the definition of violent or dangerous, as discussed above, and apply it to the forcible conviction statute and the facts of the Applicant's case later in this decision.

Next, the Applicant states that 18 U.S.C. § 16(a) defines a crime of violence, the most relevant definition for his case, as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The Applicant asserts that the plain language of the statute includes the legal element of "forcible" in relation to seizing another person, but not in relation to confining them. He therefore states that force is not an element of his specific confinement conviction, as the charging document did not include the "forcibly seizes" language, which is a different crime located in the same statute. The Applicant also states that the Director erred in determining that the use of "forcible" in the title of the statue implied that force is an element of his confinement conviction, and he asserts that the actual facts of his case did not include violent or dangerous behavior. He states that his then girlfriend had an uneasy relationship with her father and his home was a safe haven for her. However, on one occasion they began to argue, she became

[2] This decision was not published as a precedent and therefore does not bind USCIS officers in future adjudications. *See* 8 C.F.R. § 103.3(c).

increasingly upset, and she attempted to leave. Fearing for her safety in her agitated state, he expressed it was not safe for her to drive and verbally insisted she stay. He states that police arrived, broke in the window, and arrested him. He mentions that he did not use force and there was no risk of bodily harm.

Furthermore, the Applicant references the Youth Criminal Justice Act of Canada (YCJA) in claiming that forcible confinement is not a violent or dangerous crime. He states that the YCJA is the only section of the CCC which defines violent offenses and refers to specific offenses in the course of the definition, and as forcible confinement is not listed, it is not a violent or dangerous crime. The Applicant also cites to the Tackling Violent Crime Act, which revised numerous violent crime provisions of the CCC, and notably omits forcible confinement from its revisions list. The Applicant cites to Canadian caselaw in asserting that unlawful confinement, which he was convicted of, is separate and distinct from forcible confinement, in that it lacks an element of force and only involves restraint for a period of time.

The Applicant has presented arguments reflecting that his conviction was not for a violent offense. We will not make this determination, as the record establishes that he committed a dangerous offense. Again, dangerous is defined, in part, as "perilous, hazardous, [or] unsafe." We note that non-resistance is an affirmative defense for forcible confinement where the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force. Section 279.3 of the CCC. The fact that non-resistance is a defense only when threats, duress, force or exhibition of force are not used indicates that the commission of the crime involves a perilous, hazardous, or unsafe situation. Based on the record, we find that the Applicant is subject to the standard at 8 C.F.R. § 212.7(d) for having committed a violent *or* dangerous crime.

B. Discretionary Waiver

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, which include situations in which the foreign national has clearly established "exceptional and extremely unusual hardship" if the benefit is denied, or situations in which overriding national security or foreign policy considerations exist. In this case, 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 denying him admission would result in exceptional and extremely unusual hardship.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), the Board of Immigration Appeals (the Board) determined that exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." The Board stated that in assessing exceptional and extremely unusual hardship, the hardship factors used in determining extreme hardship should be considered and all hardship factors should be considered in the aggregate. *Id.* at 63-64.

The Applicant asserts that his spouse will experience emotional and medical hardship if she relocated to Canada. The Applicant's spouse states that she would be separated from her daughter and adult granddaughter, her granddaughter is pregnant, and her family would be unable to visit her due to the

distance and expense involved. She states that she would experience emotional hardship due to separation from her family, as she did when she tried living in Canada previously. She mentions that she has a history of breast cancer, she has follow-up appointments with a breast cancer specialist, and she found it impossible to find a doctor in Canada. The Applicant also states that his spouse has been diagnosed with osteoporosis, pre-diabetes, high cholesterol, anxiety, and depression. He further states that she has established medical providers in the United States and prompt medical attention would not be available in Canada due to its government-run healthcare system. The Applicant claims that it is very difficult to find a family doctor in [redacted] where he lives, and seeing a specialist takes a long time and requires a referral from a family doctor.

The Applicant next asserts that his spouse would experience emotional, medical, and financial hardship if she remained in the United States. The Applicant discusses activities he does with his spouse, including gardening, yardwork, eating out, shopping, and sightseeing. He states that her emotional health has deteriorated due to their separation, she is struggling due to her mother's death in 2018 and dealing with her estate, she has taken up smoking to cope with the separation, and she has developed anxiety and depression resulting in lethargy, inability to perform basic tasks, and loss of appetite. Furthermore, he states that she has significant financial expenses due to repairs.

The record reflects that the Applicant's spouse would experience some difficulty upon separation from the Applicant or relocation to Canada. However, these hardships do not rise to the level of exceptional and extremely unusual hardship as they are not substantially beyond the ordinary hardships that would be expected upon removal of a family member. Notably, the record does not include details of the Applicant's spouse's relationships with her family members or the role she plays in their lives. While the record includes some medical records for the Applicant's spouse and articles on medical care in Canada, they do not establish the severity of her conditions or that she would be unable to receive suitable treatment in Canada. Last, the Applicant has not provided supporting documentation to support the claim that his spouse would experience financial hardship. Based on a totality of the evidence, the Applicant has not established exceptional and extremely unusual hardship as set forth in 8 C.F.R. § 212.7(d). Because the Applicant does not merit a favorable exercise of discretion due to not establishing exceptional and extremely unusual hardship, we need not address his favorable and unfavorable factors.

**ORDER:** The appeal is dismissed.