U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 18181479

Date: APRIL 28, 2022

Appeal of Nebraska Service Center Decision

Form I-212, Application for Permission to Reapply for Admission

The Applicant will be inadmissible upon his departure from the United States for having been previously ordered removed and seeks permission to reapply for admission to the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii). The Applicant was also found inadmissible for a crime involving moral turpitude under section 212(a)(2)(A) of the Act. The Applicant submitted a Form I-601, Application for Waiver of Grounds of Inadmissibility, seeking a waiver of this inadmissibility. The Director concluded that the Applicant's conviction for larceny was an aggravated felony pursuant to section 101(a)(43) of the Act.[1] The Director then denied the waiver application, determining that the Applicant was statutorily ineligible for a waiver of inadmissibility because he was convicted of an aggravated felony after admission to the United States as a lawful permanent resident.[2] Because the Applicant's waiver application was denied, the Director denied the instant Form I-212, Application for Permission to Reapply for Admission (Form I-212) as a matter of discretion, determining that the Applicant would remain inadmissible to the United States even if U.S. Citizenship and Immigration Services (USCIS) were to grant the Form I-212. The Applicant filed an appeal of the decision with this office. We review the questions raised 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 remand the matter to the Director for further proceedings.

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, 8 U.S.C. § 1182(a)(2)(A)(i). 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. 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.

[1] Section 101(a)(43) of the Act provides a list of offenses that constitute aggravated felonies for immigration purposes.
[2] The Applicant filed an appeal of the decision with this office which we rejected as untimely.

Section 101(a)(43)(G) of the Act provides that a theft offense for which the term of imprisonment is at least one year is an aggravated felony for immigration purposes.

II. ANALYSIS

The record reflects that the Applicant was admitted to the United States as a lawful permanent resident in 1983. In [redacted] 1998, he was arrested for and charged with grand larceny in violation of section 18.2-95 of the Virginia Code Annotated (Va. Code Ann.). In [redacted] 1998, the Applicant was convicted of petit larceny in violation of section 18.2-96 of the Va. Code Ann. and received a 12-month suspended prison sentence. Because the Applicant was convicted of petit larceny, a theft offense for which he received a one-year imprisonment sentence, the Director determined that the Applicant's conviction was an aggravated felony which rendered him statutorily ineligible for a waiver of inadmissibility for his crime involving moral turpitude.

On appeal, the Applicant argues that pursuant to the holding in Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014), his offense of petit larceny is not an aggravated felony. The Applicant states that, in Omargharib, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) concluded that under Virginia law, grand larceny is not an aggravated felony because section 18.2-95 of the Va. Code Ann. was categorically overbroad with regard to the definition of aggravated felony theft in the Act.

In order to determine whether larceny under Virginia law qualifies as an aggravated felony for removal purposes, the Fourth Circuit referred to the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990), and clarified in Descamps v. U.S., 570 U.S. 254 (2013). Under this approach, only the elements of the statute of conviction are considered, rather than the defendant's underlying conduct, and "if the state offense has the same elements as the generic federal crime, then the prior conviction constitutes an aggravated felony but, if the state law crime 'sweeps more broadly' and criminalizes more conduct than the generic federal crime, the prior conviction cannot count as an aggravated felony." Omargharib at 196. The Fourth Circuit held that a Virginia larceny conviction did not constitute an aggravated felony for immigration purposes under the categorical approach because Virginia law treats fraud and theft as the same, for larceny purposes, and punishes a broader range of conduct than the federal offense. Id. at 197.

The Applicant contends that the holding in Omargharib applies to petty larceny as well as grand larceny because the statutes mirror each other but for the amount involved. At the time of the Applicant's conviction, section 18.2-96 of the Va. Code Ann. provided the following:

> Any person who:
> 1. Commits larceny from the person of another of money or other thing of value of less than $5, or
> 2. Commits simple larceny not from the person of another of goods and chattels of the value of less than $200, except as provided in subdivision (iii) of § 18.2-95, shall be deemed guilty of petit larceny.

Section 18.2-95 of the Va. Code Ann., which has not been revised since the Applicant's conviction, provides the following:

> Any person who (i) commits larceny from the person of another of money or other thing of value of $5 or more, (ii) commits simple larceny not from the person of another of goods and chattels of the value of $200 or more, or (iii) commits simple larceny not from the person of another of any firearm, regardless of the firearm's value, shall be guilty of grand larceny, punishable by imprisonment in a state correctional facility for not less than one nor more than twenty years or, in the discretion of the jury or court trying the case without a jury, be confined in jail for a period not exceeding twelve months or fined not more than $2,500, either or both.

Upon review of Virginia's larceny statutes, we agree with the Applicant that the holding in Omargharib applies to the conviction in his case. As the Applicant's conviction for petit larceny is not an aggravated felony, he is not statutorily inadmissible for a waiver of inadmissibility. We will therefore withdraw the Director's decision on the Form I-212 and remand the matter for a determination of whether the Applicant is eligible for a grant of permission to reapply for admission.

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