U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20050075

Date: SEP. 8, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Mexico, seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), for unlawful presence, and under section 212(h) of the Act, 8 U.S.C. § 1182(h), for having been convicted of a crime involving moral turpitude.

The Director of the Nebraska Service Center denied the application, concluding the Applicant does not merit a favorable exercise of discretion under the heightened standard for being convicted of a violent or dangerous crime.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit by a preponderance of evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). On appeal, the Applicant asserts that the Director erred in denying the application. Upon *de novo* review, we will remand the matter for the entry of a new decision consistent with our analysis below.

I. LAW

A noncitizen who has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of departure or removal from the United States, is inadmissible. Section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II). There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the U.S. citizen or lawful permanent resident spouse or parent of the noncitizen. Section 212(a)(9)(B)(v) of the Act.

Section 212(a)(2)(A) of the Act provides that any 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.

Individuals found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude (CIMT) may seek a discretionary waiver of inadmissibility under section 212(h) of the Act.

Section 212(h)(1)(A) of the Act provides for a waiver where 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 noncitizen has been rehabilitated. Section 212(h)(1)(B) of the Act provides for a waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. If, however, the noncitizen's conviction is for a violent or dangerous crime, USCIS may not grant a waiver unless the noncitizen also shows "extraordinary circumstances" with the final stipulation that, even if such a showing is made, the waiver can still be denied because of the gravity of the offense. 8 C.F.R. § 212.7(d).

II. ANALYSIS

The issue on appeal is whether the Director properly denied the Applicant's request for a waiver of admissibility grounds. For the reasons discussed below, we will withdraw the Director's decision and remand the matter for further consideration and entry of a new decision.

A. Inadmissibility

The Applicant entered the United States without inspection as a child in or around 2002. At the age of 13, he was abandoned by his mother who departed the United States and was left in the care of a family friend, who in turn left the United States when he was 16, leaving the Applicant to provide for himself. While attending high school he met his spouse, a U.S citizen. They married and had a U.S. citizen daughter, who is currently nine years old. In 2013, the Applicant was convicted of battery, and in 2014, he was also convicted of burglary; both convictions occurred in California. In 2015, his spouse filed a Form I-130, Petition for Alien Relative, on his behalf, which was approved. In [redacted] 2017, he was ordered removed from the United States and he departed to Mexico soon thereafter.

In 2018, he applied for an immigrant visa with the U.S. Department of State (DOS). The consular officer refused his immigrant visa, finding the Applicant inadmissible under section 212(a)(2)(A)(i) of the Act for being convicted of two CIMT crimes, and under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence.[1] However, after submission of the instant appeal, DOS determined that his battery conviction is not a CIMT, and removed that finding.[2] However, DOS still concluded that the Applicant is inadmissible under section 212(a)(2)(A)(i) for his burglary conviction.

On appeal, the Applicant asserts that he is not inadmissible under 212(a)(2)(A)(i), stating that his burglary conviction is not a CIMT. Here, a consular officer has determined that the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act based on his conviction for burglary. Because the Applicant is residing abroad and applying for an immigrant visa, DOS makes the final determination concerning the Applicant's admissibility and eligibility for a visa.

Nonetheless, we note that the record supports the consular officer's determination that the Applicant's burglary violation under California Penal Code § 459 and resulting conviction is a CIMT; and he is

[1] The Applicant does not dispute his inadmissibility for unlawful presence in the United States.

[2] As DOS withdrew its finding that the Applicant's battery crime is a CIMT, his arguments on appeal regarding whether this crime is a CIMT are moot.

inadmissible under section 212(a)(2)(A)(i) of the Act. California Penal Code § 459 defines "burglary," in pertinent part, "every person who enters any house . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." California Penal Code § 460 differentiates between burglary in the first or second degree under § 459, by stating that "every burglary of an inhabited dwelling house, vessel. . . . or the inhabited portion of any other building, is burglary of the first degree," and "[a]ll other kinds of burglary are of the second degree." The statute states that the word "inhabited" indicates the structure is used for dwelling purposes, whether it was occupied or not at the time of the burglary. The Applicant's conviction for burglary in the first degree is therefore a CIMT, as his conviction was for burglary of a structure used for dwelling purposes. *See Matter of J-G-D-F-*, 27 I&N Dec. 82 (BIA 2017) (holding that burglary of a dwelling, whether occupied or not, is a CIMT).

B. Violent or Dangerous Crime

The Director denied the application, determining that the Applicant does not merit a favorable exercise of discretion under the heightened standard at 8 C.F.R. § 212.7(d), determining that his battery crime was violent or dangerous. As discussed, DOS has determined that this crime is not a CIMT, and the record does not indicate that the Applicant's remaining CIMT crime - burglary - was a violent or dangerous crime. 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) [*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)].

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." There is no requirement that physical force must have been used or that a firearm must have been involved. Here, the Applicant was convicted under section § 459 of the California Penal Code, which does not involve any physical force. We therefore conclude that the Applicant is no longer subject to the heightened violent or dangerous crime standard and withdraw the Director's determination in this regard.

C. Extreme Hardship

Since the Applicant's conviction is not for a violent or dangerous crime, he is not subject to the heightened standard as required by 8 C.F.R. § 212.7(d) and does not need to demonstrate hardship rising to the level of exceptional and extremely unusual. Although the Director's decision concluded that the Applicant had not established exceptional and extremely unusual hardship, the Director does not appear to have determined whether the Applicant had shown extreme hardship to a qualifying relative. Therefore, we find it appropriate to remand the case to the Director to make this extreme hardship determination.

While the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, he is also inadmissible under 212(a)(9)(B)(i)(II) for accruing unlawful presence in the United States of one year or more. The unlawful presence waiver under section 212(a)(9)(v) restricts the extreme hardship analysis only to the Applicant's U.S. citizen parent or spouse. Therefore, the Applicant must show that the denial of his admission to the United States would result in extreme hardship to his spouse. Here, the record does not establish that the Director properly analyzed the evidence of record to determine whether the Applicant has shown extreme hardship to his spouse. After this determination, the Director must then consider whether the Applicant merits a favorable exercise of discretion.

We note that the Applicant has submitted statements from his spouse supported by documentary evidence that detail (1) why she has decided that she will remain in the United States if the Applicant is denied admission, and (2) why the couple decided to relocate their daughter to Mexico to live with the Applicant due to financial and logistical hardships. Specifically, the spouse indicates that she must remain in the United States to generate income to support her family. She also explains that the couple decided to send their daughter to Mexico several years ago to live with and be cared for by the Applicant because the spouse could not simultaneously provide financial support to the family and adequate care for their daughter while working two entry-level jobs.

The record shows that since his departure to Mexico, the Applicant has been unable to earn income sufficient to support himself in Mexico and substantively contribute to his family's support. His spouse remains in the United States and works two jobs in order to support herself and to remit funds to the Applicant in Mexico for his and their daughter's support. The spouse's living conditions are difficult as she resides with her mother, sleeping on the floor in her mother's small apartment, and the apartment does not contain sufficient space to accommodate her daughter. The spouse indicates that she cannot afford her own apartment in the United States as she sends the majority of her income to the Applicant in Mexico.

While the Applicant's U.S. citizen daughter is not a qualifying relative under section 212(a)(9)(B)(v) of the Act, the Director should consider the hardship experienced by the qualifying relative, in this case, the spouse, because of the hardship that the daughter has experienced. This includes lack of access to clean water, adequate housing, and schooling, as well as emotional hardships resulting from her separation from her mother. The supporting evidence provided by the Applicant regarding these issues includes the spouse's statements, copies of the spouse's pay stubs, daycare bills for the daughter's care prior to her departure to Mexico, letters and cards exchanged between them, remittance receipts for the spouse's support of the Applicant and her daughter in Mexico, letters of support from friends and family, as well as a variety of evidence documenting the Applicant's living expenses in Mexico for the care of their daughter and himself, and for the spouse's living expenses in the United States.

The Director should also consider the evidence regarding the spouse's emotional and psychological hardships, such as her post-traumatic stress disorder (PTSD) caused by repeated childhood sexual abuse by her former step-father and her severe and recurrent Major Depressive Disorder diagnosis. The submitted evidence suggests that the spouse's mental health conditions are ongoing and have worsened due to the stressors she is experiencing from the Applicant's absence, and the emotional hardships resulting from her separation from both the Applicant and her daughter. The Applicant provided the spouse's statements, copies of the spouse's medical and psychological treatment and

diagnoses, and a mental health evaluation from a mental health professional in support of these additional hardship issues.

For these reasons, we find it appropriate to remand the matter for the Director to fully analyze and discuss the evidence in the record and determine whether the Applicant has established that his spouse would experience extreme hardship should he be denied admission to the United States. If the Director finds that the Applicant has established extreme hardship to his U.S. citizen spouse, then the Director must consider whether he merits a favorable exercise of discretion.

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