U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 23589839

Date: JAN. 12, 2023

Appeal of Los Angeles Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant accrued more than one year of unlawful presence in the United States and consequently became subject to the 10-year bar to readmission described at section 212(a)(9)(B)(i)–(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)–(ii). The Applicant now seeks a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act so they may adjust to lawful permanent resident status. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver when refusal of admission would cause extreme hardship to a qualifying relative. *Id.*

The record indicates, and the Applicant does not dispute, that the Applicant entered the United States using a B1/B2 Visa Border Crossing Card in July 2000 and subsequently remained in the United States until their departure in December 2005, thereby accruing more than one year of unlawful presence and becoming subject to the 10-year bar at section 212(a)(9)(B)(i)(II) of the Act. The record further indicates that within the same month in December 2005, the Applicant reentered the United States using the same Border Crossing Card and they have remained in the country since that time.

The Los Angeles Field Office Director denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding the Applicant was inadmissible under section 212(a)(9)(B)(i) of the Act and the record did not establish that their qualifying relative would experience extreme hardship if the application were denied. The matter is now before us on appeal. We review the questions in this matter de novo. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we conclude that a remand is warranted in this case.

I. LAW

A foreign national 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. A waiver of unlawful presence under section 212(a)(9)(B)(v) is available for those who are inadmissible under this provision.

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 (CIMT) (other than a

purely political offense), or an attempt or conspiracy to commit such a crime is inadmissible. Section 212(a)(2)(A) of the Act. There is a discretionary waiver of this inadmissibility ground if refusal 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. If the foreign national demonstrates the existence of the required hardship, then they must also show they merit a favorable exercise of discretion. *Id.*

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630–31 (BIA 1996) (finding factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

Once the foreign national demonstrates the requisite extreme hardship, they must show that USCIS should favorably exercise its discretion and grant the waiver. Section 212(i) of the Act. The burden is on the foreign national 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).

II. ANALYSIS

A. Unlawful Presence Inadmissibility Ground

We begin noting that while the Applicant's appeal was pending, USCIS issued policy guidance clarifying inadmissibility under section 212(a)(9)(B) of the Act. *See generally* 8 *USCIS Policy Manual* O.6, https://www.uscis.gov/policymanual; *see also* Policy Alert PA-2022-15, *INA 212(a)(9)(B) Policy Manual Guidance* (June 24, 2022), https://www.uscis.gov/sites/default/files/document/policy-manual-updates. The policy guidance clarifies that the statutory 3- or 10-year bar to readmission under section 212(a)(9)(B) begins to run on the day of departure or removal (whichever applies) after accrual of the period of unlawful presence, but a foreign national subject to the 3- or 10-year bar is not inadmissible to the United States under section 212(a)(9)(B) unless they depart or are removed and seek admission within the 3- or 10-year period following their departure. *See generally* 8 *USCIS Policy Manual*, *supra*, at O.6(B).

The policy guidance further clarifies that a foreign national determined to be inadmissible under section 212(a)(9)(B) but who again seeks admission more than 3 or 10 years after the relevant departure or removal is no longer inadmissible under section 212(a)(9)(B) even if they returned to the United States during the statutory 3- or 10-year period because the statutory period after that departure or removal has ended. *See id.* The new policy applies to inadmissibility determinations made on or after June 24, 2022, and disposes of this issue on appeal. *See* Policy Alert PA-2022-15, at 2.

The Applicant is no longer inadmissible under this provision because more than 10 years have elapsed between their December 2005 departure from the United States and their subsequent request for admission; the fact that they spent a portion of those 10 years in the United States is not relevant. The Applicant is no longer inadmissible under section 212(a)(9)(B); however, they may be inadmissible under other grounds for which the Director did not consider in their denial.

B. Vacated Convictions and Why the Applicant Remains Convicted for Immigration Purposes

We note the Applicant's criminal history may render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. We will address his convictions later in this decision, but first we discuss the vacatur orders relating to those convictions. In 2018 the Applicant petitioned the Superior Court of California in the County of [redacted] to vacate his convictions based on Cal. Penal Code §§ 1473.7, 1016.5. In 2018, §1473.7 provided in pertinent part:

> (a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons:
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> > (1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.

Also in 2018, Cal. Penal Code § 1016.5 was titled: "Advisement concerning status as alien; reconsideration of plea; effect of noncompliance." This statute provided the following, in pertinent part:

> (a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> (b) . . . . If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. . . .

The common thread connecting these two provisions is the state court may vacate a conviction if the relevant party was not informed of any immigration consequences of their guilty or nolo contendere plea. Under *Pereida v. Wilkinson*, 141 S. Ct. 754, 763–64 (2021), an applicant bears the burden of

proving that a state-court conviction was vacated because of a substantive or procedural defect in the criminal proceedings, and not for immigration purposes or for rehabilitative or equitable reasons. *Ballinas-Lucero v. Garland*, 44 F.4th 1169, 1171–72 (9th Cir. 2022). Here, the Applicant has not made such a showing.

Precedent decisions from the Board of Immigration Appeals (BIA) establish the Applicant's 2002 convictions—that the state court vacated in 2018—will continue to be recognized as convictions for immigration purposes. The BIA stated:

> Going forward, immigration courts [and Department of Homeland Security agencies] should apply the test articulated in *Matter of Pickering* in determining the immigration consequence of any change in a state sentence, no matter how the state court describes its order. Such an alteration will have legal effect for immigration purposes when based on a procedural or substantive defect in the underlying criminal proceeding, but not when the change was based on reasons unrelated to the merits, such as the alien's rehabilitation or an interest in avoiding an immigration consequence.

Matter of Thomas and Thompson, 27 I&N Dec. 674, 675 (2019). The Applicant's 2002 convictions were not vacated based on a procedural or substantive defect in the underlying criminal proceeding. It therefore appears the Applicant's vacated convictions are relevant for immigration purposes, and they may in fact constitute an additional ground of inadmissibility.

Even if the *Thomas and Thompson* decision was not controlling precedent here, Supreme Court precedent would likely result in the same outcome. For most convictions and any appeal of those convictions that were finalized before March 31, 2010—the date the Supreme Court issued its opinion in *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010)—the agency looks to the vacatur documents to make a determination of whether the vacatur order will have an effect on convictions. USCIS consults these documents because they provide the reason a court is vacating the conviction.

If the reason a court vacated a conviction is because the foreign national was not informed of the possible immigration consequences of their plea, and if the conviction and its attendant appeals were finalized prior to the Supreme Court's decision in *Padilla*, then the conviction will apply for immigration purposes. *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989)); *see also Welch v. United States*, 578 U.S. 120, 128 (2016)); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 (2021). The Applicant's convictions occurred in 2002 before the *Padilla* decision, and the reason the court vacated his convictions was for reasons related to immigration issues and not for a procedural or substantive defect in the underlying criminal proceeding. It therefore appears as though his convictions may carry immigration consequences even though a court vacated each of them.

C. Applicant's Criminal Convictions are Possible CIMTs

As noted, the Applicant has a criminal history consisting of two possible CIMTs which were: (1) willful infliction of corporal injury on a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child; and (2) unlawful sexual intercourse with person who is a minor and is not more than three years older or three years younger than the

perpetrator. The Applicant pleaded nolo contendere and was found guilty of both charges. During the same trial, the Applicant's misdemeanor battery charge was dismissed in the furtherance of justice, because he agreed to plead nolo contendere to the unlawful sexual intercourse charge. As it relates to his arrest in 2002, Cal. Penal Code § 273.5 stated in pertinent part:

> (a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment.

The Applicant was charged with violating this statute as a misdemeanor.[1] We note the BIA has held that willful infliction of corporal injury on a spouse in violation of Cal. Penal Code § 273.5 constitutes a CIMT. *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996).

Before the Director, the Applicant provided an attachment to his adjustment of status application in which he offered an explanatory chart of his arrests, charges and their dispositions, and a column titled Immigration Consequences. As it relates to his conviction under Cal. Penal Code § 273.5, the Applicant posits that this conviction does not have any immigration consequences for two reasons. One reason being that his conviction was vacated, as discussed above.

The second reason is the Applicant's reliance on *Morales-Garcia v. Holder*, 567 F.3d 1058, 1065 (9th Cir. 2009). The Applicant presents this decision as finding a conviction under this statute is not a CIMT if the victim is a former cohabitant. However, that is not a full representation of the Ninth Circuit's holding. The court concluded that not all victims under the statute are particularly vulnerable, nor are they entitled to care and protection by the perpetrator, and because some perpetrator-victim relationships covered by the statute are more akin to strangers or acquaintances, they held this aggravating factor cannot, alone, transform § 273.5(a) into a crime categorically involving moral turpitude. Nevertheless, a state court of appeals evaluated the legislative history and found:

> [T]he court in *Morales-Garcia, supra,* 567 F.3d 1058, is simply mistaken in holding that section 273.5 applies to casual cohabitants as well as to intimate cohabitants. It is also mistaken in its apparent belief that the California Legislature does not consider former intimate cohabitants to be in a relationship which by its nature is deserving of special protection.

People v. Burton, 196 Cal. Rptr. 3d 392, 398–99 (2015). We therefore find the Applicant's citation to the *Morales-Garcia* opinion to be inapplicable and unpersuasive. The Applicant's conviction under Cal. Penal Code § 273.5 does appear to involve moral turpitude.

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[1] The punishments for some of the offenses listed in the California Penal Code may be charged or sentenced as either misdemeanors or felonies. Such statutes, known as wobbler offenses, *People v. Park*, 299 P. 3d 1263, 1266 (2013), are deemed to be felonies unless the offense is charged as a misdemeanor or reduced to a misdemeanor by the sentencing court. *People v. Chaides*, 177 Cal. Rptr. 3d 866, 870 (Cal. App. 4th, 2014). The Applicant's offense was charged as a misdemeanor, explaining the difference between the statutory language describing it as a felony.

The Applicant's conviction under Cal. Penal Code § 261.5 may also be a CIMT and the petty offense exception may only be applied if an applicant was only convicted of a single CIMT. This exception under section 212(a)(2)(A)(ii)(II) will only apply if the foreign national has a conviction for a single CIMT, and more than one CIMT renders that same person ineligible for this provision. *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 594–95 (BIA 2003) (citing *Matter of Urpi-Sancho*, 13 I&N Dec. 641, 642 (BIA 1970).

The provision at Cal. Penal Code § 261.5 was titled: "Unlawful sexual intercourse with person under 18; age of perpetrator; civil penalties." The Applicant was 20 years of age when he was charged with this offense. This statute provided in pertinent part: "Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor." Cal. Penal Code § 261.5 (2002). Within the explanatory chart attached to the adjustment application, the Applicant cited to a Supreme Court opinion and contended the court found Cal. Penal Code § 261.5 "[s]hould not be held [to be] sexual abuse of a minor, a crime of violence, or a CIMT." The case the Applicant references in the chart is *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). We are not persuaded by the Applicant's arguments here because the court only evaluated whether the provision was an aggravated felony, and they did not discuss or make reference to the concept of a CIMT. The court's opinion does not support the Applicant's statement that Cal. Penal Code § 261.5 should not be held to be a CIMT. We therefore find this Supreme Court opinion is not controlling.

Nevertheless, the Board has addressed convictions similar to the Applicant's concluding any intentional sexual conduct by an adult with a child involves moral turpitude, if the perpetrator knew or should have known that the victim was under the age of 16. *Matter of Guevara Alfaro*, 25 I&N Dec. 417, 417 (2011). *See also Matter of Dingena*, 11 I&N Dec. 723, 728–29 (BIA 1966) (concluding that as long as sexual intercourse with a child constitutes a crime under the law of the state, that moral turpitude is necessarily involved); *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1193 (BIA 1999); *Mendez-Moralez*, 21 I&N Dec. at 304. The BIA has not disturbed the well-settled treatment of these types of offenses as crimes involving moral turpitude. *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782, 788 (BIA 2020) (citing *Dingena*, 11 I&N Dec. at 728).

Finally, we note that a California state court of appeals opinion in which they found the crime of unlawful sexual intercourse with a person under 18 years of age indicates a "'general readiness to do evil,' and that it is thus necessarily a crime involving '*moral turpitude.*'" *People v. Fulcher*, 236 Cal. Rptr. 845, 848 (Ct. App. 1987) (emphasis in original).

III. CONCLUSION

The Applicant is no longer inadmissible under section 212(a)(9)(B) of the Act. Because the Director did not address whether the Applicant was otherwise inadmissible or his contention that his convictions under Cal. Penal Code §§ 273.5 and 261.5 do not constitute CIMTs, we will remand the matter to the Director to conduct this analysis and permit the foreign national to offer additional support for his position.

If the Director determines only one of the relevant convictions was a CIMT, they should consider whether the Applicant remains inadmissible in light of the petty offense exception under section

212(a)(2)(A)(ii)(II) of the Act. If however, the Director decides both crimes constitute CIMTs—meaning the Applicant is ineligible for the petty offense exception—they should first determine whether he qualifies for the rehabilitation waiver under section 212(h)(1)(A) of the Act, and if not whether he qualifies for a waiver under section 212(h)(1)(B) of the Act.

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