U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17859660

Date: MARCH 1, 2022

Motion on Administrative Appeals Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident (LPR) and seeks a waiver of inadmissibility under the Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h), for his conviction of a crime involving moral turpitude (CIMT).

The Director of the Nebraska Service Center denied the waiver application. In that decision the Director determined that the Applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for unlawful presence in the United States, that the Applicant's robbery conviction in Florida was for a violent and dangerous crime, and that the Applicant did not meet the criteria for a waiver of his criminal inadmissibility under the heightened discretionary standard set forth in the regulation at 8 C.F.R. § 212.7(d). The Applicant filed a motion to reconsider, in which he did not contest the unlawful presence finding but asserted that his conviction was not for a violent crime. The Director dismissed the motion. The Applicant then filed an appeal, reiterating his claim that his criminal conviction does not qualify as a violent or dangerous crime and therefore is not subject to the higher discretionary standard under 8 C.F.R. § 212.7(d). The Applicant also asserted that the Director erred by counting the Applicant's arrests for other offenses as unfavorable factors in the overall discretionary analysis. We dismissed the appeal.

The matter is now before us on a motion to reconsider. A motion to reconsider must establish that our previous decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit. For the reasons discussed hereinafter, we will dismiss the motion.

I. LAW

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.

Noncitizens 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. 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 the noncitizen's United States citizen or lawful permanent resident spouse, parent, son, or daughter.

The burden is on the noncitizen to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N 296, 299 (BIA 1996). A favorable exercise of discretion is not warranted for noncitizens 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" according to 8 C.F.R. § 212.7(d). Exceptional and extremely unusual hardship "must be 'substantially' beyond the ordinary hardship that would be expected when a close family member leaves this country." *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001). Even if the noncitizen were able to show the existence of extraordinary circumstances pursuant to 8 C.F.R. § 212.7(d), that alone may 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 noncitizen'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

In our decision dismissing the appeal we noted that the Applicant did not contest the findings of inadmissibility for unlawful presence in the United States and his conviction of a crime involving moral turpitude. The issues on appeal were whether the Applicant was convicted of a violent or dangerous crime, triggering the heightened discretionary standard of 8 C.F.R. § 212.7(d), and if so whether the Applicant merited a waiver as a matter of discretion.

In our decision we stated that the Director determined the Applicant's robbery conviction to be for a violent or dangerous crime, specifying that the arrest record indicated the Applicant struck the victim with an unknown object while committing the offense. The Director also found that the Applicant did not clearly establish that his spouse would suffer exceptional and extremely unusual hardship if the waiver application is not granted, as required under the heightened discretionary standard set forth in 8 C.F.R. § 212.7(d).[1]

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[1] The appeal brief made just one assertion with respect to the Director's determination that the Applicant did not establish exceptional and extremely unusual hardship to a qualifying relative. The brief asserted that the Director improperly included the Applicant's additional arrests for domestic battery and other offenses, which were ultimately dismissed, as unfavorable factors in the discretionary analysis. In our decision we noted that no further evidence of hardship to a qualifying relative was submitted in support of the appeal. After acknowledging previously submitted evidence we determined that the Applicant did not establish that any qualifying relative would experience exceptional and extremely unusual hardship if his waiver application is denied. Accordingly, we concluded that the Applicant did not clearly demonstrate that he meets the heightened discretionary standard of 8 C.F.R. § 212.7(d) for a waiver of his criminal inadmissibility.

In the appeal brief the Applicant asserted that the Director applied the wrong discretionary standard, claiming that he was convicted of a second degree felony which does not require the use of a weapon. He further claimed that the Florida robbery offense is not a "crime of violence" because "the force necessary for a conviction can be slight" [citations omitted]. In our decision we noted that section 812.13(1) of the Florida Statutes in 2004 defined "robbery" as follows:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, *when in the course of the taking there is the use of force, violence, assault, or putting in fear.* [Emphasis added.]

We also referred to the court judgment which showed that the Applicant was convicted under section 812.13(2)(b) of the Florida Statutes and that the offense was classified as "2nd Degree – F." While acknowledging the Applicant's claim that he was convicted of a felony in the second degree, we stated that the classification of the offense did not change the outcome in this case because a robbery conviction means that the crime involved "the use of force, violence, assault or putting in fear," as prescribed in section 812.13(1), regardless of whether the perpetrator carried a weapon during the commission of the crime. We then cited: (1) the probable cause affidavit in the record attesting that the Applicant, in committing the robbery with a fellow assailant, hit the victim in the face with an unknown weapon and grabbed the victim's wallet leaving him bleeding on the ground, and (2) the formal charging document alleging that the Applicant "did unlawfully take way from the person . . . certain property . . . when in the course of committing said robbery [he] did carry a weapon contrary to Florida Statute 812.13." We stated that the Applicant did not contest the accuracy of the facts and allegations described in these documents, and concluded that the Applicant's robbery conviction qualified as a violent and dangerous crime which subjected him to the heightened discretionary standard set forth in 8 C.F.R. § 212.7(d).[2]

In the motion to reconsider the Applicant asserts that we erred in our decision by stating that the Applicant did not contest the facts and allegations in the probable cause affidavit and the formal charging document and that the Applicant did not offer any evidence that the crime he committed was not violent or dangerous. The motion brief refers to an affidavit from the Applicant dated November 11, 2019, which allegedly "[d]irectly controverts the statement" of the arresting officer in the probable cause affidavit. In the affidavit the Applicant claimed that he was defending himself after the alleged robbery victim began punching him. The motion brief also refers to a statement from the robbery victim's brother, dated October 23, 2019, which allegedly supports the Applicant's version of the robbery events. In fact, it merely states that his brother and the Applicant "got into an argument" and "began to fight" and "ended up hurting each other." Both of these documents were submitted in response to the Director's request for evidence (RFE) and were therefore already in the record at the time the Director issued his decisions denying the waiver application and dismissing the initial motion

[2] 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)].

to reconsider. We cannot go behind the Applicant's conviction to assess his guilt or innocence. *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996).

The Applicant notes that we referred to the definition of "violent" in Black's Law Dictionary's which uses the terms "strong physical force" and "extreme or intense force" and asserts that this definition does not include the "slight force" or "minor force" which could be used in the application of Florida's robbery statute. As we stated in our decision, however, we were not limited to a categorical inquiry in this case but could consider both the statutory elements and the nature of the actual offense. The probable cause affidavit, as previously discussed, provided ample evidence of the violent nature of the robbery committed by the Applicant.

The Applicant once again objects to the Director's consideration of the Applicant's arrest for domestic battery and violation of probation in 2005 as unfavorable factors in the discretionary analysis. Even though these and other criminal charges against the Applicant were dismissed, the arrests themselves were legitimate factors for the Director to consider in the process of weighing the Applicant's favorable and unfavorable factors for the purpose of deciding whether he warrants a waiver of his criminal inadmissibility.

The Applicant asserts that his previously submitted evidence of hardship to qualifying relatives was not given due weight. We disagree. The Applicant's evidence was reviewed in our dismissal of the appeal and we determined that it was insufficient to establish that the emotional, financial, and health-related hardships the Applicant's wife and children would experience as a result of his absence will be exceptional and extremely unusual, as required to meet the heightened discretionary standard set forth in 8 C.F.R. § 212.7(d).

Finally, the Applicant points out that his arrest and conviction occurred more than 15 years ago and asserts that we failed to adequately consider all of the evidence showing his rehabilitation, which could entitle him to a waiver of his criminal inadmissibility under section 212(h)(1)(A) of the Act. Regardless of whether the Applicant can establish he has been rehabilitated, he would still be subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d) because of his robbery conviction, which qualifies as a violent or dangerous crime. The Applicant does not meet that standard because he has not established that any qualifying relative would experience exceptional or extremely unusual hardship if his waiver application is denied.

III. CONCLUSION

The Applicant has not established that our previous decision was based on any incorrect application of law or policy. Accordingly, the Applicant has not shown proper cause for reconsideration of that decision. We will therefore dismiss the motion to reconsider.

The Applicant bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Applicant has not done so in this motion.

ORDER: The motion to reconsider is dismissed.