



**U.S. Citizenship  
and Immigration  
Services**

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

MATTER OF H-P-T-

DATE: OCT. 11, 2016

APPEAL OF INDIANAPOLIS, INDIANA FIELD OFFICE DECISION

APPLICATION: FORM I-601, APPLICATION FOR WAIVER OF GROUNDS OF  
INADMISSIBILITY

The Applicant, a native and citizen of Vietnam, seeks a waiver of the ground of inadmissibility for a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver because the activities for which the foreign national is inadmissible occurred more than 15 years ago, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated.

The Field Office Director, Indianapolis, Indiana, denied the application. The Director concluded that the Applicant was inadmissible for a crime involving moral turpitude (third-degree sexual assault) and that he had not established extreme hardship to a qualifying relative if the waiver were to be denied.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that he does not need to establish extreme hardship to a qualifying relative because the activities for which he is inadmissible occurred more than 15 years ago, and the waiver should therefore be considered under the rehabilitation prong of section 212(h). In a notice of intent to dismiss, we stated that the Applicant had met the requirements under the rehabilitation prong but that he was convicted of a violent or dangerous crime and was therefore subjected to 8 C.F.R. § 212.7(d), which limits the favorable exercise of discretion where a violent or dangerous crime is committed except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application would result in exceptional and extremely unusual hardship. The Applicant states that we erred in concluding that he committed a violent or dangerous crime. He further states that section 212.7(d) is *ultra vires*.

Upon *de novo* review, we will dismiss the appeal.

## I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for a crime involving moral turpitude. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any 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.

Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act. Section 212(h) of the Act provides for a discretionary 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 foreign national has been rehabilitated. *See* section 212(h)(1)(A).

## II. ANALYSIS

The Applicant does not contest that he is inadmissible for committing a crime involving moral turpitude. The issues on appeal are whether 8 C.F.R. section 212.7(d) is *ultra vires*, whether the Applicant's conviction of third-degree sexual assault constitutes a violent or dangerous crime, and whether we can examine the underlying facts of the crime to determine whether it is a violent or dangerous crime. In response to the notice of intent to deny, the Applicant did not submit any additional evidence or specifically address whether extraordinary circumstances, such as national security or foreign policy considerations or exceptional and extremely unusual hardship, were present. We find that the Applicant is subject to the heightened standard under 8 C.F.R. section 212.7(d) and that he has not established that extraordinary circumstances exist to warrant a favorable exercise of discretion.

### A. Waiver

The last act rendering the Applicant inadmissible under section 212(a)(2)(A) of the Act occurred in 1999, more than 15 years ago. Consequently, the Applicant may demonstrate eligibility for a waiver of inadmissibility pursuant to either section 212(h)(1)(A) or section 212(h)(1)(B) of the Act. To meet the requirements of section 212(h)(1)(A) of the Act, the Applicant must show that 1) admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and 2) the Applicant has been rehabilitated.

In support of the waiver application, the Applicant submitted civil documentation and conviction documents, and with the appeal, he submits statements from himself and his spouse, letters of support, income tax records, insurance documents, business records, financial documentation, a letter from a licensed clinical social worker, and civil documents.

In his statements, the Applicant indicates that he is remorseful for his actions and has apologized to the victim and her family. He further states that since his 2000 conviction, he has complied with his terms of probation, gotten married, and opened a business to support his spouse and child. The record contains letters of support from the Applicant's spouse, friends, and the abbot of his temple and financial documentation related to his business. The record shows that the Applicant is gainfully employed operating a nail salon business which he purchased in 2009 and that his company has three employees. The Applicant submitted tax information from 2011 through 2014 and business-related financial statements for 2014, and the record also shows that he owns a home. It further shows that he has complied with his probation and sex offender registration requirements. The letter from the abbot states that he has known the Applicant for several years as he and his mother are often at the temple, and that the Applicant has confided in him about his past behavior. We find that based on the overall evidence included in the record, the Applicant has established that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated.

#### B. Discretion

A favorable exercise of discretion is not warranted for applicants who have been convicted of a violent or dangerous crime, except in extraordinary circumstances. 8 C.F.R. § 212.7(d). The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation or case law. See 67 Fed. Reg. 78675, 78677-78 (December 26, 2002) (explaining that defining and applying the "violent or dangerous crime" discretionary standard is distinct from determination that a crime is an aggravated felony). Pursuant to our discretionary authority, we understand "violent or dangerous" according to the ordinary meanings of those 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).

Although the Applicant claims that 8 C.F.R. section 212.7(d) is *ultra vires*, the U.S. Court of Appeals for the Seventh Circuit has held that the Attorney General did not exceed his statutory authority when he articulated the heightened standard for waiving the inadmissibility of individuals who have been convicted of violent or dangerous crimes.. *Ali v. Achim*, 468 F.3d 462, 467 (7th Cir. 2006); see also *Rivas-Gomez v. Gonzales*, 441 F.3d 1072, 1078 (9th Cir. 2006) (stating that the Attorney General possesses "broad discretion to grant or deny waivers and may establish general standards governing the exercise of such discretion 'as long as these standards are rationally related to the statutory scheme.'").

*Matter of H-P-T-*

The Applicant states that he did not commit a violent or dangerous crime because the use or threat of force or violence is present only in first-degree and second-degree sexual assault. He further states that the victim's age, standing alone, is sufficient for lack of consent.

The Applicant was convicted under Wisconsin Statutes (Wis. Stat.) § 940.225(3) of third-degree sexual assault, a Class D felony. At the time of his conviction, Wis. Stat. § 940.225 stated, in part:

(3) Third degree sexual assault. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony. Whoever has sexual contact in the manner described in sub. (5)(b)2, with a person without the consent of that person is guilty of a Class D felony.

The Applicant was convicted of third-degree sexual assault, which involves sexual contact with a person without his or her consent.<sup>1</sup> While third-degree sexual assault does not require use of physical violence, the statute requires a physical, sexual violation, and the lack of consent of the victim makes this a violent or dangerous crime, as a substantial likelihood exists that physical force will be used to overcome the victim's will to complete the act of sexual intercourse or sexual contact.

An examination of the nature of the actual offense further establishes that the Applicant's conviction was for a violent or dangerous crime. The Applicant asserts that we may not consider the nature of the underlying offense, but may only examine the statute of conviction, and relies on *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013), as well as several court of appeals decisions to support this claim. These decisions address the determination of whether a crime is an aggravated felony or involves moral turpitude for the purpose of determining inadmissibility or removability and not whether a crime is a violent or dangerous crime for purposes of discretion. As stated above, 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*, *supra*, at 1152; *Waldron*, *supra*, at 359. Court documents show that the initial charge was two counts of Wis. Stat. § 948.02, second-degree sexual assault of a child, amended to third-degree sexual assault, and the complaint filed indicates that the victim was not yet [redacted] years old and the Applicant was about 29 years old. By his own admission the Applicant stated that the incident occurred after he and the victim had consumed alcohol. Given the age of the victim and the circumstances of the crime and the likelihood of physical or mental harm to the

---

<sup>1</sup> Wis. Stat. § 939.22(48) states that "[w]ithout consent" means no consent in fact or that consent is given for one of the following reasons:

- (a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on the victim, or on a person in the victim's presence, or on a member of the victim's immediate family; or
- (b) Because the actor purports to be acting under legal authority; or
- (c) Because the victim does not understand the nature of the thing to which the victim consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth or defective mental condition, whether permanent or temporary.

(b)(6)

*Matter of H-P-T-*

victim, we find that the Applicant's conviction was for a dangerous crime and that 8 C.F.R. § 212.7(d) is applicable.

We must now consider whether extraordinary circumstances exist in the Applicant's case. 8 C.F.R. § 212.7(d), which codified for purposes of section 212(h)(2) of the Act the discretionary standard first applied to section 209(c) waivers by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), limits the favorable exercise of discretion with respect to those inadmissible under section 212(a)(2) of the Act on account of a violent or dangerous crime, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application would result in exceptional and extremely unusual hardship.

In *Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001), 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 has not claimed that foreign policy, national security, or other extraordinary equities exist and has not provided sufficient evidence to demonstrate that denial of the application would result in exceptional or extremely unusual hardship to himself or his spouse, child, or mother, whether they remain in the United States without him or accompany him to Vietnam. He states that he cares for his spouse, child (born in [REDACTED] and mother. He describes his activities with his spouse and son and states that he wants to provide for and guide his son. The Applicant indicates that he and his spouse work at his nail salon. He further indicates that his father is deceased, and he supports his mother, who is frail and lives with him. But the Applicant has not described the hardship to himself or his spouse, child, or mother in detail or provided supporting documentation of hardship. We therefore cannot determine the severity of the hardship to his family if they remain in the United States without him. Moreover, the Applicant has made no assertion and has submitted no evidence regarding hardship to himself or his family if they were to relocate to Vietnam.

Furthermore, even if the Applicant demonstrates extraordinary circumstances, 8 C.F.R. § 212.7(d) provides that depending on the gravity of the underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act. We must still "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on [the alien's] behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country." *Matter of Mendez-Morales*, 21 I&N Dec. 296, 300 (BIA 1996). The record reflects that the Applicant has sought to minimize his criminal culpability. The 2003 letter from a licensed clinical social worker stated that he had admitted to having forced sexual contact on the victim. Twelve years later, in his statement in support of his waiver application, the Applicant claimed to have had consensual sex with the victim. And in his 2015 letter seeking a pardon for his crime, he claimed that he and the victim "both had too much to drink that night and behaved improperly." We find that his recent statements about his actions are an attempt to lessen

*Matter of H-P-T-*

his crime and culpability and that a favorable exercise of discretion might therefore not be warranted even if extraordinary circumstances were present.

### III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. He was convicted of a violent or dangerous crime and has not demonstrated that a waiver of inadmissibility is merited as a matter of discretion. Accordingly, the appeal is dismissed.

**ORDER:** The appeal is dismissed.

Cite as *Matter of H-P-T-*, ID# 121491 (AAO Oct. 11, 2016)