U.S. Citizenship and Immigration Services

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

In Re: 8183696

Date: JUNE 18, 2020

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied for an immigrant visa and seeks a waiver of inadmissibility under sections 212(h) and 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(h) and (a)(9)(B)(v).

The Director of the Nebraska Service Center noted that the Applicant was inadmissible for unlawful presence of more than one year and for having been convicted of a crime involving moral turpitude. The Director then determined that, although the Applicant had established his rehabilitation, his conviction was for a violent or dangerous crime making him subject to a heightened discretionary standard, and the evidence did not establish any extraordinary circumstances for a favorable exercise of discretion.

On appeal, the Applicant asserts that his conviction is not a crime involving turpitude and that even if it is, it qualifies for the "petty offense" exception. The Applicant also contends that the Director erred in finding his conviction to be a violent or dangerous crime.

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). This office reviews 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 will dismiss the appeal.

## I. LAW

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. Section 212(a)(2)(A)(i)(I) of the Act. However, this inadmissibility does not apply to a foreign national who committed only one crime if the maximum penalty possible for the crime did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). Section 212(a)(2)(A)(ii)(II) of the Act.

Foreign nationals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act. Where the activities resulting in inadmissibility occurred more than 15 years before the date of the application, a discretionary waiver is available 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. Section 212(h)(1)(A) of the Act. A discretionary waiver is also available if denial 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.

However, a favorable exercise of discretion is generally not warranted for foreign nationals 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." 8 C.F.R. § 212.7(d). Moreover, depending on the gravity of the foreign national's underlying criminal offense, a showing of such extraordinary circumstances may still be insufficient to warrant a favorable exercise of discretion. *Id.*

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. There is a discretionary waiver of this inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national. Section 212(a)(9)(B)(v) of the Act.

## II. ANALYSIS

The record reflects, and the Applicant concedes, that he entered the United States without authorization in 1997 and remained in the country unlawfully until his departure in 2017. In addition, the record establishes that in 1998, the Applicant pled guilty to and was convicted of the felony offense of unlawful sexual intercourse with a minor in violation of section 261.5 of the California Penal Code (Cal. Penal Code). He was sentenced to 180 days' imprisonment and three years' probationary supervision as a result of the offense.

The Applicant applied for an immigrant visa from his home country of Mexico, and a consular officer from the U.S. Department of State determined that he accrued more than one year of unlawful presence in the United States prior to his departure. The consular officer therefore found that the Applicant was inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. In addition, the consular officer determined that the Applicant's conviction for unlawful sexual intercourse with a minor was a crime involving moral turpitude, and that the exception at section 212(a)(2)(A)(ii)(II) of the Act did not apply. The consular officer therefore found that the Applicant was inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. The Director affirmed these determinations, and further concluded that, although the Applicant had established rehabilitation, his conviction for unlawful sexual intercourse with a minor was a violent or dangerous crime and he had not established extraordinary circumstances, namely that his spouse would face exceptional or extremely unusual hardship.

On appeal, the Applicant first asserts that his conviction for unlawful sexual intercourse with a minor

is not a crime involving moral turpitude and that, even if it is, the petty offense exception at section 212(a)(2)(A)(ii)(II) applies because his conviction was reduced to misdemeanor and dismissed pursuant to Cal. Penal Code sections 17(b) (providing most relevantly that a crime is a misdemeanor for all purposes when "the court grants probation to a defendant and . . . on application of the defendant . . . , the court declares the offense to be a misdemeanor") and 1203.4 (providing in pertinent part that, upon completion of the conditions of probation, a defendant is permitted to withdraw a plea of guilty and be "released from all penalties and disabilities resulting from the offense") in 2015. He cites to a past non-precedent decision issued by our office and a series of Board of Immigration Appeals (Board) decisions in support of these assertions.

As a preliminary matter, while we acknowledge the Applicant's assertions, because the Applicant resides abroad and is applying for an immigrant visa, the U.S. Department of State makes the final determination concerning his admissibility and eligibility for a visa. As stated above, a consular officer determined that the Applicant was inadmissible for having been convicted of a crime of moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, and that the exception at section 212(a)(2)(A)(ii)(II) of the Act did not apply. Moreover, and as acknowledged by the Applicant on appeal, the cited decision from our office was not published as precedent and, accordingly, is not binding law and does not bind USCIS in future adjudications. *See* 8 C.F.R. § 103.3(c) (providing that precedential decisions are "binding on all [USCIS] employees in the administration of the Act"). Non-precedent decisions apply existing law and policy to the specific facts of the individual case, and may be distinguishable based on the evidence in the record of proceedings, the issues considered, and applicable law and policy. Finally, the Applicant's assertions regarding his conviction and the applicability of the petty offense exception at section 212(a)(2)(A)(ii)(II) of the Act were reviewed, considered, and rejected by the Director and the Board case law cited to by the Applicant has been overruled. *See Matter of Thomas and Thompson*, 27 I&N Dec. 674, 675 (BIA 2019) (holding that any change in classification or sentence for an offense "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"). We affirm the Director's determination that the Applicant is inadmissible for a crime of moral turpitude for which the petty offense exception does not apply.

The Applicant's next asserts that the Director erred in the determination that he does not merit a favorable exercise of discretion because his conviction for unlawful sexual intercourse with a minor was a violent or dangerous crime and that, accordingly, the heightened exceptional and extremely unusual hardship standard should not apply.

In determining whether a crime is violent or dangerous 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). The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not defined in the Act or at 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." *Id.*

It is the Applicant's burden to demonstrate that he warrants a favorable exercise of discretion, and the Applicant has not presented facts or controlling legal authority on appeal to show that his conviction for unlawful sexual intercourse of a minor is not a violent or dangerous crime. In his brief, the Applicant cites to *Pelayo-Garcia v. Holder*, 589 F.3d 1010 (9th Cir. 2009), in which the Ninth Circuit Court of Appeals determined that unlawful sexual intercourse with a minor under section 261.5 of the Cal. Penal Code was not categorically an aggravated felony under section 101(a)(43)(F) of the Act. However, as stated above, we are not limited by the categorical determinations concerning whether a statutory crime is a crime involving moral turpitude or an aggravated felony under the Act and may consider both the statutory elements and underlying nature of the offense. The Applicant does not otherwise dispute or directly address this determination, either in response to the Director's 2018 Request for Evidence or with the instant appeal, nor does he submit any additional evidence relevant to the same. Ultimately, we see no error in the Director's conclusion and, accordingly, the Applicant has not met his burden of establishing that a favorable exercise of discretion is warranted. The waiver application will remain denied.

**ORDER:** The appeal is dismissed.