U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27855896

Date: OCT. 12, 2023

Appeal of Nebraska Service Center Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of Mexico, has applied for an immigrant visa, which requires him to establish, inter alia, that he is admissible to the United States. Section 245(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(a)(2). The Applicant was found to be inadmissible, among other inadmissibility grounds, under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude ("CIMT"), and he sought a discretionary waiver of inadmissibility under section 212(h)(1)(A), (B) of the Act.

The Director of the Nebraska Service Center determined that the Applicant's two criminal convictions both constituted CIMTs and denied his waiver application, concluding that one of the Applicant's convictions was also for a violent or dangerous crime and that he did not establish that he warranted a section 212(h) waiver of inadmissibility under the heightened discretionary standard applicable to his case pursuant to 8 C.F.R. § 212.7(d). This appeal followed.

On appeal, he submits a brief, reasserts his eligibility for a waiver, and reiterates that he warrants a favorable exercise of discretion. We review the questions in this matter de novo. *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

A noncitizen convicted of a CIMT is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h)(1)(A) of the Act provides for a discretionary waiver where the underlying offenses occurred more than 15 years before the date of the waiver application if admission would not be contrary to the national welfare, safety, or security of the United States, and the noncitizen has been rehabilitated. Section 212(h)(l)(B) of the Act also provides for a waiver if denial of admission would result in "extreme hardship" to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter. In addition to establishing eligibility for a waiver under either section of the Act, by a preponderance of the evidence, the noncitizen also must show that the waiver request warrants a favorable exercise of discretion. Section 212(h)(2) of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010) (holding that the applicant bears the burden to show eligibility for the benefit sought); *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 299 (BIA 1996) (stating that the noncitizen also has the burden to demonstrate that the waiver request warrants a favorable exercise of discretion).

In assessing the discretionary factors, we must balance the adverse factors evidencing the noncitizen's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Matter of Mendez-Moralez*, 21 I&N Dec. at 300-301. However, a favorable exercise of discretion is not warranted for those who have been convicted of a violent or dangerous crime, except in "extraordinary circumstances," which may be demonstrated by, inter alia, a *clear* showing of "exceptional and extremely unusual hardship" if the waiver request is denied. 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) (discussing exceptional and extremely unusual hardship factors in the context of cancellation of removal under the Act). However, the existence of extraordinary circumstances alone may not be enough to warrant a favorable exercise of discretion. *See, e.g.*, *Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002) (providing that depending on the gravity of the underlying criminal offense, a showing of exceptional and extremely unusual hardship might still be insufficient to grant the immigration benefit as a matter of discretion); *Matter of C-A-S-D-*, 27 I&N Dec. 692, 694, 699 (BIA 2019) (same) (citing *Matter of Jean*).

II. ANALYSIS

In 2001, the Applicant was convicted of a Misdemeanor Battery of a Current or Former Significant Other in violation of California Penal Code ("CPC") section 243(e)(1) resulting in a 20-day jail sentence and 3-year probation; and, in 2010, he was convicted of Felony Vandalism under CPC section 594(a)(b)(1) for which he was sentenced to 180 days in county jail and 3-year probation.[1] As the Director noted, during the Applicant's immigration visa proceedings, the U.S. Department of State found him inadmissible for a CIMT, and the Director further determined that both convictions constituted CIMTs. The Director also found that spousal battery was a violent or dangerous crime, and that the Applicant therefore was subject to the heightened discretionary standard under 8 C.F.R. § 212.7(d). The Director concluded that, even if the Applicant otherwise met the eligibility requirements for a 212(h) waiver, he did not meet the heightened discretionary standard because he did not demonstrate extraordinary circumstances, including a showing that the denial of the waiver request would result in exceptional and extremely unusual hardship. *Id.* On appeal, the Applicant argues, for the first time on appeal, that the 2010 felony vandalism conviction is not a CIMT, and that he is otherwise eligible for a waiver under either subsection of 212(h) of the Act. The Applicant also maintains on appeal that he has been rehabilitated and he otherwise warrants a favorable exercise of discretion for a waiver under the heightened discretionary standard at 8 C.F.R. § 212.7(d).

A. The Applicant's Felony Vandalism Conviction is a CIMT

On appeal, the Applicant argues that in *Matter of E.E. Hernandez*, 26 I&N Dec. 397 (BIA 2014), the Board of Immigration Appeals (Board) held that felony vandalism in California is not a CIMT unless it is elevated by gang sentencing enhancement; and that the United States Court of Appeals for the Ninth Circuit, in *Hernandez-Gonzalez v. Holder,* 778 F.3d 793, 806-09 (9th Cir. 2015), even declined to follow the Board's reasoning that a non-CIMT offense could be transformed into a CIMT.

[1] Following his 2010 conviction, the Applicant's prior removal order was reinstated in [redacted] 2010, and he was again deported from the United States.

However, neither the Ninth Circuit nor the Board ruled on whether felony vandalism on its own, without a gang enhancement, is a CIMT. *Matter of E.E. Hernandez*, 26 I&N Dec. at 400, n.2 (specifically declining to reach this issue); *Hernandez-Gonzalez*, 778 F.3d at 806-07, n.13 (calling into question the Board's reasoning without a ruling); *cf. Diaz-Flores v. Garland*, 993 F.3d 766, 771 & n.4 (9th Cir. 2021) (noting that vandalism still might be a CIMT with aggravating factors, despite the reasoning in *Hernandez-Gonzalez*). Further, *Hernandez-Gonzalez* involved a different underlying criminal statute, possession of weapons, which specifically has been found to criminalize, in an overbroad manner, both non-CIMT and CIMT offenses. The Applicant does not set forth meaningful appellate arguments as to these distinctions or otherwise cite pertinent legal authority.

The term "moral turpitude" generally refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 833-34 (BIA 2016) (citations omitted). "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Id.* (citation omitted).

To determine whether a crime is a CIMT for cases such as this arising in the Ninth Circuit, we rely on the categorical or modified categorical approach described in *Taylor v. United States*, 110 S.Ct. 2143 (1990), and *Descamps v. United States*, 133 S.Ct. 2276 (2013). *Syed v. Barr*, 969 F.3d 1012, 1017 (9th Cir. 2020). We must first identify the elements of the statute of conviction and then compare its elements to the generic definition of a CIMT and determine whether the conviction under the state statute meets that definition. *Hernandez*-Gonzalez, F.3d 793 at 798-99; *Diaz-Flores*, 993 F.3d at 769. If the statute is overbroad (i.e. criminalizes both conduct that involves moral turpitude and conduct that does not) *and* divisible, we apply the modified categorical inquiry. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867-68 (9th Cir. 2015); *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)). A statute is divisible only if it lists "potential offense elements in the alternative, render[ing] opaque which element played a part in the defendant's conviction." *Descamps*, 133 S.Ct. at 2283. For purposes of determining whether a statute is divisible, an offense's elements, as opposed to mere means or modes of committing an offense, are those facts about the crime which "a jury—not a sentencing court—will find … unanimously and beyond a reasonable doubt." *Id.* at 2288; *see also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1135-37, n.16 (9th Cir. 2013). If a statute of conviction is divisible, we employ the modified categorical approach, and may examine the underlying record of conviction, such as the charging documents, indictment, plea agreements, transcript of plea colloquy, jury instructions, and any explicit factual finding by the trial judge to which the defendant assented, to determine which offense within the divisible statute formed the basis of the conviction. *U.S. v. Mathis*, 136 S. Ct. 2243, 2249 (2016); *Shepard v. U.S.*, 544 U.S. 13, 16 (2005).

At the time of the Applicant's offense, CPC section 594(a) (2008) criminalized vandalism and penalized those who *maliciously* deface with graffiti (or other inscribed material), damages, or destroys any real or personal property that is not their own. Vandalism is punished as a felony "[i]f the amount of defacement, damage, or destruction is four hundred dollars ($400) or more"; and damages of less than $400 is punishable solely as a misdemeanor. *In re Kyle T.*, 9 Cal.App.5th 707 (2017); Cal. Penal Code §§ 18(a), 1170(h)(1) (felonies are punishable by 16 months, 2 years, or 3 years, unless otherwise specified by the statute). The statute under which the Applicant was convicted in 2010, CPC section 594(a), criminalizes malicious vandalism as a felony (under section 594(a)(b)(1)) and misdemeanor (under section 594(a)(2)(A)). Cal. Penal Code § 594(a) (2008).

California courts have held, consistent with CPC definitions, that "malice" is commonly understood as involving "ill-will" or "a desire to cause harm to someone" and its legal sense denotes "intentional wrongful act done without justification, excuse or mitigating circumstances," which can be implied or presumed from the intentional act. *Id*. at 908-910 (2015) (*citing In re V.V.*, 51 Cal.4th 1020, 1028 (2011)); CPC sections 7(4), 450(e) ("The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."); *Ong v. Fire Ins. Exchange*, 235 Cal.App.4th 901, 908 (2015) (defining that "vandalism" in its ordinary sense as "willful or malicious destruction or defacement of public or private property."); *see also In re V.V.* at 1029 (stating that "willful and malice requirement," for California's arson offense, ensures that the wrongful act must be deliberate and intentional, as distinguished from an accidental or unintentional act).

Unlike misdemeanor vandalism, which has been held to not be a CIMT[2], California case law supports that moral turpitude inheres in *felony* vandalism as it involves a sufficient degree of culpable mental state of maliciousness and serious reprehensible conduct resulting in larger damages and harsher criminal penalties commensurate with the felonious act. *People v. Campbell*, 23 Cal. App. 4th 1488, 1496 (3d Dist. 1994) (stating that felony vandalism conviction evinced moral turpitude); *see also People v. Wheeler*, 4 Cal.4th 284, 296 (1992) (implying that a felony more forcefully indicates immoral character or dishonesty); *Mims v. Harrington*, No. 2:12-CV-200-MCE, 2013 WL 4012836, at *9 (E.D. Cal. Aug. 6, 2013), report and recommendation adopted, No. 2:12-CV-200-MCE-EFB, 2013 WL 6404993 (E.D. Cal. Oct. 18, 2013) ("Felony vandalism is a crime of moral turpitude. The mens rea of malice required for "any offense under [Penal Code] section 594" is sufficient to establish the readiness to do evil that is required of a crime of moral turpitude.") (citing *Campbell* and *Wheeler*)); *see also* U.S. Department of State's Foreign Affairs Manual, 9 FAM 302.3-2(B)(2)(U) (listing certain crimes committed against property involving moral turpitude and an inherently evil intent, including "[m]alicious destruction of property," a form of vandalism under CPC section 594(a)).

The vandalism statute of conviction therefore criminalizes both conduct that involves moral turpitude (felony vandalism) and one that does not (misdemeanor vandalism), and so, we assess whether the statute is divisible. Consistent with the language of the statute, corresponding jury instructions for felony vandalism lists the amount of damages as an *element* of the felony offense that must be proved by a jury, regardless of whether the crime was committed by defacing, damaging, or destroying another's real or personal property. Cal. Jury Instr. Crim. 14.95 Felony Vandalism (2009 Revision). Thus, the statute criminalizes two discrete offenses of felonious and misdemeanor vandalism, each requiring a distinct amount of damages as an element of the crime, which, if proven to be more than $400 (or $10,000 or more), involves morally turpitudinous conduct punishable as a felony. *Descamps*, 133 S.Ct. at 2283, 2288 (explaining the divisibility analysis); *Cabrera-Gutierrez*, 756 F.3d at 1135-37 & n.16 (same); *Rendon v. Holder*, 764 F3d 1077, 1084-89 (9th Cir. 2014); *Lopez-Valencia* 798 F.3d at 867 (stating that if the statute is overbroad *and* divisible, we apply the modified categorical inquiry).

Where the statute of conviction is divisible, we may consider the conviction documents to determine the subsection under which the Applicant was convicted under the modified categorical approach. *Shepard*, 544 U.S. at 16. Here, the Applicant acknowledges that the record of conviction reflects that

[2] *See, e.g.*, *Hernandez-Gonzalez*, 778 F.3d at 808 (noting that California's *misdemeanor* vandalism causing less than $400 in damages does not involve moral turpitude) (citation to an unpublished decision omitted).

he was convicted under a portion of the divisible vandalism statute (CPC section 594(a)(b)(1)) that has been found to involve moral turpitude, necessitating a waiver of inadmissibility for a CIMT.[3]

B. Exceptional and Extremely Unusual Hardship under Heightened Discretionary Standard

As stated, the Director found the Applicant's conviction for spousal battery offense to be a violent or dangerous crime and denied the waiver request, concluding that he did meet the heightened discretionary standard that applied to his waiver request as a result of such an offense where he did not establish exceptional and extremely unusual hardship to demonstrate extraordinary circumstances. 8 C.F.R. § 212.7(d) (stating that favorable exercise of discretion for a 212(h) waiver is generally not afforded to those who have been convicted of a violent or dangerous crime, except in extraordinary circumstances).

In denying the waiver request as a matter of discretion, the Director detailed the Applicant's two convictions, both involving his spouse, as well as his extensive immigration violations spanning a decade, all subsequent to the spousal battery conviction, until he was last deported in 2010, following the vandalism conviction, again involving his spouse. The Director then considered the relevant separation-hardship evidence, including evidence of medical, financial, and emotional hardship, and the children's school-related difficulties as well as potential travel risks associated with the family's visits to [redacted] Mexico, where the Applicant resides. However, the Director concluded that although the Applicant had established "extreme hardship" to his qualifying family members for purposes of section 212(h)(l)(B) eligibility, the cumulative hardship described did not amount to "exceptional and extremely unusual hardship" to meet the heightened discretionary standard. 8 C.F.R. § 212.7(d).

The Applicant does not dispute the Director's finding that he was convicted of a violent or dangerous crime, triggering the heightened discretionary standard; and he agrees with the Director's determination that his U.S. citizen spouse and children would experience extreme hardship for purposes of inadmissibility waiver. However, he contends that the denial of his waiver request would also cumulatively result in exceptional and extremely unusual hardship that satisfies the heightened standard. He also reasserts that he otherwise warrants a favorable exercise of discretion.

Upon review of the entirety of the record, we conclude that the Applicant has not met his burden of *clearly demonstrating* exceptional and extremely unusual hardship to establish extraordinary circumstances. 8 C.F.R. § 212.7(d).

As noted, the Applicant must show that the claimed hardship, individually or cumulatively, would be *substantially beyond* the ordinary hardship that would be expected, in his case, due to continuing inadmissibility. While certain uncommon hardships due to removal or inadmissibility may amount to extreme hardship, these types of hardship would not meet the significantly higher exceptional and extremely unusual hardship standard. *Matter of Andazola-Rivas*, 23 I&N Dec. 319 (BIA 2002) (discussing the significantly higher hardship standard in the context of cancellation of removal).

[3] Although the Applicant does not raise this issue on appeal, spousal battery under CPC section 243(e), of which he was convicted, has been held to not be a CIMT. *See Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1061-62 (9th Cir. 2006); *see also Matter of Sanudo*, 23 I&N Dec. 968, 973, 975 (BIA 2006). Regardless, the Applicant remains inadmissible for a CIMT based on his 2010 felony vandalism conviction.

On appeal, the Applicant, who is now 43 years of age, does not submit additional evidence. He instead reasserts that he married his 41-year-old spouse in 2003, with whom he has six children, including a nonbiological child. They have been separated since he was last deported from the United States to Mexico in 2010. He further reasserts that his spouse raised their children alone with limited resources, and without his financial support, and the family as a whole would experience exceptional and extremely unusual hardship in large part due to prolonged separation, the spouse's low income, and her worsening medical conditions, including depression, ADHD, obesity, and severe osteoarthritis in her left hip limiting her mobility.

The record contains the couple's statements, the Applicant's income statement, the spouse's medical documents, her tax filings, and a medical account history listing expenses for various health services provided to the family members. Other documentary evidence of record reflects that one child, J-[4], who is now 20 years old, has depression, anxiety and learning disorders, and ADHD, and he has received school help through Individual Education Planning ("IEP") programs. A 2020 medical document for the couple's 15-year-old son, A-, notes that he has reported having difficulty with school subjects and he was referred to routine mental health exams. A-'s 2019 and 2020 medical documents further note that he has received medical care for anxiety and depression. Based on the foregoing, the Applicant claims that his spouse's ongoing medical, emotional, and financial needs, along with the children's separation anxiety due to his inadmissibility, have created extreme stress and difficulty for their relationships and within the family. He also renews his claim that living in [redacted] Mexico, where there is high crime, poses a serious safety risk to his family when they visit him from California.

We acknowledge the hardships demonstrated in the record, particularly the medical diagnoses of the Applicant's spouse, the family's limited income and other evidence of economic hardship, as well as documents indicating the two children's mental health conditions and related educational needs, which we agree cumulatively amount to extreme hardship. However, the record does not clearly demonstrate exceptional and extremely unusual hardship as a result of the Applicant's inadmissibility, as required. The Applicant generally claims on appeal that without his presence and support, his family's struggles will continue to deteriorate significantly. While we acknowledge the ongoing hardship due to separation, the Applicant did not provide sufficient testimonial or documentary evidence that continued separation would result in deterioration of his family's struggles that would amount to exceptional and extremely unusual hardship.

Moreover, although the record shows that the Applicant's spouse has the stated medical conditions, it also reflects that she is able to obtain the needed medications and continues to receive medical care. Further, notwithstanding the spouse's low income, the record does not indicate that she is unable to cover her and her children's expenses, including medical expenses, without the Applicant's help. It is also unclear if the family receives government benefits or other assistance, and whether the three adult children are able to assist the spouse.[5] The record also indicates that the 20-year-old J- has been receiving treatment and medications for his medical conditions as well as educational assistance through the IEP, which was last set to be completed in 2022 with a goal towards his graduation and joining the military. While the record contains medical documents prepared in 2019 and 2020

[4] We use initials to protect individuals' privacy.

[5] Medical documents for the younger children, K- and A-, state that, at the time of their doctors' visits in June 2020, *father*, mother, four brothers, and one sister *resided* together in the same household.

referencing the 15-year-old A-'s prior mental health conditions, including anxiety and depression and potential school-related concerns, it otherwise lacks any updated evidence of ongoing medical or educational needs that would require the Applicant's personal assistance. The other documents in the record do not indicate any particular or unusual hardship to the remaining children.[6]

We recognize the claim, as did the Director, as to the Applicant's difficulty living in [redacted] Mexico, and related potential safety risk. However, the record reflects that the family has been able to visit the Applicant in [redacted] Mexico, and it does not otherwise address or describe hardships to the Applicant there or to his family during their visits. Further, the spouse in her second letter stated that she and her children have never been a victim of a crime while visiting [redacted] Mexico, though they continue to fear traveling there. The Applicant does not claim that he himself was a victim of a crime in Mexico. The remaining documents for the Applicant's rehabilitation and good character do not specifically relate to the issue of hardship. Finally, the appeal brief does not respond to other deficiencies noted in the Director's decision.

As noted above, exceptional and extremely unusual hardship must be *substantially beyond* the ordinary hardship that would be expected due to the Applicant's continuing inadmissibility. The hardships present in the Applicant's case are not so egregious or unusual as to meet the heightened standard required by 8 C.F.R. § 212.7(d).

III. CONCLUSION

The Applicant requires a waiver because he is inadmissible for a CIMT. However, he has also been convicted of a violent and dangerous crime and has not clearly demonstrated extraordinary circumstances that warrant a favorable exercise of discretion. Therefore, the Applicant is ineligible for a waiver under section 212(h) of the Act.

ORDER: The appeal is dismissed.

[6] The oldest child is the Applicant's nonbiological child. Copies of the two remaining adult children's birth certificates the Applicant submitted (for V- and R-) do not list their father.