

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

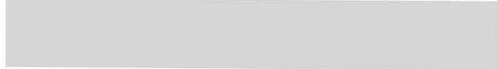


U.S. Citizenship
and Immigration
Services



Date:

JUL 16 2015



IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Act,
8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

for A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Oakland Park, Florida, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Cuba who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States with his U.S. citizen children, his U.S. citizen father, and U.S. lawful permanent resident spouse and mother.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. The Field Office Director also indicated that the application would be denied as a matter of discretion as a result of the seriousness of the applicant's 2003 conviction and in light of his 2011 arrest, which did not lead to a conviction.

On appeal, the applicant states that the Field Office Director's decision concerning extreme hardship and discretion is in error, in particular because the Immigration Judge had approved the applicant's waiver in prior proceedings and was overturned on appeal on jurisdictional grounds.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2)(A)(i)(I) of the Act provides, in pertinent part, that an alien convicted of "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.

The Act does not define the term "crime involving moral turpitude." In *Matter of Perez-Contreras*, the Board of Immigration Appeals (BIA or Board) provided:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. . . .

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. . . . Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. . . . However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

20 I&N Dec. 615, 617-18 (BIA 1992) (citations omitted); *see also Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Keungne v. U.S. Att’y Gen.*, 561 F.3d 1281, 1284 (11th Cir. 2009) (citing *Vuksanovic v. U.S. Att’y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006)).

In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We begin with a categorical inquiry, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); *Vuksanovic v. U.S. Att’y Gen.*, *supra*, at 1311 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)); *Sosa-Martinez v. U.S. Att’y Gen.*, 420 F.3d 1338, 1342 (11th Cir. 2004); *Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Matter of Short*, *supra*; *see also Matter of Louissaint*, *supra*; *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

Where the statute does not contain a single, indivisible set of elements but rather encompasses multiple distinct criminal offenses, “some . . . which involve moral turpitude and some which do not,” the analysis moves beyond the categorical inquiry. *Matter of Short*, *supra*, at 137-138. In applying the Supreme Court’s decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013) to the immigration context, the Board stated that a criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of ‘elements,’ more than one combination of which could support a conviction; and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match” to the relevant generic offense (i.e. an offense involving moral turpitude). *Matter of Chairez-Castrejon*, 26 I&N Dec. 349, 353 (BIA 2014) (citing *Descamps*, *supra*, at 2283). For the purpose of determining whether a statute is divisible, an offense’s elements are those facts about the crime which “‘[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.’ ” 26 I&N Dec. at 353 (quoting *Descamps*, *supra*, at 2288). The Board indicated that absent a requirement for jury unanimity, the disjunctive language of the statute merely expresses alternative “means” of committing the crime, rather than alternative “elements” that render the statute divisible into distinct offenses. 26 I&N Dec. at 354.

If a statute is divisible, we conduct a modified categorical inquiry, reviewing the record of conviction to determine the offense within the statute for which the respondent was convicted. *See Matter of Short*, *supra*, at 137-38. The record of conviction is a narrow, specific set of documents which includes the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Matter of Louissaint*, *supra*, at 757; *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005) (finding that the record of conviction is limited to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”)

The record establishes that on July 16, 2003, the applicant was convicted in the Circuit Court of the [redacted] County, Florida of Grand Theft in the Third Degree, in violation of Fla. Stat. § 812.014(2)(C), and Burglary of an unoccupied structure in violation of Fla. Stat. § 810.02(4)(A) for his conduct on June 25, 2003. The applicant was placed on probation for one year and ordered to pay costs and restitution and complete community service. The applicant was also arrested in 2011, but the disposition for that arrest shows that he did not face prosecution for the charges associated with that arrest.

At the time of the applicant’s conviction, Section 810.02 of the Florida Statutes provided in relevant part that:

810.02. Burglary

- ...
- (b) For offenses committed after July 1, 2001, “burglary” means:
1. Entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter; or
 2. Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance:
 - a. Surreptitiously, with the intent to commit an offense therein;
 - b. After permission to remain therein has been withdrawn, with the intent to commit an offense therein; or
 - c. To commit or attempt to commit a forcible felony, as defined in s. 776.08.

- ...
- (4) Burglary is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a:
- (a) Structure, and there is not another person in the structure at the time the offender enters or remains; or

Fla. Stat. § 812.014(2)(C) at the time of the applicant’s conviction stated:

- (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
 - (a) Deprive the other person of a right to the property or a benefit from the property.
 - (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

...
- 2 (c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, if the property stolen is...

A plain reading of Fla. Stat. § 812.014 shows that it can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. To constitute a crime involving moral turpitude, the BIA has determined that a theft offense must require the intent to permanently take another person's property. See *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). As the minimum conduct needed for a conviction under Fla. Stat. § 812.014 does not involve moral turpitude, we cannot find that a violation of Fla. Stat. § 812.014 is categorically a crime involving moral turpitude. It is thus necessary to determine whether the statute is divisible into separate offenses with distinct *mens rea*, or whether intent to temporarily or permanently deprive/appropriate are merely alternative means of committing the offense. To do so, we turn to the Florida Supreme Court's Standard Jury Instructions for Criminal Cases.

To prove the crime of Theft under Fla. Stat. § 812.014, the jury instructions require the State to “prove the following two elements beyond a reasonable doubt”:

1. (Defendant) knowingly and unlawfully [obtained or used] [endeavored to obtain or to use] the (property alleged) of (victim).
2. [He] [She] did so with intent to, either temporarily or permanently,
 - a. [deprive (victim) of [his] [her] right to the property or any benefit from it.]
 - b. [appropriate the property of (victim) to [his] [her] own use or to the use of any person not entitled to it.]

Fla. Standard Jury Instr. (Crim.) 14.1.**** (201*).

Based on the jury instructions, a jury in a case concerning an alleged violation of Fla. Stat. § 812.014 does not need to be unanimous regarding whether the defendant intended to either “temporarily or permanently” deprive or appropriate property. A jury could convict a defendant of Fla. Stat. § 812.014 without agreeing on whether the defendant had the intent to permanently deprive or appropriate property or, alternatively, temporarily deprive or appropriate property. Rather than describing two separate types of theft offenses, the statute describes different means to commit the one offense. While the language at issue — “with intent to, either temporarily or permanently,” — may be disjunctive, it does not render the statute divisible so as to warrant a modified categorical inquiry, and the use of the modified categorical approach is not permissible.

As a modified categorical approach is unavailable because the statute is not divisible, we are unable to determine that the applicant was convicted of a crime involving moral turpitude as a result of his conviction under section 812.014(2)(C).

We next look to the applicant's conviction under Fla. Stat. § 810.02 for Burglary of an Unoccupied Dwelling. The Board has found “there is nothing inherently immoral, base, vile, or depraved in

unlawfully breaking and entering a building...,” when analyzing the New York burglary statute, but found that the crime accompanying the burglary is what would indicate moral turpitude, or not. *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). The Florida burglary statute criminalizes breaking, entering, or remaining in without authorization a dwelling with the intent to commit an offense therein, but does not specify the underlying offense. In determining whether a crime is categorically a crime involving moral turpitude, the inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. See *Matter of Louissaint*, *supra*; see also *Moncrieffe v. Holder*, 133 S.Ct. at 1684-1685; *Gonzales v. Duenas-Alvarez*, 127 S.Ct. at 822. Burglary of an Unoccupied Dwelling under Fla. Stat. § 810.02 is therefore not categorically a crime involving moral turpitude because intent to commit an underlying offense involving moral turpitude is not required for a conviction under the statute.

As noted above, the modified categorical approach may be applied only if a statute is found to be divisible – when it “lists a number of alternative elements that effectively create several different crimes, some of which [involve moral turpitude] and some of which [do] not.” See *Donawa v. U.S. Attorney General*, 735 F.3d 1275, 1281 (11th Cir. 2013) (citing *Descamps*, 133 S.Ct. at 2285). Section 810.02 of the Florida Statutes is not divisible because it does not list multiple distinct criminal offenses, some of which involve moral turpitude and some which do not. Rather, it is overbroad in that it prohibits breaking, entering, or remaining in without authorization a dwelling with intent to commit an unspecified offense, but does not list separate offenses with distinct *mens rea*, some of which involve moral turpitude.

As the modified categorical approach is unavailable, we are unable to determine that the applicant’s conviction under Fla. Stat. § 810.02 is a crime involving moral turpitude.¹ Accordingly, we find that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The waiver application is not necessary.

ORDER: The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the waiver application is unnecessary.

¹ Even if we were permitted to apply the modified categorical approach and examine the record of the applicant’s burglary conviction, which resulted from the same events leading to his grand theft conviction, the underlying crime specified in the charging document was theft. As the Florida theft statute was found not to be a crime involving moral turpitude under the categorical approach and not divisible, the applicant’s conviction for burglary with the underlying intent to commit theft would not be considered a crime involving moral turpitude.