



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

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

MATTER OF A-T-G-

DATE: MAR. 11, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-918 SUPPLEMENT A, PETITION FOR QUALIFYING FAMILY MEMBER OF U-1 RECIPIENT

The Petitioner¹ seeks nonimmigrant classification of the Derivative as a qualifying family member of a U-1 nonimmigrant. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(U)(ii), 8 U.S.C. § 1101(a)(15)(U)(ii). The Director, Vermont Service Center, denied the petition, and we dismissed a subsequent appeal. The matter is now before us on a motion to reopen and reconsider. The motion will be denied.

I. APPLICABLE LAW AND APPELLATE JURISDICTION

Section 101(a)(15)(U)(ii) of the Act provides for derivative U nonimmigrant classification to qualifying family members of victims of certain criminal activity who assist government officials in investigating or prosecuting such criminal activity. *See also* 8 C.F.R. § 214.14(f)(1) (“An alien who has petitioned for or has been granted U-1 nonimmigrant status (*i.e.*, principal alien) may petition for the admission of a qualifying family member . . . if accompanying or following to join such principal alien”).

Pursuant to the regulation at 8 C.F.R. § 214.14(f)(1)(ii), the qualifying family member must be admissible to the United States. Section 212(d)(14) of the Act requires U.S. Citizenship and Immigration Services (USCIS) to determine whether any grounds of inadmissibility exist when adjudicating a Form I-918 Supplement A, Petition for Qualifying Family Member of U-1 Nonimmigrant, and provides USCIS with the authority to waive certain grounds of inadmissibility as a matter of discretion. All nonimmigrants must establish their admissibility to the United States or show that any grounds of inadmissibility have been waived. 8 C.F.R. § 214.1(a)(3)(i).

For qualifying family members who are inadmissible to the United States, the regulations at 8 C.F.R. §§ 212.17 and 214.14(f)(3)(ii) require the filing of a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, in conjunction with a Form I-918 Supplement A in order to waive any ground of inadmissibility. The regulation at 8 C.F.R. § 212.17(b)(3) states in pertinent part: “There is no appeal of a decision to deny a waiver.” As we do not have jurisdiction to review

¹ The Form I-290B, Notice of Appeal or Motion, was completed and signed by the Derivative. However, the beneficiary of a visa petition is not an affected party and may not submit an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B).

whether the Director properly denied the Form I-192, we do not consider whether approval of the Form I-192 should have been granted. The only issue before us is whether the Director was correct in finding the Derivative to be inadmissible and, therefore, requiring an approved Form I-192 pursuant to 8 C.F.R. §§ 212.17 and 214.14(f)(3)(ii).

Section 212(a) of the Act sets forth the grounds of inadmissibility to the United States, and states, in pertinent parts:

(2) Criminal and Related Grounds

(A) Conviction of Certain Crimes

- (i) In General.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
 - (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.

....

(6) Illegal Entrants and Immigration Violators

(A) Aliens Present Without Permission or Parole

- (i) In General.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

....

(7) Documentation Requirements.-

....

(B) Nonimmigrants.-

- (i) In general.-Any nonimmigrant who-

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(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period . . .

....

is inadmissible.

....

(9) Aliens Previously Removed

....

(C) Aliens Unlawfully Present after Previous Immigration Violations.-

(i) In general.-Any alien who-

....

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

....

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The Derivative is a citizen of Mexico who claims to have last entered the United States after removal on September 16, 2005. He married the Petitioner on [REDACTED] 2012, in Iowa. On April 30, 2003, the Iowa District Court for [REDACTED] convicted the Derivative, pursuant to his guilty plea, of burglary in the third degree in violation of Iowa Code § 713.6A(2), an aggravated misdemeanor, and sentenced him to two years incarceration (suspended), one year formal probation, participation in the victim offender reconciliation program (VORP), and payment of costs, fees, and restitution. On [REDACTED] 2003, the Iowa District Court for [REDACTED] convicted the Derivative, pursuant to his guilty plea, of the same offense, and sentenced him to two years imprisonment. At the time of the Derivative's convictions, Iowa defined burglary and burglary in the third degree as follows:

§ 713.1. Burglary defined

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such

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occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

I.C.A. § 713.1 (West 2003).

§ 713.6A - Burglary in the third degree

1. All burglary which is not burglary in the first degree or burglary in the second degree is burglary in the third degree. Burglary in the third degree is a class "D" felony, except as provided in subsection 2.

2. Burglary in the third degree involving a burglary of an unoccupied motor vehicle or motor truck as defined in section 321.1, or a vessel defined in section 462A.2, is an aggravated misdemeanor for a first offense. A second or subsequent conviction under this subsection is punishable under subsection 1.

I.C.A. § 713.6A (West 2003).

On [REDACTED] 2003, the Iowa District Court for [REDACTED] convicted the Derivative of possession of marijuana in violation of Iowa Code section 124.401(5), a serious misdemeanor, and sentenced him to 90 days imprisonment (suspended) and one year probation. The Iowa Code at the time of this offense provided as follows:

§ 124.401. Prohibited acts—manufacturers—possessors—counterfeit substances—simulated controlled substances—penalties

.....

5. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. . . . If the controlled substance is marijuana, the punishment shall be by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense.

I.C.A. § 124.401(5) (West 2003).

On [REDACTED] 2003, the City of [REDACTED] Iowa, issued a citation to the Derivative as a minor in possession of alcohol in violation of Iowa Code section 123.47, and a summons to appear at the [REDACTED] Courthouse. The court disposition

for the offense is not in the record.² The Director did not cite this offense as a ground for inadmissibility, and we will not further address the violation.

The Petitioner filed the Form I-918 Supplement A and the Derivative filed the Form I-192 on June 25, 2012. On August 4, 2014, the Director denied the Form I-192 finding the Derivative inadmissible under the following sections of the Act: § 212(a)(2)(A)(i)(I) (conviction of a crime involving moral turpitude), § 212(a)(2)(A)(i)(II) (controlled substance violation), § 212(a)(6)(A)(i) (present without admission or parole), § 212(a)(7)(B)(i)(I) (no valid passport), and § 212(a)(9)(C)(i)(II) (previously ordered removed and entered without being admitted), and that he did not merit a favorable exercise of discretion. The Director denied the Form I-918A because the Derivative was not admissible to the United States and his grounds of inadmissibility had not been waived. On appeal, the Petitioner did not contest the Derivative's admissibility, and asserted that the Director should approve the Form I-192 as a matter of discretion. We dismissed the appeal, as we had no jurisdiction to review the denial of the Derivative's Form I-192. The Petitioner timely filed the motion to reopen and reconsider.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

III. ANALYSIS

On motion, the Petitioner submits a brief and previously submitted evidence. As we do not have jurisdiction to review whether the Director properly denied the Derivative's Form I-192, the only issue before us is whether the Director was correct in finding the Derivative inadmissible to the United States, thus requiring an approved Form I-192.

The Petitioner has not asserted new facts to be proved in the reopened proceeding, as required by the regulation at 8 C.F.R. § 103.5(a)(2). The Petitioner does not cite binding precedent decisions or other legal authority establishing that we incorrectly applied the pertinent law or agency policy, nor does he show that our prior decision was erroneous based on the evidence of record at the time, as required by the regulation at 8 C.F.R. § 103.5(a)(3). Consequently, the motion to reopen and reconsider will be denied for the reasons discussed below. *See* 8 C.F.R. § 103.5(a)(4) (a motion that does not meet the applicable requirements shall be denied).

² The Petitioner states on the Form I-918A that the Derivative paid a fine for this violation.

A. Inadmissibility for Commission of a Crime Involving Moral Turpitude

The term, “crime involving moral turpitude” is not defined in the Act. In interpreting the phrase, the Board of Immigration Appeals held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[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.

(Citations omitted.)

On motion, the Petitioner contests the Director’s finding that the Derivative is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for a conviction of a crime involving moral turpitude. The Petitioner asserts that the burglary statute under which he was convicted does not categorically involve moral turpitude, as Iowa defines burglary to include the unlawful entry of an occupied structure with the intent to commit assault, which does not categorically involve moral turpitude. The Petitioner further states that the modified categorical approach as outlined in *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013), reh’g denied, 134 S. Ct. 41 (2013), is not appropriate in this case, as the criminal statute has a single, indivisible set of elements.

The U.S. Supreme Court recently clarified the process for determining when a violation of a statute that prohibits several forms of conduct categorically involves moral turpitude. *See Descamps* at 2281. As a threshold matter, we review the state statute of conviction to determine whether it is categorically broader or narrower than the generic federal statute. The Iowa statute of conviction limits the defendant’s intention to committing an assault, a felony, or a theft during the commission of the burglary offense, and is thus narrower than the generic definition of burglary. *See Taylor v. U.S.*, 495 U.S. 575, 598 (1990), which stated that the “the generic, contemporary meaning of burglary” contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. As the Iowa statute is narrower than the generic burglary offense, we proceed with an analysis of the statutory language as set forth in *Descamps*.

Contrary to the Petitioner’s assertions, the Iowa definition of burglary at Iowa Code section 713.6A is divisible in the *Descamps* sense, in that the fact finder must determine which of the alternative

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mental states the defendant possesses (felony, theft, or assault) as an element of the conviction.³ The Eighth Circuit Court of Appeals, in which this case arises, has held that under *Descamps*, whether a statute is divisible depends on whether the statute “sets out one or more elements of the offense in the alternative.” *Avendano v. Holder*, 770 F.3d 731, 734 (8th Cir. 2014).⁴ The *Descamps* court stated that the modified categorical approach is required when a divisible statute lists potential offense elements in the alternative, and the court cannot determine which element played a part in the defendant’s conviction without reviewing the record underlying the conviction. *See Descamps* at 2285. We will thus review the extra-statutory materials in this case to determine what crime the Derivative was convicted of, and whether the crime involved moral turpitude.

Both of the information documents formally accusing the Derivative of burglary for the offenses committed on February 28, 2003, and on November 4, 2003, state as follows:

BURGLARY OF A CAR, in violation of Section 713.6A(2) of the Code of Iowa, by unlawfully and willfully breaking and/or entering an unoccupied motor vehicle belonging to [owner of vehicle] without any right, license or privilege to do so, *while having the intent to commit a theft therefrom*. (Aggravated Misdemeanor).

(Emphasis added). Further, the Derivative stated in the plea agreement dated [REDACTED] 2003, that he “acted as a lookout for another person who entered a motor vehicle with the intent to steal property from the car.” The police report dated [REDACTED] 2003, observed that the Derivative was caught with a radio that had been stolen from a nearby car.⁵ As both burglary offenses required as an element the intent to commit a theft, the offenses were crimes of moral turpitude. *See Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006); *Matter of De LaNues*, 18 I&N Dec. 140, 145 (BIA 1981). As such, the Derivative was convicted of two crimes involving moral turpitude.

The Petitioner also contends on motion that as the statute of conviction specifically applies to burglary of an unoccupied motor vehicle, there is less risk of violence against the public, and thus does not involve turpitudinous conduct. In *State of Iowa v. Alexander*, 853 N.W.2d 295 (Iowa App., 2014), the Iowa Court of Appeals rejected this interpretation, finding that Iowa Code section

³ The Iowa Criminal Jury Instructions provide that for burglary in the third degree, the state must prove the element of intent in the alternative, e.g. that the criminal defendant committed the offense “with the specific intent to commit a [felony of (describe felony)] [theft] [assault]” *See Iowa Criminal Jury Instructions*, 2004, [REDACTED]

⁴ *See also Chanmouny v. Ashcroft*, 376 F.3d 810, 812 (8th Cir. 2004), where the Eighth Circuit approved the BIA’s categorical approach for examining whether a criminal conviction is a crime of moral turpitude. The court stated that: “if the statute contains some offenses which involve moral turpitude and others which do not, it is to be treated as a “divisible” statute, and we look to the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted.” The court further found that the categorical approach is consistent with the Supreme Court decisions determining whether a prior conviction was a violent felony under the Armed Career Criminal Act (ACCA) (citations omitted).

⁵ The Petitioner cites *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), in support of his argument that courts do not review the underlying facts supporting the conviction. The court in the *Moncrieffe* case, however, did not reach the *Descamps* analysis because the statute in that case was broader than the generic federal counterpart.

713.6A(2), the statute at issue in this case, necessarily involves burglary of an occupied structure under Iowa Code sections 713.1 and 702.12. The Petitioner further asserts that the rule of lenity requires any ambiguity in the interpretation of the law under Iowa Code sections 713.1 and 713.6A(2) be resolved in favor of the Derivative. The Petitioner, however, does not cite any ambiguity in the interpretation of the Iowa burglary statute.

Accordingly, we uphold the Director's decision that the Derivative is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for convictions of crimes involving moral turpitude.

B. Inadmissibility for a Crime Relating to a Controlled Substance

On motion, the Petitioner contests that the Derivative is inadmissible under section 212(a)(2)(A)(i)(II) of the Act for violating a law relating to a controlled substance, arguing that the definition of marijuana at Iowa Code section 124.204 under which the Derivative was convicted is broader than the generic definition of marijuana under 21 U.S.C. § 802, and thus he was not convicted of a crime relating to a controlled substance and cannot be ruled inadmissible, citing *Mellouli v. Lynch*, — U.S. —, 135 S.Ct. 1980 (2015). Unlike the statute of conviction at issue in *Mellouli*, which criminalized possession of certain drug paraphernalia⁶ not listed as a controlled substance under 21 U.S.C. § 802 because the elements of the Iowa statute were overbroad, the Derivative in this case was convicted of possession of marijuana, which is undeniably a controlled substance under 21 U.S.C. § 802. The Petitioner does not assert that marijuana is not a controlled substance, nor that the *elements* of the criminal statute are overbroad.⁷

The Petitioner further asserts that the rule of lenity requires any ambiguity in the interpretation of the statute at I.C.A. § 124.204(5) be resolved in favor of the Derivative. The Petitioner does not cite any ambiguity in the interpretation of Iowa's statutory language criminalizing the possession of marijuana as a controlled substance.

Accordingly, we uphold the Director's decision that the Derivative is inadmissible under section 212(a)(2)(A)(i)(II) of the Act as he was convicted of a law relating to a controlled substance.

C. Inadmissibility for Certain Immigration Violations

The Director found the Derivative inadmissible under sections 212(a)(6)(A)(i) (present without admission or parole), 212(a)(7)(B)(i)(I) (no valid passport), and 212(a)(9)(C)(i)(II) (previously ordered removed and entered without being admitted). The Petitioner does not contest these grounds of inadmissibility on motion, but, instead, argues that the Derivative has been rehabilitated and contributes to the Petitioner's recovery from injuries resulting from the harm that formed the

⁶ The defendant in the *Mellouli* case was charged with possession of drug paraphernalia "to ... store [or] conceal .. a controlled substance under Kan. Stat. Ann. section 21-5709(b)(2).

⁷ Furthermore, the Derivative has not shown that there is a realistic, not just theoretical, probability that the State would apply the Iowa statute to an instance that falls outside the generic definition of marijuana. *See Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

basis for her U nonimmigrant petition. The Director denied the Derivative's application for a waiver of inadmissibility, and we have no jurisdiction to review the denial of a Form I-192 submitted in connection with a Form I-918 Supplement A. 8 C.F.R. § 212.17(b)(3).

IV. CONCLUSION

The Petitioner has not established that the Derivative is admissible to the United States or that the grounds of inadmissibility under sections 212(a)(2)(A)(i)(I), 212(a)(2)(A)(i)(II), 212(a)(6)(A)(i), 212(a)(7)(B)(i)(I), and 212(a)(9)(C)(i)(II) of the Act have been waived. The Derivative is consequently ineligible for nonimmigrant classification under section 101(a)(15)(U)(ii) of the Act, pursuant to 8 C.F.R. § 214.1(a)(3)(i).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of A-T-G-*, ID# 15791(AAO Mar. 11, 2016)