U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-A-N-V-

DATE: FEB. 26, 2016

APPEAL OF MIAMI FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Cuba, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Miami, Florida, denied the application. The matter is now before us on appeal. The appeal will be dismissed. The matter will be remanded to the Director for further proceedings consistent with this opinion.

The Applicant was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed 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 spouse and children.

In a decision dated November 7, 2014, the Director determined that the Applicant had not established that he had been rehabilitated or that a qualifying relative would suffer extreme hardship upon his removal. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, as a matter of discretion.

On appeal the Applicant contends that his convictions were for crimes no longer considered crimes involving moral turpitude, that his convictions were for crimes that occurred more than 15 years ago so he need not show extreme hardship to a qualifying relative, and that he has been rehabilitated. With the appeal the Applicant submits a brief, a statement from his spouse, medical documentation for his spouse, school and medical records for his children, financial documentation, and letters of support. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny 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 . . . is inadmissible.

The Board of Immigration Appeals (Board) 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.

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude begins with a categorical inquiry that "depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." *Itani v. Ashcroft*, 298 F.3d 1213, 1215-16 (11th Cir. 2002); *see also Vuksanovic v. U.S. Att'y Gen.*, 439 F.3d 1308, 1311 (11th Cir. 2006) (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).

However, where the statute under which an alien was convicted is "'divisible'—that is, it contains some offenses that are [crimes involving moral turpitude] and others that are not[,] . . . the fact of conviction and the statutory language alone are insufficient to establish . . . under which subpart [the alien] was convicted." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). 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 v. United States,* 133 S. Ct. 2276, 2283 (2013), *see also Donawa v. U.S. Att'y Gen.*, 735 F. 3d 1275, 1281 (11th Cir. 2013). "Barring guidance from the state courts interpreting a statute, [we] apply traditional tools of statutory interpretation to decide whether a statute sweeping broader than a generic offense is divisible and thus amenable to analysis under the modified categorical approach." *United States v. Estrella*, 758 F.3d 1239, 1245-46 (11th Cir. 2014). Although divisibility may often be ascertained from the language of the statute itself, a statute is only divisible where the jury would have to agree unanimously to convict on the basis of one alternative as opposed to the other. *Id.* at 1245-46 (citing *Descamps*, *supra*, at 2289-90).

If the statute is divisible, "the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered" under a modified categorical inquiry. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernauth*, *supra*, at 1354-55). The modified categorical approach is intended only as tool to apply the categorical inquiry to the relevant element from a statute with multiple alternatives, not to evaluate the facts that the judge or jury found. *See Estrella*, *supra*, at 1246 (citing *Descamps*, *supra*, at 2287).

The record reflects that on [redacted] 1997, in the Fifteenth Judicial Circuit Court, [redacted] Florida, the Applicant was convicted of Burglary of Conveyance, a third degree felony, in violation for Fla. Stat. § 810.02(1). The record further reflects that on [redacted], 1997, the Applicant was convicted in the Nineteenth Judicial Circuit Court, [redacted] Florida, of Grand Theft in violation of Fla. Stat. § 812.014(2)(C)(6), a third degree felony, and Grand Theft Auto, in violation of Fla. Stat. § 812.014(2)(C)(1), also third degree felony. At the same time the Applicant was also convicted of Burglary of Structure in violation of Fla. Stat. § 810.02, a third degree felony, and of Possession of Burglary Tools, in violation of Fla. Stat. § 810.06, a third degree felony.

At the time of the Applicant's theft convictions the Florida statute stated:

812.014. Theft

> (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.

To constitute a crime involving moral turpitude, the Board 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. Specifically, to prove the crime of Theft, the jury instructions state, in pertinent part:

> 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.]

Based on the Florida Supreme Court's Standard 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, so 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's theft convictions involved moral turpitude.

As the offense defined by Fla. Stat. § 812.014 is neither a categorical crime involving moral turpitude nor divisible as defined in *Descamps*, we find that the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his theft convictions.

We next look at the Applicant's third degree felony convictions for Burglary of a Structure and Burglary of a Conveyance in violation of Fla. Stat. § 810.02. At the time of the Applicant's convictions the Florida statute stated in pertinent part:

810.02. Burglary

> (1) "Burglary" means entering or remaining in 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 remain.
>
> . . . .
>
> (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
>
> (b) Conveyance, and there is not another person in the conveyance at the time the offender enters or remains.

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 entering or remaining in a

dwelling, a structure, or a conveyance, 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 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. It is thus necessary to determine whether the statute is divisible into separate offenses with distinct mens rea.

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). In a recent decision, the Eleventh Circuit noted that *Descamps* requires that a sentencing court determine whether a statute is "divisible" or "indivisible" based on whether it requires proof of alternative elements. The Court noted that if a statute lists multiple, alternative elements and creates several different crimes, then the statute is divisible. *United States v. Lockett*, No. 14-15084, 2016 WL 240334 (11th Cir. Jan. 21, 2016). 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 entering or remaining in a dwelling, a structure, or a conveyance 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 convictions under Fla. Stat. § 810.02 involved moral turpitude. Accordingly, we find that the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his burglary convictions.

We now turn to the Applicant's conviction for Possession of Burglary Tools, in violation of Fla. Stat. § 810.06, a third degree felony. At the time of the Applicant's conviction the Florida statute stated:

810.06. Possession of burglary tools

> Whoever has in his possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

In *Matter of S-*, 6 I&N Dec. 769 (BIA 1955), the Board held that possession of burglary tools in violation of § 464(b) of the Canadian Criminal Code was not be a crime involving moral turpitude unless possession was accompanied by an intent to use the tools to commit a crime defined as one involving moral turpitude. In the present case the Applicant's convictions for burglary were found

not to be crimes of moral turpitude. Accordingly, we find that the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his conviction for possession of burglary tools.

The record does not demonstrate that the Applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and the Form I-601 is therefore moot. As the Form I-601 is moot, the appeal will be dismissed as unnecessary, and the matter will be remanded for further proceedings consistent with this opinion.

ORDER: The appeal is dismissed. The matter is remanded to the Director, Miami Field Office, for further proceedings consistent with the foregoing opinion.

Cite as *Matter of A-A-N-V-*, ID# 14511 (AAO Feb. 26, 2016)