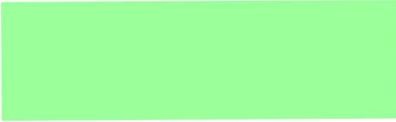




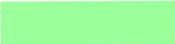
**U.S. Citizenship
and Immigration
Services**

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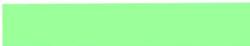


DATE: **JAN 12 2015**

Office: TAMPA

File: 

IN RE:

Applicant: 

APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Israel 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 a crime involving moral turpitude. The field office director concluded the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Ground of Inadmissibility (Form I-601). *Decision of the Field Office Director*, May 14, 2014. The denial did not address counsel's contention that the applicant is not inadmissible.

On appeal, counsel asserts that as a result of recent decisions issued by the U.S. Supreme Court and the Board of Immigration Appeals (BIA), the applicant can no longer be found inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. In support, counsel submits a brief and copies of unpublished AAO and BIA decisions, as well as one by a Florida Immigration Judge.

Concluding the applicant admitted having committed the crime charged, the field office director found her to be inadmissible under Section 212(a)(2)(A) of the Act, stating, in pertinent part:

(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 (BIA) stated in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

[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.

The record shows the applicant's participation in the Pre-Trial Intervention Program of [REDACTED] County, Florida, was approved by a Florida circuit court on September [REDACTED] regarding the charge of Grand Theft in the Third Degree (of property valued at between \$300 and \$5,000), in

violation of Florida Statutes (F.S.) § 812.014(2)(c)(1), for her conduct on March [REDACTED]. The Pre-Trial Intervention Agreement provided that full compliance would result in dismissal of all charges and, finding the applicant to have complied, the court granted the state's motion to dismiss the charges against her. Further, the record shows the applicant pled guilty on [REDACTED] to retail theft under F.S. § 812.015 and was ordered to pay court costs and restitution. The applicant disputes that she is inadmissible pursuant to section 212(a)(2)(A) of the Act.

The Board of Immigration Appeals has held that participation in Florida's Pre-Trial Intervention Program is not a conviction under the Act. *See Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989). Counsel further asserts that statements in the applicant's Pre-Trial Intervention agreement do not comprise an admission of guilt and, further, that even were they such an admission, theft under F.S. § 812.014(2)(c)(1) is not a crime involving moral turpitude. Upon review, the applicant's assertions are persuasive.

Fla. Stat. § 812.014 states in relevant part:

- (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 . . . if the property stolen is:
 1. Valued at \$300 or more, but less than \$5,000.

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 individual 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.” *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005). Under such circumstances, “the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (citing *Jaggernaut, supra*, at 1354-55).

The Eleventh Circuit does not permit inquiry beyond the record of conviction, called a modified categorical approach. *See Fajardo, supra*, at 1310 (11th Cir. 2011) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

A plain reading of F.S. § 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. The BIA has determined that to constitute a crime involving moral turpitude, 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 F.S. § 812.014 does not involve moral turpitude, we cannot find that a violation of F.S. § 812.014 is categorically a crime involving moral turpitude.

In a 2013 decision, the Supreme Court held that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, "courts could discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction." *Id.* at 2284-85 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009) (internal quotation marks omitted)); *see also Johnson v. United States*, 559 U.S. 133, 144 (2010) ("[T]he 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction.").

In *Matter of Chairez-Castrejon*, the BIA revisited its method of determining whether a statute is divisible and held that the approach to divisibility applied in *Descamps* also applied in the immigration context. 26 I&N Dec. 349, 352-5 (BIA 2014) (reconsidering *Matter of Lanferman*, 25 I & N Dec. 721 (BIA 2012), and ultimately "withdraw[ing] from that decision to the extent that it is inconsistent with *Descamps*."). The BIA noted that after *Descamps*, 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. *Id.* at 353. The BIA further explained that for purpose of determining whether a statute is truly 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 . . . unanimously¹ and beyond a reasonable doubt." *Id.* at 353 (quoting *Descamps* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999))). The BIA found that a statute was not divisible merely because it "disjunctively enumerated intent, knowledge, and recklessness as alternative mental states" and

¹ The BIA noted that in states where jury unanimity is not required, "we deem the 'elements' of the offense to be those facts about which the jury was required to agree by whatever vote was required to convict in the pertinent jurisdiction." 26 I&N Dec. at 353, n. 2.

further stated that the statute “can be ‘divisible’ into three separate offenses with distinct mens rea only if . . . jury unanimity regarding the mental state” was required. *Id.* at 352-354. As it had not been established that jury unanimity was required, the BIA held that the alternative mens rea were merely alternative “means” of committing the crime rather than alternative “elements” of the offense. *Id.* at 355.

As noted above, under the Florida statute at issue, grand theft is not categorically a crime involving moral turpitude because the law includes intent either to temporarily or permanently deprive the owner of the property. 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 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:

[T]he State must 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.]

Based on these Standard Jury Instructions, a jury in a case concerning an alleged violation of F.S. § 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 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 admitted committing a crime involving moral turpitude.²

² As noted above, counsel asserts that the applicant’s statement that she accepted responsibility for the crime charged in order to participate in diversion under the PTI agreement did not constitute an admission of guilt for immigration purposes. However, as the crime charged does not involve moral turpitude, we need not determine whether her statement constitutes an admission of guilt under section 212(a)(2)(A)(i).

As noted above, the applicant was convicted on April [REDACTED] of retail theft under F.S. § 812.015 and was ordered to pay court costs and restitution in the amount of \$7.84, the cost of the stolen merchandise.

Fla. Stat. § 812.015 states in relevant part:

(d) “Retail theft” means the taking possession of or carrying away of merchandise, property, money, or negotiable documents; altering or removing a label, universal product code, or price tag; transferring merchandise from one container to another; or removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value.

Fla. Stat. § 812.014 (3)(a) provides that theft of any property valued at less than \$100 is “petit theft of the second degree and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, and as provided in subsection (5), as applicable.”

Florida Statutes § 775.082 provides, in pertinent part:

(4) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

....

(a) For a misdemeanor of the first degree, by a definite term of imprisonment not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days.

Even if we were we to find that the applicant’s retail theft conviction is a crime involving moral turpitude,³ we would also find that the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act applies. The exception applies where an alien has committed only one crime (involving moral turpitude) and the maximum penalty possible for that crime did not exceed imprisonment for one year, and the alien was not sentenced to imprisonment in excess of six months. Based on the record before us, the applicant was convicted of misdemeanor retail theft, and the maximum penalty for this crime under Florida law is imprisonment for one year. The applicant was not sentenced to imprisonment. Therefore, this offense would fall within the petty offense exception, and the conviction does not render the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

³ In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the Board of Immigration Appeals found that violation of a Pennsylvania retail theft statute involved moral turpitude because the nature of retail theft is such that it is reasonable to assume such an offense would be committed with the intention of retaining merchandise permanently.

As the offense defined by F.S. § 812.014 is neither a categorical crime involving moral turpitude nor divisible as defined in *Descamps* and *Chairez-Castrejon*, and where the applicant's retail theft conviction under F.S. § 812.015 would fall under the petty offense exception, we find that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the waiver application is not necessary.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. The appeal will be dismissed because the applicant is not inadmissible under section 212(a)(2)(A)(i) of the Act, and an application for a waiver of inadmissibility is therefore not required.

ORDER: The appeal is dismissed, as the application for a waiver of inadmissibility is unnecessary.