U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Avenue NW, MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 4 2015

FILE #:

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IN RE:

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

ON BEHALF OF APPLICANT:

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director of the Oklahoma City, Oklahoma Field Office denied the Application for Waiver of Grounds of Inadmissibility (Form I-601), and the matter is now before the Administrative Appeals Office (AAO) on appeal. As we find the applicant is not inadmissible, the director's decision will be withdrawn and the appeal dismissed as unnecessary.

The applicant is a native and citizen of Guatemala 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 crimes involving moral turpitude. He seeks a waiver of inadmissibility under 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 May 12, 2014, the director determined that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative if the applicant were denied admission to the United States. He denied the Form I-601 application accordingly.[1]

On appeal the applicant asserts, through counsel, that his grand theft conviction, in violation of Florida Statutes section 812.014, does not meet the definition of a crime involving moral turpitude based on recent U.S. Supreme Court and the Board of Immigration Appeals (BIA) decisions. He asserts further that pursuant to section 212(a)(2)(A)(ii)(II) of the Act, his second theft conviction qualifies as a petty offense which does not render him inadmissible. The applicant asserts , in the event that he is found to be inadmissible, that the director erroneously and detrimentally analyzed his application pursuant to criteria contained in section 212(i) of the Act, 8 U.S.C. § 1182(i), rather than criteria as set forth in section 212(h) of the Act. In addition, the applicant asserts, through counsel, that evidence in the record establishes that his wife and children would experience extreme hardship if he were denied admission into the United States.

The record includes, but is not limited to, briefs, documents establishing relationships and identity, affidavits, psychological evaluations,; financial evidence, letters attesting to the applicant's good moral character, and country-conditions information about Guatemala. The entire record was reviewed and considered in rendering a decision on the appeal.

As discussed in detail below, we concur with the applicant's assertions concerning his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (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 . . . is inadmissible.

[1] The record reflects that the applicant also filed a Form I-601 on February 26, 2009. The application was denied on September 29, 2012, and the applicant did not appeal the decision.

Section 212(h) of the Act provides, in pertinent part, that the Attorney General [now Secretary of the Department of Homeland Security (Secretary)] may, in his discretion, waive inadmissibility under section 212(a)(2)(A)(i)(I) of the Act:

> (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.[2]

The BIA 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. (Internal citations omitted.)

The record reflects, in pertinent part, the following criminal history for the applicant:

> On , 2007, the applicant was found guilty of Grand Theft, in violation of Florida Statutes (Fla. Stat.) § 812.014(2)(c)(1). He was sentenced to 24 months' probation; however, his probation was revoked on 2008, due to his violation of the probation terms.
>
> On 2008, the applicant was found guilty of Larceny – Petit Theft, First Offense, in violation of Fla. Stat. § 812.014(3)(a). He was ordered to pay fines and court-related fees.[3]

Fla. Stat. § 812.014, in effect at the time of the applicant's convictions, stated in relevant part:

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[2] The applicant asserts that the director erroneously analyzed his waiver application pursuant to criteria contained in section 212(i) of the Act rather than criteria as set forth in section 212(h) of the Act. Though the director incorrectly refers to section 212(i) of the Act, the error is harmless because the record does not reflect that he misapplied that law.

[3] The applicant also was found guilty of probation violation and two motor-vehicle related offenses. These offenses, however, are not crimes involving moral turpitude and do not affect the applicant's admissibility into the United States.

(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.

* * *

(3) (a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree[.]

For cases arising in the Eleventh Circuit, such as the applicant's case, 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)) and *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." *Jaggernauth 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 *Jaggernauth*, *supra*, at 1354-55). The Eleventh Circuit does not permit inquiry beyond the record of conviction. *See Fajardo*, *supra*, at 1310 (11th Cir. 2011).

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. 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 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.

The Supreme Court held in its 2013 decision, *Descamps v. United States,* 133 S. Ct. 2276 (2013), 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. The Supreme Court noted that the modified categorical approach was developed so that in cases where 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 that applied in the *Descamps* decision also applied in the immigration context. *See Matter of Chairez-Castrejon,* 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 purposes 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 . . . unanimously and beyond a reasonable doubt."[4] *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 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, in the present matter the applicant's convictions for grand and petit theft are not categorically crimes involving moral turpitude, in that the pertinent criminal statute 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

[4] 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.

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 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 find that the applicant was convicted of crimes involving moral turpitude.

As the offenses defined by Fla. Stat. § 812.014 are neither categorical crimes involving moral turpitude nor divisible as defined in *Descamps* and *Chairez-Castrejon*, *supra,* 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.[5]

ORDER: As the applicant is not inadmissible, the waiver application is declared unnecessary and the appeal is dismissed.

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[5] We find it unnecessary to address the applicant's assertion that his 2008 conviction for Larceny – Petit Theft falls under the petty offense exception contained in section 212(a)(2)(A)(ii)(II) of the Act, as the offense is a violation under Fla. Stat. § 812.014(3), which, as discussed in this decision, is not a crime involving moral turpitude.