



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

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

MATTER OF J-H-K-

DATE: NOV. 4, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Applicant, a native and citizen of Tanzania, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (INA, or the Act) § 212(h), 8 U.S.C. § 1182(h). The Director, Nebraska Service Center, denied the application. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the Applicant established extreme hardship to his qualifying relatives. Nevertheless, the Director denied the Form I-601 as a matter of discretion.

On appeal, the Applicant asserts that his favorable factors outweigh his unfavorable factors and therefore he is eligible for a waiver as a matter of discretion. In support, the Applicant submits a brief and documentation pertaining to his criminal convictions. The entire record was reviewed and considered in arriving at a decision on appeal.

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.

....

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was

convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (the Board) 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.

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 engage in 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 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 Short, 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,” we engage in a modified categorical inquiry. *Short, supra*, at 137-138. A criminal statute can be considered 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 v. United States*, 133 S. Ct. 2276, 2283 (2013)).

For the purpose of determining whether such 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.’ ” *Chairez-Castrejon, supra*, at 353 (quoting *Descamps, supra*, at 2288). Absent a requirement for jury unanimity, the disjunctive language of the statute merely expresses alternative “means” of committing the crime, rather than alternative “elements,” and the statute therefore is not divisible. *Chairez-Castrejon*,

(b)(6)

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supra, at 354. Consequently, a conviction under the statute would only be a crime of moral turpitude if moral turpitude necessarily inheres in each of the alternative means of committing the crime. *Id.*

If the statute is divisible, we then conduct a modified categorical inquiry by reviewing the record of conviction to determine which statutory phrase was the basis for the conviction. *See 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. *Louissant, 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 Applicant was convicted on [REDACTED] 2006 of domestic abuse assault resulting in injury in violation of Iowa Statutes § 708.2A(2)(b), and he was sentenced to six months in jail, one year of probation, and payment of restitution and court-related expenses. At the time of the Applicant’s conviction, Iowa Statutes § 708.2A(2)(b) stated:

1. For the purposes of this chapter, “domestic abuse assault” means an assault, as defined in section 708.1, which is domestic abuse as defined in section 236.2, subsection 2, paragraph “a”, “b”, “c”, or “d”.
2. On a first offense of domestic abuse assault, the person commits:
 - a. A simple misdemeanor for a domestic abuse assault, except as otherwise provided.
 - b. A serious misdemeanor, if the domestic abuse assault causes bodily injury or mental illness.

As the Applicant does not contest his inadmissibility for committing domestic abuse assault resulting in injury, and the record does not show the determination that this is a crime involving moral turpitude to be in error, we will not disturb the finding of inadmissibility under section 212(a)(2)(A) of the Act.

The Applicant was convicted on [REDACTED] 2003 of theft by check in the fourth degree in violation of Iowa Statutes § 714.1(6), and he was ordered to pay monetary penalties. At the time of the Applicant’s conviction, Iowa Statutes § 714.1(6) stated:

Makes, utters, draws, delivers, or gives any check, share draft, draft, or written order on any bank, credit union, person, or corporation, and obtains property, the use of property, including rental property, or service in exchange for such instrument, if the person knows that such check, share draft, draft, or written order will not be paid when presented.

Whenever the drawee of such instrument has refused payment because of insufficient funds, and the maker has not paid the holder of the instrument the amount due thereon within ten days of the maker's receipt of notice from the holder that payment has been refused by the drawee, the court or jury may infer from such facts that the maker knew that the instrument would not be paid on presentation. Notice of refusal of payment shall be by certified mail, or by personal service in the manner prescribed for serving original notices.

Whenever the drawee of such instrument has refused payment because the maker has no account with the drawee, the court or jury may infer from such fact that the maker knew that the instrument would not be paid on presentation.

The Board has held that issuance of a bad check constitutes a crime involving moral turpitude where intent to defraud or "guilty knowledge" is an essential element of the offense. *Matter of Bart*, 20 I&N Dec. 436, 437 (BIA 1992); *see also Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980). In *Matter of Colbourne*, 13 I&N Dec. 319 (BIA 1969), the Board there held that a conviction for drawing and delivering a worthless check in violation of Title 14, Section 835(a)(1) of the Virgin Islands Code was not a crime involving moral turpitude as the statute did not include the intent to defraud. *Matter of Colbourne*, at 320. The statute in that case stated:

- (a) Whoever makes, draws, utters, or delivers any check, draft or order for the payment of money
 - (1) to the value of \$100 or more upon any bank or other depository knowing at the time of such making, drawing, uttering or delivering that the maker or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full, upon its presentation, shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both[.]

We note that the language of this statute is nearly identical to the language of Iowa Statutes § 714.1(6). While knowledge of insufficient funds is an element in the above statute and in the language of Iowa Statutes § 714.1(6), intent to defraud is not an essential element of the crime in the above statute and in the language of Iowa Statutes § 714.1(6). Based on the relevant case law, we find that the Applicant's conviction under Iowa Statutes § 714.1(6) was not for a crime involving moral turpitude.

The record reflects that the Applicant has several other convictions and the Director did not find these to be crimes involving moral turpitude. We agree that his other convictions do not involve moral turpitude. Therefore, we find that the Applicant has been convicted of only one crime involving moral turpitude, specifically, serious misdemeanor charge of domestic abuse assault resulting in injury in violation of Iowa Statutes § 708.2A(2)(b). The maximum possible sentence under Iowa Statutes § 903.1(b) for a serious misdemeanor at the time the Applicant was convicted was one year and his sentence was not in excess of 6 months. He is therefore eligible for the petty

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offense exception under section 212(a)(2)(A)(ii) of the Act. The Applicant is thus not inadmissible under section 212(a)(2)(A) of the Act and his waiver application is unnecessary.

ORDER: The appeal is dismissed.

Cite as *Matter of J-H-K-*, ID# 12126 (AAO Nov. 4, 2015)