



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

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

MATTER OF E-A

DATE: APR. 8, 2016

APPEAL OF MIAMI, FLORIDA 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 the ground of inadmissibility for a crime involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). A foreign national seeking to be admitted to the United States as an immigrant or to adjust status to lawful permanent residence must be admissible or receive a waiver of inadmissibility. U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver if refusal of admission would result in extreme hardship to a qualifying relative or qualifying relatives; or, because the activities for which the foreign national is inadmissible occurred 15 years prior, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States and the foreign national has been rehabilitated.

The Field Office Director, Miami, Florida, denied the application. The Director found the Applicant 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, and concluded that the Applicant had not been rehabilitated and did not establish that his admission to the United States would not be contrary to the national welfare, safety, or security of the United States. The Director noted that that the Applicant has been arrested six separate times and most recently in 2013 for contempt.

The matter is now before us on appeal. In the appeal, the Applicant submits a brief and resubmits documentation concerning his 2013 arrest for contempt of court for non-payment of court-ordered child support. The Applicant states that his 2013 arrest did not lead to a conviction, and the Director erred in concluding he has not shown rehabilitation, as required for a waiver under section 212(h) of the Act.

Upon *de novo* review, we will dismiss the appeal. The matter will be remanded to the Director for further proceedings consistent with this opinion. The Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and does not require a waiver of inadmissibility.

(b)(6)

Matter of E-A-

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and was found inadmissible for a crime involving moral turpitude, specifically attempted burglary, possession of burglary tools, and criminal mischief. Section 212(a)(2)(A) of the Act provides, in pertinent parts:

(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 (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

II. ANALYSIS

The Director found the Applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude, citing the Applicant's convictions for attempted burglary, possession of burglary tools, and criminal mischief. As an initial matter, we must determine if any of the Applicant's convictions are in fact convictions for crimes involving moral turpitude. We find that they are not, and therefore the Applicant is not inadmissible under section 212(a)(A)(i)(I) of the Act and does not require a waiver of inadmissibility.

A. Inadmissibility

The record reflects that on [REDACTED] 1999, in the Eleventh Judicial Circuit Court in and for [REDACTED], Florida, the Applicant was convicted of attempted burglary (unoccupied), a third degree felony, in violation of Fla. Stat. § 810.02(3); possession of burglary tools, a third degree felony, in violation of Fla. Stat. § 810.06; and criminal mischief (\$200-\$999.99), a first degree misdemeanor, in violation of Fla. Stat. § 806.13(1)(b)(2). The Applicant was sentenced to 75 days imprisonment as a result of these convictions. The activities that led to this conviction occurred on [REDACTED] 1994.

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).

We will first look to the Applicant’s third degree felony conviction for attempted burglary, unoccupied, in violation of Fla. Stat. § 810.02, to determine whether the Applicant is inadmissible for that conviction under section 212(a)(2)(A)(i)(I). At the time of the Applicant’s conviction, 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 found that “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 the statutory text. 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*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Moncrieffe v. Holder*, 133 S.Ct. at 1684-1685; *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).. 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. Att’y Gen*, 735 F.3d at 1281 (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*, 810 F.3d 1262, 1269 (11th Cir. 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 attempted burglary conviction.

Next, we will look to the Applicant's conviction for criminal mischief), in violation of Fla. Stat. § 806.13(1)(b)(2). At the time of the Applicant's conviction, the Florida statute stated:

806.13. Criminal mischief; penalties; penalty for minor

(1) (a) A person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto.

(b) 1. If the damage to such property is \$200 or less, it is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

2. If the damage to such property is greater than \$200 but less than \$1,000, it is a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

A crime involving moral turpitude must involve intentional conduct and must be "inherently base, vile, or depraved" or "contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Perez-Contreras*, 20 I&N Dec. at 617-18. Here, "the offense of criminal mischief requires that the actor possess the specific intent to damage the property of another." *In the Interest of J.G.*, 655 So.2d 1284, 1285 (Fla. App. 4th 1995). The Board has found that property damage crimes, however, must also involve an aggravating element in order for moral turpitude to inhere. *See Matter of R-*, 5 I&N Dec. 612, 616 fn. 1 (BIA 1954) (finding as the aggravating element the use of explosives, in a statute that resulted in a conviction of a crime involving moral turpitude of an individual who "wantonly, willfully and maliciously, by ... explosive substances ... destroys, or attempts to destroy, damages or injures any property"); and *Matter of M-*, 3 I&N Dec. 272, 273 (BIA 1948) (involving a conviction under a statute that applied to those who "maliciously or wantonly kill, wound, disfigure, or injure any animal, the property of another," where the injuring of an animal was found to involve moral turpitude); *but see Matter of N-*, 8 I&N Dec. 466, 468 (BIA 1959) (finding statute penalizing property damage did not categorically involve moral turpitude due to being overly broad).

The Florida criminal mischief statute does not require an aggravating element and therefore does categorically punish only conduct that involves moral turpitude. We must then decide whether the statute is divisible. We find that it is not, in that it is overly broad, with the monetary amount of property damage being insufficient to determine whether the conduct involved moral turpitude. *See Descamps v. United States*, 133 S. Ct. at 2281. Accordingly, we find that the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for his conviction for criminal mischief.

Lastly, we 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 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. The statute at issue in the instant case does not categorically concern a crime involving moral turpitude. Even were we were to find that the statute is divisible, however, the record of conviction would support finding that the Applicant's conviction for attempted burglary, which accompanied his conviction for possession of burglary tools, did not involve moral turpitude. As a result, we do not find his conviction for possession of burglary tools to fall under section 212(a)(2)(A)(i)(I) of the Act.

B. Discretion

The Applicant's other convictions involved nonmoving traffic violations and contempt of court for non-payment of child support, neither of which make the Applicant inadmissible. The Applicant's arrest record and his detention for contempt, however, may be considered when evaluating his eligibility for discretionary benefits under the Act. We do not reach the issue of discretion here, as we find that the Applicant is not inadmissible. *See generally Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996).

III. CONCLUSION

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 therefore serves no purpose. As the Form I-601 is not necessary, the appeal will be dismissed, and the matter will be remanded for further proceedings consistent with this opinion.

Matter of E-A-

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 E-A-*, ID# 16206 (AAO Apr. 8, 2016)