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

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

MATTER OF R-R-P-

DATE: AUG. 26, 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 concluded that the Applicant did not have a qualifying relative, could not establish extreme hardship, and had failed to explain why he warranted a waiver as a matter of discretion.

The matter is now before us on appeal. In the appeal, the Applicant claims that his conviction was over 15 years ago and that he is not a danger to the national welfare or security of the United States. The Applicant also states that he has been a law abiding citizen and has maintained employment, he is a loving spouse and father, and he has been rehabilitated.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for a crime involving moral turpitude. Specifically, the Applicant was convicted of Grand Theft 3rd Degree and Uttering a Forged Instrument on [REDACTED] 1999. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible.

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Individuals found inadmissible under section 212(a)(2)(A) of the Act may seek a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(h) of the Act provides for a discretionary waiver where the activities occurred more than 15 years before the date of the application if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated (Section 212(h)(1)(A)), or if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter (Section 212(h)(1)(B)).

II. ANALYSIS

The issue presented on appeal is whether the Applicant has established eligibility for a waiver of inadmissibility pursuant to either section 212(h)(1)(A) or section 212(h)(1)(B) of the Act. The Applicant does not contest the finding of inadmissibility for a crime involving moral turpitude, a determination supported by the record for the uttering a forged instrument conviction. The record does not reflect that his conviction for grand theft in the third degree is a crime involving moral turpitude. The Applicant's spouse claims that the Applicant's removal would result in a disintegration of their family and harm their child. The record does not contain sufficient evidence demonstrating the Applicant has been rehabilitated. The record does not indicate whether the Applicant has a qualifying relative, and therefore it cannot be concluded that the Applicant has established extreme hardship to a qualifying relative. The appeal will be dismissed.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for crimes involving moral turpitude. Specifically, the Applicant was convicted of grand theft 3rd degree, in violation of Florida Statutes § 812.014(2)(C)(1), on [REDACTED] 1999, and uttering a forged instrument, in violation of Florida Statutes § 831.02, on [REDACTED] 1999.

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.” *Jaggernaut 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 divisible, i.e. contains elements rather than means, where the prosecutor would specifically charge one alternative as opposed to the other and the jury would agree unanimously to convict on the basis of that alternative. *Id.* at 1245-46 (citing *Descamps, supra*, at 2289-90); *see also U.S. v. Lockett*, 810 F.3d 1262, 1268-69 (11th Cir. 2016).

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 *Jaggernaut*, *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. *Estrella, supra*, at 1246 (citing *Descamps, supra*, at 2287).

Fla. Stat. § 812.014 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. To constitute a crime involving moral turpitude, the BIA 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.

Pursuant to the Florida 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. The statute is not divisible because, rather than describing two separate types of theft offenses, it describes different means to commit the one offense. We therefore conclude that because Fla. Stat. § 812.014 is not categorically a crime involving moral turpitude and is not divisible, the Applicant’s conviction for grand theft is not a crime involving moral turpitude.

The Applicant was also convicted of uttering a forged instrument under Fla. Stat. § 831.02, which at the time of the Applicant’s conviction prohibited “[uttering or publishing] as true a false, forged or altered record, deed, instrument . . . knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person.” The Applicant does not contest that he is inadmissible for having been convicted of a crime involving moral turpitude, and we concur with the Director’s determination that the Applicant’s conviction for uttering a forged instrument is a crime involving moral turpitude, rendering him inadmissible under section 212(a)(2)(A) of the Act.

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B. Waiver

The activities resulting in the Applicant's uttering a forged instrument conviction occurred on [REDACTED] 1997, more than 15 years ago. Consequently, the Applicant may demonstrate eligibility for a waiver of inadmissibility pursuant to section 212(h)(1)(A) of the Act. To meet the requirements of section 212(h)(1)(A) of the Act, the Applicant must show that 1) admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and 2) the Applicant has been rehabilitated.

The record includes court records for the Applicant's criminal convictions, a letter from the Applicant's spouse, a letter from a childhood friend of the Applicant, and tax returns.

The letter from the Applicant's spouse states the Applicant is a peaceful and respectful person and that he regrets all of the mistakes he made 15 years ago. The second letter in the record is from a childhood friend of the Applicant and states that the Applicant lived with her family when he first arrived and that she looked up to him as an older brother. The letter from the Applicant's spouse only makes one brief statement that the Applicant regrets mistakes he made 15 years ago. The second letter does not address whether the Applicant has been rehabilitated.

The record contains copies of police and court records pertaining to the Applicant's criminal record. It has been 15 years since the conduct that rendered the Applicant inadmissible. The record indicates the Applicant was also convicted of driving under the influence in 1998 and that he violated the terms of his probation for his uttering a forged instrument conviction and was sentenced to 9 months in a county jail on [REDACTED] 2000. He also repeatedly failed to appear in court for these and other charges. There is no statement from the Applicant expressing his remorse or explaining how he has been rehabilitated. Without additional evidence demonstrating the Applicant's rehabilitation, the single, brief statement from the Applicant's spouse is not sufficient to demonstrate that he has been rehabilitated. We do not find the record to support a determination the Applicant has been rehabilitated as required by section 212(h)(1)(A) of the Act.

Next, we will address eligibility for a waiver under section 212(h)(1)(B) of the Act. The Applicant must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, the record is not clear that the Applicant has a qualifying relative or what hardships any such qualifying relative would experience due to the Applicant's inadmissibility. The Applicant's spouse has submitted a brief statement claiming that if the Applicant is deported, their family will disintegrate and she and her son will be affected emotionally. The record indicates that the Applicant's spouse and stepson have applied for lawful permanent resident status, but does not indicate that they have been granted this status. The Applicant has therefore not established that he has a qualifying relative for a waiver under section 212(h)(1)(B) of the Act.

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The Applicant has not met his burden of establishing that he is eligible for a waiver under section 212(h) of the Act. As the Applicant has not demonstrated that he has been rehabilitated or that denying him admission would result in extreme hardship to a qualifying relative under section 212(h)(1)(B) of the Act, we need not consider whether the Applicant warrants a waiver in the exercise of discretion.

III. CONCLUSION

The Applicant has the burden of proving eligibility for a waiver of inadmissibility. *See* section 291 of the Act, 8 U.S.C. § 1361. The Applicant has not met that burden. The record does not demonstrate that the Applicant has established that he is eligible for a waiver under section 212(h)(1)(A) or (B) of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of R-R-P-*, ID# 16872 (AAO Aug. 26, 2016)