



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

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

MATTER OF E-A-H-

DATE: FEB. 3, 2016

APPEAL OF LOS ANGELES FIELD OFFICE DECISION

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

The Applicant, a native and citizen of El Salvador, seeks a waiver of inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Director, Los Angeles, California Field Office, denied the application. The matter is now before us on appeal. The appeal will be sustained.

The Applicant was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

In a decision dated May 19, 2014, the Director concluded that the evidence did not establish extreme hardship to the Applicant's qualifying relatives or that he is rehabilitated. The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, the Applicant asserts that his last offense was over 15 years ago, so he does not have to establish extreme hardship because he has been rehabilitated and that his admission would not be contrary to the national welfare, safety, and security of the United States. Alternatively, he asserts that his spouse, a U.S. lawful permanent resident, and his mother, a U.S. citizen, would suffer extreme hardship if his waiver application is denied.

We issued a notice of intent to dismiss the appeal, to advise the Applicant that he was subject to 8 C.F.R. § 212.7(d), because his convictions for sexual battery were for violent or dangerous crimes.

In response to our notice, the Applicant asserts that he was not convicted of a crime of violence, that his family members would experience exceptional and extremely unusual hardship if his application were not approved, and that he merits a favorable exercise of discretion.

The record includes, but is not limited to: briefs; letters written by the Applicant, his family members, employer, and friends; documentation regarding the Applicant's criminal history; identification and relationship documentation; school records; financial documentation; and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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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.

The Board of Immigration Appeals (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.

(Citations omitted.)

The record indicates that on [REDACTED] 1991, the Applicant was convicted in the Circuit Court of [REDACTED] Virginia, of three counts of grand larceny, a felony in violation of Va. Code Ann. § 18.2-95. On [REDACTED] 1991, the Applicant was sentenced to serve two years on each count for a total of six years. Sixteen months of the sentence were suspended conditioned upon the Applicant's good behavior. On [REDACTED] the court found that the Applicant had violated the terms of his probation, and the court ordered that all 16 months of the suspended sentence be revoked and the Applicant to serve 16 months in the state penitentiary.

At the time of the Applicant's conviction, Va. Code Ann. § 18.2-95, provided, in pertinent parts:

Any person who:

- (i) commits larceny from the person of another
- (ii) commits simple larceny not from the person . . . of goods and chattels of the value of \$200 or more,
- . . .

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shall be guilty of grand larceny.

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."). *See also In re Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006) (In determining whether theft is a crime of moral turpitude, the BIA considers "whether there was an intention to permanently deprive the owner of his property.").

The offense of larceny is not defined in Va. Code Ann. § 18.2-95. However, the Virginia Supreme Court held in *Tarpley v. Commonwealth*, 261 Va. 251, 256, 542 S.E. 2d 761, 763-64 (2001) that, "[l]arceny, a common law crime, is the wrongful or fraudulent taking of another's property without his permission and with the intent to deprive the owner of that property permanently." (citations omitted). *See also Burton v. Com.*, 708 S.E.2d 444, 58 Va.App. 274 (2011).

In the instant case, the statute under which the Applicant was convicted, Va. Code Ann. § 18.2-95, involves permanent takings. As grand larceny under Va. Code Ann. § 18.2-95 requires an intention to permanently deprive the owner of property, we find that a violation of Va. Stat. § 18.2-95 is categorically a crime involving moral turpitude. *See also Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014) (Virginia larceny statute is "indivisible as a matter of law" and only the categorical approach applies). Accordingly, the Applicant is inadmissible under section 212(a)(2)(A)(i) of the Act.

The record also reflects that on [REDACTED] 1991, the Applicant was arrested and charged with three counts of aggravated sexual assault. On [REDACTED] 1992, he was convicted of two counts of sexual battery in violation of Va. Code Ann. § 18.2-67.4.¹ At the time of his conviction, Va. Code Ann. § 18.2-67.4 read as follows:

An accused shall be guilty of sexual battery if he or she sexually abuses the complaining witness against the will of the complaining witness, by force, threat, or intimidation, or through the use of the complaining witness's mental incapacity or physical helplessness.

For cases arising in the Fourth Circuit, to determine whether a conviction is for a crime involving moral turpitude, we first apply the categorical approach. *Prudencio v. Holder*, 669 F.3d 472, 484-485 (4th Cir. 2012) (citing *Taylor v. United States*, 495 U.S. 575, 600-01 (1990)). This requires "look[ing] only to the statutory definition of the state crime and the fact of conviction to determine whether the conduct criminalized by the statute, including the most innocent conduct, qualifies as a [crime involving moral turpitude]." *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008)

¹ The Director stated that the Applicant was convicted of aggravated sexual assault/battery. This portion of the Director's decision shall be withdrawn.

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(citing *Taylor, supra*, at 599-601) (applying the categorical approach to determine whether a conviction is for a crime of violence).

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 of the record of conviction. *Matter of Short, supra*, at 137-138; *see also Prudencio, supra*, at 484-85 (citing *Taylor, supra*, at 602). 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). For the purpose of determining whether such a statute is truly divisible, an offense’s elements are those facts about the crime which “a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.” *Descamps, supra*, at 2288; *see also Omargharib v. Holder*, 775 F.3d at 196-199 (finding theft offense not to be divisible, and thus not an aggravated felony, because jury instructions did not require jury to find unanimously that the taking was “fraudulent” rather than “wrongful”). 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. *Omargharib, supra*, at 199.

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. *See Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009); *see also Shepard v. U.S.*, 544 U.S. 13, 16 (2005). Limiting the review to the record of conviction prevents adjudicators from “finding facts about a past crime under the guise of determining the nature of the crime.” *Diaz-Ibarra, supra*, at 348 (citing *Shepard, supra*, at 24-26). 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 underlying the conviction. *See Descamps, supra*, at 2287.

In *In re Samudo*, 23 I&N Dec. 968 (BIA 2006), the BIA noted that, “we have recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability.” *Id.* at 971. Va. Stat. § 18.2-67.4 includes the types of “aggravating” factors that would cause us to find that the conduct at issue represents an inherently base, vile, or depraved act. Sexually abusing a victim by force, threat or intimidation or through the use of the victim’s mental incapacity or physical helplessness represents a vile and depraved act. We find that the Applicant’s convictions under Va. Stat. § 18.2-67.4 are categorically crimes involving moral turpitude. The Applicant does not contest the finding of inadmissibility.

The record also reflects that on [REDACTED] 1992, the Applicant was charged with malicious wounding which resulted in his conviction on [REDACTED] 1992, for assault and battery. He was sentenced to 12 months in jail with 8 months suspended, conditioned upon good behavior and keeping the peace.²

² Given that we have determined that the Applicant has been convicted of two crimes involving moral turpitude, we will not analyze whether his conviction for assault and battery is also a crime involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part:

The Attorney General [now Secretary of Homeland Security (Secretary)] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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.

The record supports finding the Applicant has met the requirements for a waiver under section 212(h)(1)(A) of the Act. First, the Applicant's most recent conviction for a crime involving moral turpitude occurred in 1991, more than 15 years ago. Second, the record supports a finding of rehabilitation given his lack of criminal activity for the past 23 years, his expressions of remorse for his criminal conduct, his work history, statements attesting to his being a reliable and hard worker, and statements reflecting his close family ties and his family's reliance on him. Finally, the record contains no evidence to support concluding that the Applicant's admission to the United States would be contrary to U.S. national welfare, safety, or security. We therefore conclude that the Applicant meets the requirements for a waiver under section 212(h)(1)(A) of the Act.

Once eligibility for a waiver is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion in favor of the waiver. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996) (*en banc*). A favorable exercise of discretion is limited in the case of an applicant who has been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d) states:

The [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act (8 U.S.C. 1182(h)(2)) to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the

Act in cases involving violent or dangerous crimes, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the alien's underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The words "violent" and "dangerous" and the phrase "violent or dangerous crimes" are not further defined in the regulation, and we are aware of no precedent decision or other authority containing a definition of these terms as used in 8 C.F.R. § 212.7(d). A similar phrase, "crime of violence," is found in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under that section, a crime of violence is an aggravated felony if the term of imprisonment is at least one year. As defined by 18 U.S.C. § 16, a crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, *or* any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. We note that the Attorney General declined to reference section 101(a)(43)(F) of the Act or 18 U.S.C. § 16, or the specific language thereof, in 8 C.F.R. § 212.7(d). Thus, we find that the statutory terms "violent or dangerous crimes" and "crime of violence" are not synonymous and the determination that a crime is a violent or dangerous crime under 8 C.F.R. § 212.7(d) is not dependent on it having been found to be a crime of violence under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

Nevertheless, we will use the definition of a crime of violence found in 18 U.S.C. § 16 as guidance in determining whether a crime is a violent crime under 8 C.F.R. § 212.7(d), considering also other common meanings of the terms "violent" and "dangerous". The term "dangerous" is not defined specifically by 18 U.S.C. § 16 or any other relevant statutory provision. Thus, in general, we interpret the terms "violent" and "dangerous" in accordance with their plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d). For example, Black's Law Dictionary, Eighth Edition (2004), defines violent as "[o]f, relating to, or characterized by strong physical force," "[r]esulting from extreme or intense force," or "[v]ehemently or passionately threatening," and dangerous as "perilous; hazardous; unsafe" or "likely to cause serious bodily harm." Decisions to deny waiver applications on the basis of discretion under 8 C.F.R. § 212.7(d) are made on a factual "case-by-case basis." 67 Fed. Reg. at 78677-78.

In our notice of intent to dismiss the appeal, we cited *Wireko v. Reno*, 211 F.3d 833 (4th Cir. 2000), a decision in which a crime under this statute had been found to be a "crime of violence." In his response to our notice of intent to dismiss, the Applicant asserts that the U.S. Court of Appeals for the Ninth Circuit held, in *Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015), that the term

“crime of violence” is unconstitutionally vague and to use it, even as additional guidance, would violate his due process rights. Constitutional issues are not within our appellate jurisdiction; therefore this assertion will not be addressed in the present decision.

As stated above, the statutory term “crime of violence” is not synonymous with “violent or dangerous crimes” in 8 C.F.R. § 212.7(d), and we are not limited by determinations concerning whether a statutory crime is a “crime of violence” under 18 U.S.C. § 16 or an aggravated felony under section 101(a)(43)(F) of the Act. *See* 67 Fed. Reg. 78675, 78677-78 (December 26, 2002).

The inclusion of the term “dangerous” further signals that even crimes not marked by actual or physical force against the victim, but that may cause serious harm or are otherwise unsafe or hazardous, also trigger the requirements of 8 C.F.R. § 212.7(d). As stated above, in considering whether a crime is violent or dangerous, we will interpret these terms in accordance with other plain or common meanings, and consistent with any rulings found in published precedent decisions addressing discretionary denials under the standard described in 8 C.F.R. § 212.7(d).

Our inquiry pursuant to 8 C.F.R. § 212.7(d) is not an inquiry into whether a crime is a crime of violence and therefore an aggravated felony. It is the Applicant’s burden to demonstrate that he warrants a favorable exercise of discretion, and the Applicant has not presented facts or controlling legal authority to show that his crime was not a violent or dangerous crime. The plain language of the statute supports concluding that the Applicant’s conviction was, at a minimum, a dangerous offense, because it requires a physical violation that likely would result in physical or emotional harm, which the victim is unable to prevent. Therefore, we find that the Applicant is subject to 8 C.F.R. § 212.7(d).

In discussing the lower “extreme hardship” standard, the Board has stated that the definition “is not . . . fixed and inflexible;” rather the determination is based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (en banc). Relevant factors include: the presence of family ties to U.S. citizens or lawful permanent residents in the United States; family ties outside the United States; country conditions where the qualifying relative would relocate and family ties in that country; the financial impact of departure; and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 565-66. Additionally, extreme hardship to the qualifying relative must be established in the event that he or she remains in the United States, and in the event that he or she accompanies the applicant to the home country. *See id.* at 565-68 (considering the hardships of family separation and relocation). In order to show “exceptional and extremely unusual hardship,” the applicant must show more than “extreme hardship.” *See Matter of Monreal-Aguinaga*, 23 I&N Dec. 56, 62 (BIA 2001) (en banc) (holding in cancellation of removal case that the “standard requires a showing of hardship beyond that which has historically been required in suspension of deportation cases involving the ‘extreme hardship’ standard”). The hardship “must be substantially beyond the ordinary hardship that would be expected when a close family member leaves this country,” and is “limited to truly exceptional

situations.” *Id.* (internal quotation marks omitted). However, the applicant need not show that hardship would be unconscionable. *Id.* at 60.

Therefore, the Applicant is subject to the heightened discretionary standard under 8 C.F.R. § 212.2(7). Accordingly, to demonstrate that he merits a waiver in the exercise of discretion, the Applicant must show that “extraordinary circumstances” warrant approval of the waiver. Extraordinary circumstances may exist in cases involving national security or foreign policy considerations, or if the denial of the applicant’s admission would result in exceptional and extremely unusual hardship to a qualifying relative. The Applicant’s case does not involve national security or foreign policy considerations; therefore we will consider whether he has shown exceptional and extremely unusual hardship to a qualifying relative. The Applicant’s qualifying relatives include his U.S. citizen mother and children and his lawful permanent resident spouse.

On appeal, the Applicant contends that his spouse will suffer hardship if they are separated due to his removal. The Applicant explains that his spouse is a native of Mexico and has lived in the United States for more than 20 years. She became a lawful permanent resident in 1993. In a letter the Applicant’s wife states that she and the Applicant have three children and one grandchild who reside with them. She further states that all three children attend school and she relies upon the Applicant, who plays an active role in the family, to help care for them. She explains that he manages household needs and chores while she works and that he also supervises the children’s school work and recreational activities. She adds that the Applicant picks her up from work, as she does not drive, indicating her livelihood is tied to the Applicant’s ability to assist her.

While the record lacks details to corroborate claims of financial hardship, family members indicate that they need the financial support of both the Applicant and his spouse. The Applicant’s spouse states that they have often “gone to bed without having a meal” and that she has sought government assistance in the past, during periods of the Applicant’s unemployment. She asserts that if the Applicant were removed to El Salvador, he would be unemployed permanently, thereby causing her financial hardship because she would need to support him in addition to their children. She expresses concern that because he lacks professional contacts or friends there and may experience age discrimination, his employment opportunities are limited. She further asserts that traveling to El Salvador to visit him would impose a financial hardship. The Applicant’s children add that without his financial assistance, they would not be able to attend school.

The Applicant also asserts that his 67 year-old U.S. citizen mother would suffer hardship if they are separated because she relies on the Applicant, who takes her to medical appointments and provides her with food and shelter. The evidence indicates that the Applicant’s mother takes medication for high blood pressure.

In addition, the record contains supporting letters from the Applicant’s children, which demonstrate the strong family bond they have with the Applicant. The Applicant’s children credit him with encouraging them to study hard and strive for college; they consider the Applicant a role model and cannot see themselves living without him. The Applicant’s spouse is concerned that, should the

Applicant be removed, his relationship with their children “will break apart.” The Applicant’s children were all born in the United States. The Applicant’s spouse states that her two sons especially need the Applicant as a positive role model. The Applicant asserts that his 20 year-old daughter is the mother of a young child. On appeal, the Applicant submits a Migration Policy Institute report analyzing the harm children experience as a result of a parent’s deportation, including emotional harm, financial stress, housing instability, and declining school performance.

Family separation is an important factor in evaluating hardship. In *Salcido-Salcido v. INS*, 138 F.3d 1292 (9th Cir. 1998), the Ninth Circuit discussed the effect of emotional hardship on the foreign national and her husband and children as a result of family separation, stating that “the most important single hardship factor may be the separation of the alien from family living in the United States” and that there must be a careful appraisal of “the impact that deportation would have on children and families.” *Id.* at 1293. Furthermore, the Ninth Circuit indicated that “considerable, if not predominant, weight,” must be attributed to the hardship that will result from family separation. *Id.*

The asserted hardship factors in this case are emotional hardship as a result of separation from the Applicant, concern about the Applicant’s well-being given conditions in El Salvador, and loss of physical and financial support. The Applicant has shown that multiple qualifying relatives would experience several types of hardship as a result of their separation from him. Taking into account the hardship in the aggregate, the Applicant has demonstrated that his family would experience exceptional and extremely unusual hardship.

Regarding hardship the Applicant’s qualifying relatives would experience if they were to relocate with him to El Salvador, the evidence indicates that the Applicant’s mother, spouse, and children have significant community, social, academic, family, and medical ties to the United States. The Applicant’s spouse has lived in the United States for more than 20 years. The Applicant’s mother has lived in the United States since 1974, for more than 40 years. His children were born in the United States and have never lived outside this country. The Applicant’s mother, wife, and children have extended family here.

The Applicant’s spouse, age 43, explains she has never lived in El Salvador, as she is a native of Mexico; she has no family ties to El Salvador; and four of her siblings reside in the United States. She states that she is concerned about the availability of affordable health care and the high crime rate in El Salvador. She adds that the Applicant lacks family and professional connections there, which will add to their financial hardship, if they were to relocate together.

The Applicant submits a news article that outlines the difficulties deportees have in adjusting to life in El Salvador, including being branded as criminals. He also submits a Physicians for Human Rights report indicating that overwhelming violence and criminality permeate El Salvador, and children are exposed to gang violence and pressure to join gangs. The same report states that violence against women is rife and women face job discrimination. Two additional reports emphasize the widespread incidence of violent crime.

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Given the Applicant's qualifying relatives' years in the United States, their ties to this country, their lack of ties to El Salvador, the financial difficulties that will result upon relocation, and the level of discrimination and violence they would encounter in El Salvador, we conclude that the Applicant has demonstrated that if his qualifying relatives joined him to live in El Salvador, their hardship would rise to the level of "exceptional and extremely unusual hardship," as required in 8 C.F.R. § 212.7(d).

The Applicant established his eligibility for a waiver under section 212(h)(1)(A) of the Act, and he has demonstrated that he merits a favorable exercise of discretion under 8 C.F.R. § 212.7(d).

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.

ORDER: The appeal is sustained.

Cite as *Matter of E-A-H-*, ID# 12225 (AAO Feb. 3, 2016)