



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

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

MATTER OF C-A-A-

DATE: FEB. 9, 2016

APPEAL OF KENDALL 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 inadmissibility. *See* Immigration and Nationality Act (the Act) § 212(h), 8 U.S.C. § 1182(h). The Field Office Director, Kendall, Florida, denied the application. The matter is now before us on appeal. The appeal will be dismissed and remanded to the Director for further proceedings consistent with the foregoing opinion.

The Applicant was found to be 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 been convicted of crimes involving moral turpitude.

The Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, finding the evidence insufficient to establish extreme hardship to a qualifying relative.

On appeal, the Applicant asserts that following the decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), he is not inadmissible for having been convicted of crimes involving moral turpitude and alternatively, his lawful permanent resident spouse and mother would suffer extreme hardship if he is removed.

The record includes, but is not limited to: a brief; identity and relationship documents; statements from the Applicant, his mother, wife, and siblings; criminal records; financial records; and copies of legal decisions. The entire record was reviewed and considered in rendering this decision.

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

- (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.

(b)(6)

*Matter of C-A-A-*

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.

The record reflects that on [REDACTED], 2011, the Applicant was convicted of trespass and petit theft in the Circuit Court, Twentieth Judicial Circuit in and for [REDACTED] Florida, in violation of Fla. Stat. §§ 810.08(2)(a) and 812.014(3)(a). The Applicant was sentenced to serve six months of probation and fined. The Applicant also was convicted of larceny—grand theft in the third degree in the Circuit Court of the Twentieth Judicial Circuit in and for [REDACTED] Florida, in violation of Fla. Stat. § 812.014(2)(c)(1). The record reflects that the Applicant was sentenced to serve twelve months of probation, fined, and ordered to pay restitution.

At the time of the Applicant's convictions, Fla. Stat. § 812.014 stated in relevant part:

(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) Appropriately 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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, 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, 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 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 individual] 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 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 *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. *See Estrella, supra*, at 1246 (citing *Descamps, supra*, at 2287)

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 Board 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.”) .

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 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’s convictions of grand theft and petit theft were for 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*, the Applicant’s convictions for grand and petit theft

cannot be deemed to be convictions for crimes involving moral turpitude.

Next we will analyze whether the Applicant's conviction for trespass is a crime involving moral turpitude. At the time of the Applicant's conviction, Fla. Stat. § 810.08 read:

Trespass in structure or conveyance

(1) Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.

(2)(a) Except as otherwise provided in this subsection, trespass in a structure or conveyance is a misdemeanor of the second degree . . . .

With regard to the Applicant's trespass conviction, in *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979), malicious trespass was found to involve a crime involving moral turpitude, as it involved the intent to commit petit larceny, which at the time was considered a crime involving moral turpitude. Under Fla. Stat. § 810.08(2)(A), the Applicant's trespass conviction did not involve the intent to commit petit larceny or any crime involving moral turpitude. Therefore we find that the Applicant's trespass conviction does not involve a crime involving moral turpitude.

The Director's determination that the Applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act is withdrawn. Therefore, the waiver application is unnecessary, and it is not necessary to address whether the Applicant established extreme hardship to a qualifying relative.

In the present case, the record does not establish that the Applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act. The Applicant's waiver application is thus unnecessary and the appeal will be dismissed.

**ORDER:** The appeal is dismissed. The matter is remanded to the Field Office Director, Kendall Field Office, for further proceedings consistent with the foregoing opinion.

Cite as *Matter of C-A-A-*, ID# 14888 (AAO Feb. 9, 2016)