



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

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

MATTER OF Y-P-P-

DATE: JAN. 28, 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) of the Act, 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 this decision.

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 Applicant is seeking to become a lawful permanent resident under the Cuban Adjustment Act.

In a decision dated September 17, 2014, the Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, finding that the evidence was insufficient to establish that the Applicant's bar to admission would impose extreme hardship to his U.S. citizen spouse and children.

On appeal, the Applicant asserts that he is not inadmissible and that his family members would suffer extreme hardship if he is removed from the United States. He further asserts that his serious crimes occurred more than 15 years ago and his more recent convictions were not for crimes involving moral turpitude.

The record contains, but is not limited to: statements from the Applicant's wife, uncle, and friend; identity and relationship documents; school records of the Applicant's son; a psychosocial assessment of the Applicant, his wife, and their children; financial records; the Applicant's arrest and conviction records; and a report on conditions in Cuba. The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(2) of the Act states that:

(A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

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- (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-

- (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

- (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 (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.

(Citations omitted.)

The record shows that the Applicant was convicted in the Eleventh Judicial Circuit Court in and for [REDACTED] Florida, on [REDACTED] 1997, on four counts of grand theft, third degree, in violation of Fla. Stat. § 812.014(2)(c)(1). On [REDACTED] 2003, the Applicant was convicted by the same court for petit larceny in violation of municipal ordinance 25/25, for which adjudication was withheld. He was ordered to pay a fine. On [REDACTED] 2007, the Applicant was convicted for the offense of criminal mischief in violation of Fla. Stat. § 806.13(1)(b); trespass in violation of Fla. Stat. §

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810.09(2)(a); and grand theft in violation of Fla. Stat. § 812.014. For these offenses the Applicant was sentenced to probation for 18 months and ordered to pay restitution in the Twentieth Judicial Circuit Court in and for [REDACTED] Florida.<sup>1</sup>

Fla. Stat. § 812.014, as in effect at the time of the Applicant's convictions, states, 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) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

For cases arising in the Eleventh Circuit, the determination of whether a conviction is a crime involving moral turpitude requires a categorical inquiry into “the statutory definitions of the . . . offenses, and not to the particular facts underlying those convictions.” *Fajardo v. Attorney General*, 659 F.3d 1301, 1305 (11th Cir. 2011) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). However, if the statutory definition of a crime includes “conduct that would categorically be grounds for removal [or inadmissibility] as well as conduct that would not, then the record of conviction – i.e., the charging document, plea, verdict, and sentence – may also be considered.” 659 F.3d at 1305 (citing *Jaggernaut v. U.S. Att’y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005)).

In the instant case, the Florida statute under which the Applicant was convicted involves both temporary and permanent takings. 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.”). Therefore, we cannot find that a violation of Fla. Stat. § 812.014 is categorically a crime involving moral turpitude.

In a 2013 decision, the Supreme Court held 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. *Descamps v. United States*, 133 S. Ct. 2276 (2013). The Court noted that the modified categorical approach was developed so that when a statute was divisible and referred to several different crimes, “courts could discover which statutory phrase, contained within a statute

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<sup>1</sup> The Applicant was also convicted of driving with a suspended license, trespass, and littering, but these convictions are not a basis of inadmissibility.

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 because the 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 determine that the Applicant was convicted of crimes involving moral turpitude.

As the offense defined by Fla. Stat. § 812.014 is neither a categorical crime involving moral turpitude nor divisible, we find that the Applicant is not inadmissible for his theft convictions.

The next issue is whether the Applicant’s conviction for the offense of criminal mischief in violation of Fla. Stat. § 806.13(1)(b). At the time of the Applicant’s conviction, Fla. Stat. § 806.13 read:

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 . . . .

We are unaware of any published caselaw addressing whether the crime of criminal mischief under Florida law is a crime of moral turpitude. However, in *Matter of N-*, 8 I&N Dec. 466 (BIA 1959), the Board found that Delaware’s malicious mischief statute encompassed crimes that did and did not involve moral turpitude, and the record of conviction did not show the conduct was “inherently base or depraved.” *Id.* at 468. Moreover, the Board found that the malicious mischief of breaking the glass in a door and damaging a mailbox were not crimes involving moral turpitude in *Matter of C-*, 2 I&N Dec. 716 (BIA 1947) and in *Matter of B-*, 2 I&N Dec. 867 (BIA 1947). According to Fla. Stat. § 806.13, any person who willfully and maliciously injures or damages any property is guilty of the offense. We do not find that the statutory language pertains to conduct that is inherently base, vile, or depraved. Accordingly, we conclude that the Applicant’s malicious mischief conviction for damaging property under Fla. Stat. § 806.13 is not for a crime 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. § 810.09 read:

Trespass on property other than structure or conveyance

(1)(a) A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure or conveyance:

. . . or

2. If the property is the unenclosed curtilage of a dwelling and the offender enters or remains with the intent to commit an offense thereon, other than the offense of trespass,

commits the offense of trespass on property other than a structure or conveyance.

A conviction under Fla. Stat. § 810.09(2)(a) does not explicitly require that the prohibited act be accompanied by a malicious intent. Though the statute includes penalizing offenders who intend “to commit an offense . . . other than the offense of trespass,” the statute does not distinguish between offenses involving moral turpitude and other offenses. In the instant case, we have concluded that the record does not establish that the Applicant’s convictions for grand and petit theft were for crimes involving moral turpitude; therefore the record does not show that he committed trespass with intent to commit such crimes.

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The record establishes that the Applicant was not convicted of a crime involving moral turpitude. Accordingly, we find that the Applicant is not inadmissible. The Applicant's waiver of inadmissibility application is thus moot and the Director's decision will be withdrawn.

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

Cite as *Matter of Y-P-P-*, ID# 12325 (AAO Jan. 28, 2016)