U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-A-W-H-

DATE: JULY 19, 2016

APPEAL OF OAKLAND PARK, FLORIDA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Jamaica, seeks a waiver of the ground of inadmissibility for crimes involving moral turpitude. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). The Applicant also seeks a waiver of inadmissibility for fraud or misrepresentation. *See* section 212(i) of the Act, 8 U.S.C. § 1182(i). 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.

The USCIS Director, Oakland Park, Florida Field Office, denied the application, finding that the Applicant was not eligible to adjust her status to that of a lawful permanent resident under section 245(a) of the Act, 8 U.S.C. § 1255(a), as she had not established that she had been inspected and admitted to the United States with fraudulent entry documents or that she was exempt from that requirement. The Director also stated that since the Applicant was not eligible to adjust to lawful permanent resident status, she was not eligible for a waiver. Finally, the Director concluded that the Applicant had not shown that her qualifying relatives would experience extreme hardship if her waiver application were denied.

The matter is now before us on appeal. In the appeal, the Applicant submits a brief and additional evidence. She claims that the Director erred in finding her inadmissible for crimes involving moral turpitude and ineligible for adjustment of status. She also asserts that the Director erred when he determined that she had not established that her spouse would suffer extreme hardship if her application was denied.

Upon *de novo* review, we will dismiss the appeal, because the Applicant is not inadmissible.

I. LAW

The Applicant is seeking to adjust status to lawful permanent resident and has been found inadmissible for crimes involving moral turpitude, specifically, for her two convictions for petit theft. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national

convicted of a crime involving moral turpitude is inadmissible. 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).

The Applicant has also been found inadmissible for fraud or misrepresentation under section 212(a)(6)(C)(i) of the Act, because she claims that she presented a photo-substituted passport to procure admission into the United States. Section 212(a)(6)(C)(i) of the Act renders inadmissible any foreign national who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act.

Section 212(i) of the Act, 8 U.S.C. § 1182(i), provides for a waiver of this inadmissibility if refusal of admission would result in extreme hardship to the United States citizen or lawful permanent resident spouse or parent of the foreign national.

II. ANALYSIS

The Applicant filed her waiver application concurrently with an adjustment of status application.[1] The Director denied both applications, finding that she had not shown that she had been inspected and admitted into the United States and therefore could not adjust to lawful permanent resident status. The Applicant asserts that she was inspected and admitted into the United States and that she is inadmissible for fraud or misrepresentation, because she used fraudulent documents when she was admitted. The Applicant does not support her assertions that she used fraudulent documents to procure admission into the United States with documentary evidence. The evidence the Applicant provides to show that she was admitted into the United States under an assumed identity or with fraudulent documents consists of sworn statements. The Applicant has not established that she was admitted with fraudulent documents and is therefore inadmissible for fraud or misrepresentation.

The Applicant further asserts that she is not inadmissible for her convictions of crimes involving moral turpitude. We agree that the Applicant is not inadmissible for her two petit theft convictions, because she was not convicted of crimes involving moral turpitude.

[1] As the Applicant states on appeal, the Director's decisions denying both applications address overlapping issues concerning the Applicant's eligibility to adjust to lawful permanent resident status and her inadmissibilities necessitating a waiver. In addition, the Applicant correctly states that both decisions include inconsistent statements about the Applicant's eligibility to adjust her status, a matter that is not within our jurisdiction. We have considered the entire record in rendering our decision concerning the Applicant's inadmissibilities and her appeal of the denial of her waiver application.

A. Inadmissibility

1. Crimes Involving Moral Turpitude

The record shows that the Applicant was convicted in the [redacted] Florida, in 2005 and 2007 of petit theft in the second degree in violation of Fla. Stat. § 812.014-3a, for which adjudication was withheld. In 2005, she was sentenced to probation for six months. In 2007, she was ordered to pay court costs.

Fla. Stat. § 812.014, as in effect at the time of the Applicant's convictions, states, in relevant part that 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 appropriate the property to his or her own use.

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).

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 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.").

The Applicant's convictions for 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 in effect at the time of the Applicant's convictions 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 the 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 her theft convictions.

2. Fraud or Misrepresentation

The Director addressed the Applicant's assertion that she was inadmissible under section 212(a)(6)(C)(i) of the Act, specifically, she claimed to have committed. been admitted to the United States in August 2005, after presenting a photo-substituted Jamaican passport and visa to U.S. inspection officials. To corroborate her claim, the Applicant submits two sworn statements from relatives, claiming that they brought her to the airport, met her plane, and knew that the Applicant's mother provided the documents to the Applicant. The Applicant has not provided the Form I-94,

Arrival or Departure Card, the photo-substituted passport and visa that she claims she used to gain admission, or other details, such as the name of the passport owner. At her adjustment interview, she indicated that she gave the passport to her aunt's husband and had not seen it since then. She also testified that she did not remember the name in the passport. These statements, in conjunction with the Applicant's testimony, are insufficient to establish that she was inspected and admitted into the United States and that she made a willful material misrepresentation to gain admission. Moreover, the record includes a Form I-130, Petition for Alien Relative, that the Applicant's spouse filed on her behalf, which indicates that she entered the United States without inspection in August 2005. These inconsistent representations concerning her admission are relevant to the Applicant's eligibility to adjust her status to that of lawful permanent resident, because under section 245a of the Act, a foreign national must have been inspected and admitted or paroled into the United States to be eligible for adjustment of status to permanent resident. [2]

On appeal, the Applicant argues that she has established that she was inspected and admitted into the United States because her entry was "procedurally regular," citing to *Matter of Quilantan,* 25 I&N Dec. 285 (BIA 2010). In *Matter of Quilantan*, the Board found "the basic facts" were not in dispute, including the respondent's claim that a U.S. immigration officer waved her in to the United States without questioning her and without inspecting an entry document. *Matter of Quilantan*, 25 I&N Dec. at 290. The Board noted that the immigration judge earlier had found "the facts were undisputed that the respondent presented herself for inspection" and concluded that the respondent was admitted to the United States. *Id.* at 293. In this case, the facts concerning the Applicant's admission are in dispute. Taking into account the inconsistencies concerning her admission in the record, we find the evidence insufficient to establish that the Applicant presented herself for inspection and was admitted.

The Applicant also asserts that *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980), supports her claim that she was admitted to the United States. She states that her own credible testimony is sufficient to establish she was inspected and admitted. In *Matter of Areguillin*, the Board determined that the respondent bore the burden of establishing that she presented herself for inspection. In that case, the immigration judge had not addressed the credibility and sufficiency of the respondent's evidence, specifically her uncorroborated testimony that she was admitted to the United States without documentation. *Matter of Areguillin*, at 310. The Board remanded the matter to the immigration judge to give the respondent an opportunity to provide additional evidence. *Id.*

The evidence does not establish that the Applicant presented a fraudulent passport to a U.S. government official in order to procure admission to the United States. As such, we find that she did not willfully mispresent herself in seeking to procure admission to the United States and is therefore not inadmissible under section 212(a)(6)(C)(i) of the Act.

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[2] The Director found that the Applicant had not established that she had been admitted into the United States using a fraudulent document.

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. Although the Applicant is not inadmissible for crimes involving moral turpitude or fraud or misrepresentation, the record does not show that the Applicant was inspected and admitted into the United States.

ORDER: The appeal is dismissed.

Cite as *Matter of S-A-W-H-*, ID# 16905 (AAO July 19, 2016)