



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

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

MATTER OF M-A-B-

DATE: JUNE 17, 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 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.

The USCIS Director, Oakland Park, Florida Field Office denied the application. The Director concluded that the Applicant had not established that a bar to his admission would impose extreme hardship on his qualifying relative.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in finding him inadmissible, because he was not convicted of a crime involving moral turpitude.

Upon *de novo* review, we will sustain 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 for his conviction of third degree grand 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 (other than a purely political offense) 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). Section 212(h) of the Act provides for a discretionary waiver if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

(b)(6)

Matter of M-A-B-

II. ANALYSIS

The only issue to be addressed is whether the Applicant is inadmissible under section 212(a)(2)(A) of the Act. The Applicant contests the finding of inadmissibility. He asserts that an immigration judge terminated his removal proceedings, finding that his conviction was not for a crime involving moral turpitude, and he therefore should not be required to file a waiver for that inadmissibility. Although we are not bound by the immigration judge's finding, the record establishes that the Applicant was not convicted of a crime involving moral turpitude and he is not inadmissible under section 212(a)(2)(A) of the Act.¹

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude, specifically third degree grand theft.

The record shows that the Applicant was convicted on [REDACTED] 2011, in [REDACTED] Florida, of third degree grand theft in violation of Fla. Stat. § 812.014(2)(c)(1). At the time of the Applicant's conviction, Fla. Stat. § 812.014 provided in pertinent part that: "(1) A person commits theft if he or she knowingly obtains . . . the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property [or] (b) Appropriate the property to his or her own use."

For cases arising in the [REDACTED] 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 a foreign national 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 foreign national] 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.

¹ The Applicant has not established that the doctrine of *res judicata* applies in this case. *See Dormescar v. Att'y Gen.*, 690 F.3d 1258 (11th Cir. 2012) (outlining required elements and burden of proof for *res judicata* claims).

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 *Jaggernauth, supra*, at 1354-55). The modified categorical approach is intended only as a 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).

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.”).

As noted above, in the present matter the Applicant’s conviction for grand theft is not categorically a crime 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 in effect at the time of the Applicant’s conviction. Specifically, to prove the crime of theft, the jury instructions state, in pertinent part:

To prove the crime of Theft, the 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 a crime 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 conviction. The Applicant’s waiver of inadmissibility application is thus moot and the Director’s decision will be withdrawn.

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 met that burden. His single conviction was not for a crime involving moral turpitude.

ORDER: The appeal is sustained.

Cite as *Matter of M-A-B-*, ID# 16907 (AAO June 17, 2016)