



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

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

MATTER OF A-R-M-

DATE: JUNE 22, 2016

APPEAL OF NEBRASKA SERVICE CENTER 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 Director, Nebraska Service Center, denied the application. The Director concluded that the Applicant is not eligible for a waiver under section 212(h) of the Act as he has been convicted of an aggravated felony following admission to the United States as a lawful permanent resident. The Director determined that the Applicant was convicted of aggravated felonies under sections 101(a)(43)(G) and 101(a)(43)(H) of the Act, 8 U.S.C. § 8 U.S.C. 1101(a)(43)(G), (H).

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director erred in determining that he was convicted of aggravated felonies under sections 101(a)(43)(G) and 101(a)(43)(H) of the Act.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

The Applicant is seeking admission as an immigrant and has been found inadmissible for a crime involving moral turpitude, specifically extortion. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides that any foreign national convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime 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. Section 212(h) of the Act provides for a discretionary

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waiver if denial of admission would result in extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter.

Section 212(h)(2) of the Act provides that no waiver shall be granted to a foreign national who has previously been admitted to the United States as lawfully admitted for permanent residence if he or she: 1) has been convicted of an aggravated felony since the date of admission, or 2) has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the initiation of removal proceedings.

II. ANALYSIS

The only issue presented on appeal is whether the Applicant has been convicted of an aggravated felony, which would bar him from applying for a waiver of inadmissibility under section 212(h)(2) of the Act. The Applicant was convicted of extortion in Michigan in 1991. The Applicant does not contest that he has been convicted of a crime involving moral turpitude, but asserts that he is eligible for a waiver under section 212(h) of the Act, as his U.S. citizen spouse would experience extreme hardship upon denial. Though we find that the Applicant has not been convicted of an aggravated felony under sections 101(a)(43)(G) and 101(a)(43)(H) of the Act, we find that he has been convicted of an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). As the Applicant has been convicted of an aggravated felony after his admission to the United States as a lawful permanent resident, he is not eligible for a 212(h) waiver.

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, extortion.

In assessing whether a conviction is a crime involving moral turpitude, we must first “determine what law, or portion of law, was violated.” *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979). We conduct a categorical inquiry for that statutory offense, considering the “inherent nature of the crime as defined by statute and interpreted by the courts,” not the underlying facts of the crime committed. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *see also Matter of Louissaint*, 24 I&N Dec. 754, 757 (BIA 2009) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). This categorical inquiry focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Short, supra; Louissaint, supra; Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).

The record reflects that the Applicant was convicted of extortion under Michigan Compiled Laws § 750.213 on [REDACTED] 1991, in the [REDACTED]. The Board of Immigration Appeals has determined that extortion is a crime involving moral turpitude. *See Matter of F-*, 3 I&N Dec. 361 (BIA 1949) (demand with menaces is a crime involving moral turpitude). The Director found the Applicant to be inadmissible under section 212(a)(2)(A) of the Act based on his conviction for a crime involving moral turpitude. The Applicant does not dispute this ground of inadmissibility on appeal. We affirm the Director’s finding.

B. Waiver

The Applicant was lawfully admitted to the United States for permanent residence on December 10, 1972, as a special immigrant. The Applicant's extortion conviction occurred subsequent to that admission, in 1991. Therefore, if that conviction qualifies as a conviction for an aggravated felony, the Applicant is ineligible to obtain a waiver under section 212(h) of the Act.

The Applicant resides within the jurisdiction of the Sixth Circuit Court of Appeals (Sixth Circuit). In determining whether a conviction constitutes an aggravated felony for cases arising in the Sixth Circuit, we first apply the categorical approach.

The focus of the categorical inquiry is on the elements of the statute of conviction. *See U.S. v. Covington*, 738 F.3d 759 (6th Cir. 2014) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)) (applying *Descamps* analysis to a crime of violence determination under the Armed Career Criminal Act). First, we will look to the statute under which the alien was convicted and compare its elements to the relevant definition of aggravated felony set out in section 101(a)(43) of the Act. Under this categorical approach, an offense qualifies as an aggravated felony if and only if the full range of conduct covered by the criminal statute falls within the meaning of that term. *See Taylor v. United States*, 495 U.S. 575, 600 (1990).

If the statute contains elements that could be applied to conduct that would constitute an aggravated felony and conduct that would not, we must determine whether the statute at issue lists alternative elements and is divisible. *Covington, supra*, citing *Descamps, supra*, at 2283. This requires looking at the statute to determine whether it lists several, alternative ways to violate the statute. *Id.*

Where a statute lists alternative versions of an offense, we engage in a modified categorical inquiry of the record of conviction. *Covington, supra*, citing *Shepard v. U.S.*, 544 U.S. 13 (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, supra*, at 2283.

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). 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. We look at the record of conviction to determine what particular phrase of the statute was violated. *Covington, supra*.

In denying the Applicant's Form I-601, the Director determined that he was convicted of an aggravated felony under section 101(a)(43)(G) of the Act. Under section 101(a)(43)(G) of the Act, the term aggravated felony includes a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least 1 year.

The Supreme Court, in *Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007), found that the accepted generic theft definition for aggravated felony purposes under section 101(a)(43)(G) of the Act is “the taking of property or the exercise of control of property without consent with the criminal intent to deprive the owner of rights of ownership, even if such deprivation is less than total or permanent.”

The Director further determined that the Applicant was convicted of an aggravated felony under section 101(a)(43)(H) of the Act. Under section 101(a)(43)(H) of the Act, the term aggravated felony includes an offense described in section 875, 876, 877, or 1202 of title 18 of the United States Code (relating to the demand for or receipt of ransom).

18 U.S.C. §§ 875, 876, and 877 relate to interstate communications, mailing threatening communications, and mailing threatening communications from a foreign country, respectively. 18 U.S.C. § 1202(a) provides:

Whoever receives, possesses, or disposes of any money or other property, or any portion thereof, which at any time has been delivered as ransom or reward in connection with a violation of section 1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined under this title or imprisoned not more than ten years, or both.

The Applicant was convicted of extortion under Michigan Compiled Laws section 750.213. Michigan Compiled Laws section 750.213 (1991) provides:

Malicious threats to extort money—Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.

In applying the categorical approach, we look to the statute under which the Applicant was convicted, Michigan Compiled Laws section 750.213, and compare the elements of the statute to the relevant aggravated felony definitions under sections 101(a)(43)(G) and 101(a)(43)(H) of the Act. The range of conduct punishable under Michigan Compiled Laws section 750.213 does not fall within the meaning of section 101(a)(43)(G) of the Act, which includes the taking or exercise of control over property without consent, or section 101(a)(43)(H) of the Act, which includes the receipt, possession, or disposal of money or property delivered as ransom or reward. The statutory elements of Michigan Compiled Laws section 750.213 are not included in the statutory elements of sections 101(a)(43)(G) and 101(a)(43)(H) of the Act. As such, the Applicant has not been

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categorically convicted of an aggravated felony in accordance with these sections of the Act and there is no need to apply the modified categorical approach for further analysis of these sections.

However, the record reflects that the Applicant has committed a crime of violence aggravated felony. Under section 101(a)(43)(F) of the Act, the term aggravated felony includes a crime of violence as defined in section 16 of title 18 of the United States Code, not including a purely political offense, for which the term of imprisonment is at least 1 year.

18 U.S. Code § 16 provides that the term “crime of violence,” means:

- (a) 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
- (b) 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.

Under section 750.213 of the Michigan Compiled Laws, an individual may be convicted of extortion if, in addition to other elements, he maliciously threatens to accuse another of any crime or offense or maliciously threatens any injury to the person, property or mother, father, husband, wife or child of another. The statute lists several alternative ways to violate section 750.213 of the Michigan Compiled Laws. The statute includes conduct that would constitute a crime of violence aggravated felony, maliciously threatening injury to a person or property, and conduct that would not, maliciously threatening to accuse another of any crime or offense. Accordingly, the Michigan statute is divisible in accordance with the jurisprudence of the Sixth Circuit and we must next turn to the record of conviction to determine which phrase of the statute was violated.

The record contains an amended information filed with the [REDACTED], dated [REDACTED] 1991. The information alleges in count one, extortion, that the Applicant did maliciously threaten to injure a person with intent thereby to extort money or any pecuniary advantage whatever or to compel the person so threatened to do or refrain from doing an act against his/her will, contrary to Michigan Compiled Laws section 750.213. The Applicant subsequently pled guilty to this count of the information on [REDACTED] 1991.¹

As the record of conviction indicates that the Applicant pled guilty to maliciously threatening to injure the person of another individual, he has been convicted of an offense that has, as an element, the threatened use of physical force against the person or property of another. Accordingly, the Applicant has been convicted of a crime of violence as contemplated by section 101(a)(43)(F) of the

¹ The Applicant, in response to our notice of intent to deny (NOID), asserts that he is not in possession of this amended information. However, the record reflects that the Applicant pled guilty to extortion in [REDACTED] based on the allegations within this information. There is no indication that the Applicant was not in receipt of the information upon which his plea was based. In fact, the record indicates that the Applicant provided this information to an immigration judge while the Applicant was in removal proceedings.

Act. Further, as the Applicant was sentenced in 1992 to 6 to 20 years of incarceration for this conviction, he also meets the 1 year term of imprisonment requirement in section 101(a)(43)(F) of the Act.

In response to our NOID, the Applicant asserts that the threat of any injury under Michigan Compiled Laws section 750.213, is not the same as the threatened use of physical force required for a crime of violence under section 101(a)(43)(F) of the Act. The Applicant contends that extortion under Michigan Compiled Laws is not categorically a crime of violence. Based on the modified categorical approach, we determined that the portion of the extortion statute violated by the Applicant constitutes a crime of violence.

In support of this contention, the Applicant cites *People v. Krist*, 97 Mich. App. 669, 675, 296 N.W.2d 139 (1980), in which the Michigan Supreme Court found the phrase “against his will,” as used in Michigan Compiled Laws section 750.213, includes an individual saving himself or a member of his immediate family from personal disgrace. The Applicant contends that with extortion, the threat of injury typically means threat of injury to reputation rather than violent injury.

The Applicant asserts that the threat of personal disgrace does not amount to a crime of violence. However, the phrase “against his will,” is used in the Michigan Compiled Law section 750.213 to refer to a perpetrator who threatens injury to a person to compel him or her to do or refrain from an act against his or her will. A victim of extortion under this statute, acting to save an individual from personal disgrace, is so compelled by a malicious threat of injury to a person or property. A crime of violence can be defined as an offense including the threatened use of physical force against the person or property of another. 18 U.S. Code § 16(a).

The Applicant also notes that the court in *Krist* indicated that extortion victims are not confronted with the threat of immediate harm, as injury is delayed pending the victim’s failure to act upon the demands of the extortionist. The crime of violence definition at 18 U.S. Code § 16(a), though, similarly does not require investigation into the imminence of the threatened use of physical force.

The Applicant asserts that he has not been convicted of a crime of violence under 18 U.S. Code § 16(b) due to unconstitutional vagueness, but as we have determined that he has been convicted of a crime of violence under 18 U.S. Code § 16(a), we will not address his argument as it relates to an alternate subsection of the code.

The Applicant pled guilty to extortion under Michigan Compiled Laws section 750.213, a divisible statute requiring a modified categorical inquiry. Under this statute, the Applicant pled to maliciously threatening to injure a person with intent thereby to extort money or any pecuniary advantage whatever or to compel the person so threatened to do or refrain from doing an act against his/her will. The Applicant’s plea to a malicious threat to injure a person is sufficient to determine that he has satisfied the definition of a crime of violence under 18 U.S. Code § 16(a).

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. The Applicant was convicted of committing an aggravated felony with an imposed sentence of over 1 year, subsequent to his admission to the United States as a lawful permanent resident. Accordingly, the Applicant is not eligible for a waiver for his crime involving moral turpitude conviction under section 212(h)(2) of the Act. The Applicant remains inadmissible to the United States under section 212(a)(2)(A) of the Act.

ORDER: The appeal is dismissed.

Cite as *Matter of A-R-M-*, ID# 15706 (AAO June 22, 2016)