



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

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

MATTER OF P-J-G-

DATE: OCT. 4, 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 Colombia, 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 that of a lawful permanent resident (LPR) 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 or, where the activities for which the foreign national is inadmissible occurred 15 years prior, if the foreign national's admission would not be contrary to the national welfare, safety, or security of the United States and the foreign national has been rehabilitated.

The Field Office Director, Oakland Park, Florida denied the application. The Director concluded that the Applicant was inadmissible for having been convicted of crimes involving moral turpitude. He found that the negative factors in the Applicant's case outweighed the positive such that his waiver application must be denied.

The matter is now before us on appeal. In the appeal, the Applicant states that his convictions are not categorically crimes involving moral turpitude. He states that the Director erred as a matter of law and abused his discretionary authority in denying his waiver application.

Upon *de novo* review, we will sustain the appeal. The Applicant has shown that the activities for which he is inadmissible occurred 15 years ago; his admission would not be contrary to the national welfare, safety, or security of the United States; and he has been rehabilitated.

I. LAW

The Applicant is seeking to adjust his status to an LPR and has been found inadmissible for a crime involving moral turpitude, specifically for workers compensation fraud and theft. 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.

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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 waiver where the activities occurred more than 15 years before the date of the application if admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and the foreign national has been rehabilitated (Section 212(h)(1)(A)) or 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)(1)(B)).

II. ANALYSIS

The issues on appeal are whether the Applicant's criminal convictions are categorically crimes involving moral turpitude rendering him inadmissible under section 212(a)(2)(A) of the Act and, if so, whether he qualifies for a waiver of this inadmissibility. The Director found that the Applicant's convictions did render him inadmissible and that he did not warrant a waiver of this inadmissibility. The Applicant asserts that his conviction for workers compensation fraud is not a crime involving moral turpitude because it does not involve intent to defraud and his conviction for theft is not a crime involving moral turpitude because a conviction can result from either a temporary or permanent taking. We find that the Applicant's conviction for theft does not render him inadmissible, but we find him inadmissible as a result of his conviction for workers compensation fraud. However, we also find that he qualifies for a waiver of this inadmissibility under section 212(h)(1)(A) of the Act.

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. The record establishes that on [REDACTED] 2003, the Applicant pled guilty to workers compensation fraud under section 440.37(1) and grand theft under section 812.014(2)(C)(1) of the Florida Statutes.¹ The criminal complaint in the Applicant's case shows that these convictions stemmed from events which occurred in 1999.

The Applicant states that his crimes are not categorically crimes involving moral turpitude. He states that his conviction for workers compensation fraud is not a categorical crime involving moral turpitude because intent to defraud is neither explicit in the statutory definition nor implicit in the nature of workers compensation fraud as it is defined under section 440.37(1) of the Florida Statutes. The Applicant also states that his conviction for grand theft is not a categorical crime involving moral turpitude because a permanent taking is not required for a conviction under Florida Statute 812.014(2)(C)(1).

¹ Section 440.37(1) of the Florida Statutes was replaced in 2000 by section 440.105, the Applicant was convicted under section 440.37(1) because this was the section of law he was charged under before the statute was replaced.

The Act does not define the term “crime involving moral turpitude.” However, the Board of Immigration Appeals provided the following general definition in *Matter of Perez-Contreras*:

[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. . . .

20 I&N Dec. 615, 617-18 (BIA 1992)(citations omitted). “[N]either the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude.” *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992).

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 alien 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 alien] 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 divisible, i.e. contains elements rather than means, where the prosecutor would specifically charge one alternative as opposed to the other and the jury would agree unanimously to convict on the basis of that alternative. *Id.* at 1245-46 (citing *Descamps*, *supra*, at 2289-90); *see also U.S. v. Lockett*, 810 F.3d 1262, 1268-69 (11th Cir. 2016).

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.

Estrella, supra, at 1246 (citing *Descamps*, supra, at 2287).

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that “[w]hatever else the phrase ‘crime involving moral turpitude’ may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . The phrase ‘crime involving moral turpitude’ has without exception been construed to embrace fraudulent conduct.” 341 U.S. 223, 232 (1951).

In *Matter of Flores*, the Board also held that even if intent to defraud was not an explicit statutory element, a crime could still be found to involve moral turpitude. 17 I&N Dec. 225, 230 (BIA 1980). The Board explained that “where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude.” *Id.* at 228. Thus, we find that the Applicant has not established that his conviction for workers compensation fraud is not a crime involving moral turpitude.

However, the Applicant’s conviction for grand theft does not constitute a crime involving moral turpitude. Fla. Stat. § 812.014 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). 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. Further, a jury need not agree unanimously whether the offense involved the intent to permanently or temporarily deprive the owner of the property to convict, and the statute is therefore not divisible. See *United States v. Estrella*, 758 F.3d 1239, 1245-46 (11th Cir. 2014) (citing *Descamps*, supra, at 2289-90); see also *U.S. v. Lockett*, 810 F.3d 1262, 1268-69 (11th Cir. 2016).

The Act makes clear that a foreign national seeking admission must establish admissibility “clearly and beyond doubt.” See section 235(b)(2)(A) of the Act; see also section 240(c)(2)(A) of the Act. The same is true for demonstrating admissibility in the context of an application for adjustment of status. See generally *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008); *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); and *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008).

The Applicant has not met this burden in establishing his admissibility clearly and beyond doubt in regard to his conviction for workers compensation fraud. Thus, he is inadmissible under section 212(a)(2)(A) of the Act for having committed a crime involving moral turpitude. However, he qualifies for a waiver of this inadmissibility under section 212(h)(1)(A) of the Act.

B. Waiver

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The last acts rendering the Applicant inadmissible under section 212(a)(2)(A) of the Act occurred on [REDACTED] 1999, more than 15 years ago. Consequently, the Applicant may demonstrate eligibility for a waiver of inadmissibility pursuant to either section 212(h)(1)(A) or section 212(h)(1)(B) of the Act. To meet the requirements of section 212(h)(1)(A) of the Act, the Applicant must show that 1) admission to the United States would not be contrary to the national welfare, safety, or security of the United States, and 2) the Applicant has been rehabilitated.

In support of the Applicant's waiver application he submits: identification documentation, financial documents, court documents, a statement from his U.S. citizen spouse, a psychological evaluation, and photographs. The record shows that Applicant has no other criminal record, served his probation, and helps to support his spouse both emotionally and financially. The Applicant has shown that his admission would not be contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated.

C. Discretion

We now consider whether the Applicant merits a waiver of inadmissibility as a matter of discretion. The burden is on the Applicant to establish that a waiver of inadmissibility is warranted in the exercise of discretion. *Matter of Mendez-Morales*, 21 I&N Dec. 296, 299 (BIA 1996). We must balance the adverse factors evidencing the Applicant's undesirability as a lawful permanent resident with the social and humane considerations presented to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. *Id.* at 300 (citations omitted). The adverse factors include the nature and underlying circumstances of the inadmissibility ground(s) at issue, the presence of additional significant violations of immigration laws, the existence of a criminal record, and if so, its nature, recency and seriousness, and the presence of other evidence indicative of bad character or undesirability. *Id.* at 301. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where residency began at a young age), evidence of hardship to the foreign national and his or her family, service in the U.S. Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to good character. *Id.*

The unfavorable factors in the Applicant's case include: his criminal record, his unlawful residence in the United States after overstaying his visitor's visa, and his periods of employment without authorization. The favorable factors in the Applicant's case include the hardship his U.S. citizen spouse and stepchildren would suffer if he were not granted a waiver. The record indicates that the Applicant's spouse is suffering symptoms of depression and anxiety as a result of the Applicant's immigration situation. She states that the Applicant provides her and her children with emotional and financial support. The record also indicates that the Applicant has helped to support his family in the United States and Colombia through self-employment. Finally, as stated above, the Applicant has no other criminal record except for his 2003 convictions for conduct that occurred 17 years ago.

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Thus, we find that the favorable factors in the Applicant's case outweigh the unfavorable such that a favorable exercise of discretion is warranted.

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. The appeal will be sustained.

ORDER: The appeal is sustained.

Cite as *Matter of P-J-G-*, ID# 121781 (AAO Oct. 4, 2016)