



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

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

MATTER OF E-C-

DATE: SEPT. 12, 2016

APPEAL OF PHOENIX, ARIZONA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of El Salvador, 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 or, because 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, Phoenix, Arizona, denied the application. The Director concluded that the Applicant had not established extreme hardship to a qualifying relative.

The matter is now before us on appeal. In the appeal, the Applicant submits additional evidence and claims that the Director did not explain why the evidence was insufficient to establish extreme hardship to a qualifying relative and did not discuss whether the Applicant warrants a waiver as a matter of discretion.

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 crimes involving moral turpitude. Specifically, the Applicant was convicted of Assault with a Deadly Weapon in 1992, Forgery in 1997, and Burglary in 1998. 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, 8 U.S.C. § 1182(h). 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)).

II. ANALYSIS

The issues presented on appeal are whether the Applicant is eligible for a waiver under section 212(h)(1)(A) of the Act and whether he warrants a waiver as a matter of discretion. The Applicant states on appeal that he has not had any additional criminal convictions since 1998, a period of 18 years, that he has adopted a strong work ethic and has dedicated his life to supporting his family. He states that his spouse would experience extreme hardship if she were to relocate to El Salvador due to the conditions there. The Applicant also states that he warrants a waiver as a matter of discretion. Upon examination of the record we find the Applicant meets his burden of proof for eligibility for a waiver under section 212(h)(1)(A) of the Act and that he warrants a waiver as a matter of discretion.

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, the Applicant was convicted of Assault with a Deadly Weapon in violation of California Penal Code section 245(a)(1) on [REDACTED] 1992, and Forgery, in violation of California Penal Code section 476, on [REDACTED] 1997. The Applicant does not contest his inadmissibility under section 212(a)(2)(A) of the Act, however, as a matter of clarification, we will examine whether the Applicant's convictions for assault with a deadly weapon in violation of California Penal Code section 245(a)(1) and burglary under California Penal Code section 459 constitute crimes involving moral turpitude.

For cases arising in the Ninth Circuit, the determination of whether a crime is a crime involving moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005). There must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude." *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a "realistic probability," a foreign national must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

If the statute is overbroad (i.e. criminalizes both conduct that involves moral turpitude and conduct that does not) *and* divisible, we apply the modified categorical inquiry. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867–68 (9th Cir. 2015); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)). The modified categorical inquiry looks to the limited, specified set of documents that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – for the purpose of determining which alternative element formed the basis of the conviction (thus effectuating the categorical analysis for divisible statutes). *See Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1300-02 (9th Cir. 2014).

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). For the purpose of determining whether such a statute is divisible, an offense’s elements, as opposed to mere means or modes of committing an offense, are those facts about the crime which “a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.” *Descamps, supra*, at 2288; *see also United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1135–37 & n.16 (9th Cir. 2013). The first step in determining elements versus means begins with the text of the statute of conviction, and the use of the disjunctive term “or” generally indicates alternative means rather than elements. *Almanza-Arenas v. Lynch*, 809 F.3d 515, 522-24 (9th Cir. 2015), *amended and superseded by Almanza-Arenas v. Lynch*, 815 F.3d 469, 477-78 (9th Cir. 2016) (Finding motor vehicle theft under 10851(a) of the California indivisible because intent element – intent to permanently or temporary deprive the owner of the property – was expressed disjunctively and would not be charged by the prosecutor or considered by the jury as containing distinct elements rather than alternative means). We review state law, including jury instructions, or the documents comprising the record of conviction, to confirm what the “prosecutor included as elements of the crime and to what elements the petitioner pleaded guilty,” or what a jury must find as elements (rather than means of committing) the crime. 815 F.3d at 478-82; *see also Rendon v. Holder*, 764 F.3d 1077, 1084-1089 (9th Cir. 2014) (Finding burglary under section 459 of the California Penal Code indivisible because jury would not need to choose between intent to commit larceny or other felony.)

The Applicant was convicted under Cal. Penal Code § 245(a)(1) of assault with a deadly weapon or by force likely to produce great bodily injury. As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, assault or battery offenses involving some aggravating dimension, such as the use of a deadly weapon or serious bodily harm, have been found to be crimes involving moral turpitude. *See, e.g., Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (finding that second degree assault with a knife is a crime involving moral turpitude); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon); *Matter of S-*, 5 I&N Dec. 668 (BIA 1954) (assault with a .38-caliber revolver); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (intentional infliction of serious injury).

A finding of moral turpitude may also involve “an assessment of both the state of mind and the level of harm required to complete the offense.” *Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007). Crimes

committed intentionally or knowingly with the specific intent to inflict a particular harm, and with a resulting meaningful level of harm, constitute crimes involving moral turpitude, but “as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required” for a finding of moral turpitude. *Id.* “[W]here no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.” *Id.*; see also *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) (finding that third-degree assault under section 9A.36.031(1)(f) of the Revised Code of Washington is not a crime involving moral turpitude because neither intent nor recklessness is required for a conviction); *Matter of Fualaau*, 21 I&N Dec. at 478 (third-degree assault in Hawaii, an offense that involves recklessly causing bodily injury to another person, is not a crime involving moral turpitude); *Matter of P-*, 3 I&N Dec. 5, 8-9 (BIA 1947) (finding that assault without a deadly weapon but with the intent to cause great bodily harm is a crime involving moral turpitude).

Under California law, an “assault” is defined as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240. A conviction under section 245(a)(1) requires, as an additional material element, proof that the assault is committed with a deadly weapon or instrument (other than a firearm) or by force likely to produce great bodily injury.

In *Ceron*, the Ninth Circuit noted that the California Supreme Court had determined that section 245(a)(1) was a general intent crime and that it does not require that the individual have a specific intent to injure or actually perceive the risk created by his or her conduct.¹ *Ceron v. Holder*, 747 F.3d 773, 784 (9th Cir. 2014). The statute requires only that the individual commit an intentional act and have knowledge of the perceived risk from his or her actions, not a subjective appreciation of the risk.² *Id.*

Since section 245(a)(1) requires only general intent and not an intent to inflict injury or an appreciation of the risk resulting from one’s actions, we find that the offense under this statute is not a crime involving moral turpitude. See *Matter of Solon*, *Matter of Perez-Contreras*, *Matter of Fualaau*, and *Matter of P-*, *supra*.

The Applicant remains inadmissible under section 212(a)(2)(A) for having been convicted of Forgery, in violation of California Penal Code section 476. See *Matter of Islam*, 25 I&N Dec. 637, 638 (BIA 2011) (“Forgery . . . ha[s] long been considered to be [a] crime[] involving moral turpitude”); *Matter of Seda*, 17 I&N Dec. 550, 552 (BIA 1980) (“[T]he respondent pleaded guilty to forgery, which is a crime involving moral turpitude.”); *Matter of Jimenez*, 14 I&N Dec. 442, 443 (BIA 1973) (“Forgery has been held to be a crime involving moral turpitude.”); *Matter of A-*, 5 I&N Dec. 52, 53 (BIA 1953) (“Where fraud or forgery is involved, it is clear that a finding of moral turpitude is required and we need not inquire as to whether or not the crime is malum prohibitum or malum in se.”); *Jordan v. De George*, 341 U.S. 223, 232 (1951) (“Whatever else the phrase ‘crime

¹ See *People v. Williams*, 29 P.3d 197, 203-204 (Cal. 2001).

² *Id.*

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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.")

B. Waiver

The last act rendering the Applicant inadmissible under section 212(a)(2)(A) of the Act occurred in 1997, 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.

The record contains statements from the Applicant and his spouse, the Applicant's mother and friends and acquaintances of the Applicant. The statements from the Applicant's spouse and mother detail how they rely on the Applicant for support. Other statements attest to the Applicant's moral character and dedication to his family and work ethic. A statement from the Applicant's employer indicates that he worked there for a period of five years from 2004 to 2009, and again from 2012 until the present time.

The record does not indicate that the Applicant has been arrested or charged with any additional crimes since 1998. The Applicant also has some history of gainful and stable employment. The Applicant has demonstrated that his admission to the United States would not be contrary to the national welfare, safety or security of the United States:

With regard to rehabilitation, the Applicant completed his probation sentence for the conviction and the record establishes that the Applicant has not been charged with any additional crimes since 1998. The Applicant does state that he is truly sorry for what he did in the past and that he has dedicated his life to caring for his spouse, children and mother. Given the length of time since the Applicant's last conviction, his completion of the court-ordered supervision and probation requirements for his convictions and the statements submitted into the record attesting to his moral character, we find the record to support that the Applicant 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 negative factors in this case include the Applicant's convictions for Assault with a Deadly Weapon, Burglary and Forgery. The Applicant has been convicted of a crime involving moral turpitude (Forgery). Nonetheless, it has been 15 years since the Applicant has been convicted of a serious crime. In addition, the Applicant successfully completed the periods of probation related to his convictions and has expressed remorse for his criminal history.

The positive factors in this case include the presence of the Applicant's family members. The record establishes that the Applicant's spouse, mother and at least one child reside in the United States. The record establishes that the Applicant's admission would not be contrary to the national welfare, safety or security of the United States, and that he has been rehabilitated. Another factor weighing in favor of positive discretion is the hardship the Applicant's spouse would experience upon relocation due to her age, the family and community ties that she would have to sever in the United States and the conditions in El Salvador. The record also establishes that the Applicant would likely experience hardship upon relocation to El Salvador based on the conditions there. When we weigh the positive and negative factors in this case we find that the Applicant warrants a favorable exercise of discretion.

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 Applicant has been convicted of a crime involving moral turpitude, as well as a violent or dangerous crime, although his convictions are over 15 years old. The Applicant has established that his admission would not be contrary to the national welfare, safety or security of the United States and that he has been rehabilitated. The Applicant warrants a favorable exercise of discretion and we will sustain the appeal.

ORDER: The appeal is sustained.

Cite as *Matter of E-C-*, ID# 17057 (AAO Sept. 12, 2016)