



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

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

MATTER OF R-S-S-H-

DATE: SEPT. 19, 2016

APPEAL OF MIAMI, FLORIDA FIELD OFFICE DECISION

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

The Applicant, a native and citizen of Cuba, 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 more than 15 years ago, 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 Miami Field Office Director, Kendall, Florida, denied the application. The Director concluded that the Applicant had been convicted of a violent or dangerous crime and that he had not shown that his qualifying relatives would suffer exceptional and extremely unusual hardship as the result of his inadmissibility. The Director further determined that the evidence was insufficient to establish that the Applicant had been rehabilitated due to his multiple arrests.

The matter is now before us on appeal. In the appeal, the Applicant claims that the Director erred in finding that he had to prove hardship to his qualifying family members to be eligible for a waiver. He claims that he has been rehabilitated and warrants a favorable exercise of discretion.

Upon *de novo* review, we will dismiss 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. Section 212(a)(2)(A) of the Act, 8 U.S.C. § 1182(a)(2)(A), provides, in pertinent part, that a foreign national convicted of "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime" is inadmissible.

For cases arising in the Eleventh Circuit, such as this one, 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. 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); *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. *See Estrella, supra*, at 1246 (citing *Descamps, supra*, at 2287).

II. ANALYSIS

The Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for crimes involving moral turpitude, specifically, petit larceny and battery on a law enforcement officer. The record also reflects that the Applicant was convicted of resisting an officer with violence.¹ The Applicant does not contest that he is inadmissible for crimes involving moral turpitude. We will withdraw the portion of the Director’s decision finding that the Applicant’s conviction for petit larceny is a crime involving moral turpitude. Nonetheless, he remains inadmissible under section

¹ The Director did not find the Applicant inadmissible for this conviction. We will not analyze whether battery on a law enforcement officer is a crime involving moral turpitude, because he is inadmissible for his conviction for resisting an officer with violence.

212(a)(2)(A) of the Act for his conviction for resisting an officer with violence, which is a violent or dangerous crime; therefore he must meet the requirements of 8 C.F.R. § 212.7(d) to warrant a favorable exercise of discretion.

A. Inadmissibility

As stated above, the Applicant has been found inadmissible under section 212(a)(2)(A) of the Act for crimes involving moral turpitude.

1. Petit Larceny

The record shows that the Applicant was convicted of petit larceny under section 812.014 of the Florida Statutes (Fla. Stat.) in 1985. That statute, as in effect at the time of the Applicant's conviction, 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.

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 Florida Statutes § 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 conviction for petit 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. Specifically, to prove the crime of theft, the jury instructions in effect at the time of the Applicant's convictions state, in pertinent part:

The State must prove the following two elements beyond a reasonable doubt:

- I. (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's conviction for petit larceny was 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 petit larceny conviction.

2. Resisting an Officer with Violence

Evidence in the record shows that the Applicant was convicted of resisting an officer with violence, under Fla. Stat. § 843.01, in 1984. At the time of the Applicant's conviction, Fla. Stat. § 843.01 provided "[w]hoever knowingly and willfully resists, obstructs, or opposes any [law enforcement officer] by offering or doing violence to the person . . . is guilty of a felony of the third degree"

In *Cano v. U.S. Att'y Gen.*, the Eleventh Circuit found that a conviction for resisting an officer with violence to his or her person in violation of Fla. Stat. § 843.01 is categorically a crime involving moral turpitude. 709 F.3d 1052 (11th Cir. 2013). The court noted that to be convicted under Fla. Stat. § 843.01, a defendant must have "(1) knowingly (2) resisted, obstructed, or opposed a law enforcement officer (3) who was in the lawful execution of any legal duty (4) by offering or doing violence to his person." *Id.* at 1054 (quoting *Yarusso v. State*, 942 So.2d 939, 942 (Fla. 2d DCA

2006)). In addition, the court noted that “the intent requirement . . . applies to both resisting arrest and the offer or use of violence.” *Id.* (citing *U.S. v. Romo-Villalobos*, 674 F.3d 1246 (11th Cir. 2012)). Noting that Florida courts have distinguished a conviction under Fla. Stat. § 843.01 from other crimes against law enforcement officers, such as simple assault, the court explained that Fla. Stat. § 843.01 requires more than mere unwanted touching but instead “involves the use or threat of physical force.” *Id.* Therefore, the court found that “because Fla. Stat. § 843.01 requires intentional violence against an officer, it criminalizes ‘conduct [that] exhibits a deliberate disregard for the law, which we consider to be a violation of the accepted rules of morality and the duties owed to society.’” *Id.* (quoting *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988)).

Florida courts have found that “violence is a necessary element of the offense” of resisting arrest under Fla. Stat. § 843.01. *Romo-Villalobos* at 1249 (citing *Rawlings v. State*, 976 So.2d 1179, 1181 (Fla. 5th DCA 2008)); *see also Walker v. State*, 965 So.2d 1281, 1284 (Fla. 2d DCA 2007). Therefore, a conviction under Fla. Stat. § 843.01 cannot occur “from a passive resistance to arrest” but instead must involve “assault by force or violence on an arresting officer.” *Danesh* at 672; *see also Harris v. State*, 5 So. 3d 750, 751 (Fla. Dist. Ct. App. 2009) (“Offering to do violence plainly involves the ‘threat of physical force or violence’ while actually doing violence plainly involves the ‘use . . . of physical force or violence.’”). As noted above, the conviction also requires that a defendant knew that his victim was a police officer engaged in his lawful duties. *Cano* at 1054. Accordingly, the conviction rises above the level of simple assault to require both knowledge of the police officer’s status and the aggravating factor of intentional use or threatened use of physical violence. *Id.* Therefore, we find that a conviction under Fla. Stat. § 843.01 is categorically a crime involving moral turpitude, which renders a foreign national inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Moreover, given the requirement of intentional or threatened use of violence under this statute, we also find that the Applicant’s conviction under Fla. Stat. § 843.01 is for a violent or dangerous crime. A favorable exercise of discretion is limited for applicants who have been convicted of a violent or dangerous crime. Specifically, 8 C.F.R. § 212.7(d), which codified for purposes of section 212(h)(2) of the Act the discretionary standard first applied to section 209(c) waivers by the Attorney General in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), limits the favorable exercise of discretion with respect to those inadmissible under section 212(a)(2) of the Act on account of a violent or dangerous crime, except in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which denial of the application would result in exceptional and extremely unusual hardship. The regulation provides further that depending on the gravity of the underlying criminal offense, a showing of extraordinary circumstances might still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

The words “violent” and “dangerous” and the phrase “violent or dangerous crimes” are not further defined in the regulation or case law. A “crime of violence” is an aggravated felony pursuant to section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), and as defined at 18 U.S.C. § 16. However, the Attorney General declined to reference either section of law or the definition of “crime of violence” in 8 C.F.R. § 212.7(d). In the interim rule, the Department of Justice noted that while individuals convicted of aggravated felonies generally would not warrant a favorable exercise of

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discretion, the rule would not contain an explicit connection to avoid “unduly constraining the . . . discretion to render waiver decisions on a case-by-case basis.” 67 Fed. Reg. 78675, 78677-78 (Dec. 26, 2002).

Pursuant to this discretionary authority, we understand “violent or dangerous crimes” according to plain and common meanings of the terms “violent” and “dangerous.” Black’s Law Dictionary (9th ed. 2009), for example, defines *violent* as 1) “[o]f, relating to, or characterized by strong physical force,” 2) “[r]esulting from extreme or intense force,” or 3) “[v]ehemently or passionately threatening.” It defines *dangerous* as “perilous, hazardous, [or] unsafe,” or “likely to cause serious bodily harm.” In determining whether a crime is a violent or dangerous crime for purposes of discretion, we are not limited to a categorical inquiry but may consider both the statutory elements and the nature of the actual offense. *See Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1152 (9th Cir. 2015); *Waldron v. Holder*, 688 F.3d 354, 359 (8th Cir. 2012). As noted above, violence has been determined to be a necessary element of the Applicant’s conviction under Fla. Stat. § 843.01; we therefore conclude that his conviction is for a violent or dangerous crime.

B. Waiver

We will first determine whether the Applicant merits a waiver of inadmissibility. 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; or if denial of admission would result in extreme hardship to a U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

The last acts rendering the Applicant inadmissible under section 212(a)(2)(A) of the Act occurred in 1984, 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.

Evidence in the record to establish the Applicant’s eligibility under section 212(h)(1)(A) includes his criminal history. The Applicant has an extensive arrest record dating from 1982 to 2009, including four counts of sexual battery on a minor, 11 counts of lewd and lascivious assault on a child, two counts of indecent exposure, one count of aggravated battery, two counts of battery, one count of burglary, two counts of grand theft, and seven counts of unemployment compensation fraud. The record indicates that none of these arrests resulted in a conviction. We give little weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein. *See Matter of Arreguin*, 21 I&N Dec. 38, 42 (BIA 1995). In addition to his convictions for petit larceny, battery on a law enforcement officer, and resisting an officer with violence, the Applicant has been convicted of carrying a concealed weapon and criminal mischief. The record also shows that the Applicant received at least 13 traffic citations for driving with a suspended license between 1982 and

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2009. The Applicant has not expressed remorse for his criminal conduct. In two statements he asserts that the sexual assault charges, which did not result in a conviction, arose in the context of a divisive divorce proceeding. As the Director noted, however, the Applicant provided no evidence to corroborate his claims.

The Applicant submits evidence to demonstrate rehabilitation in the form of letters from family members and former employers, which address his character, and evidence of his certification as a professional estimator. The record also contains evidence that the Applicant has been involved in charity work through his employer. He states that has not been arrested on any charges relating to controlled substances. He offers proof of his professional credentials, business ownership, and payment of income taxes. His admission would not be contrary to the national welfare, safety, or security of the United States. Nonetheless, he has not established that he has been rehabilitated, as he has not expressed remorse for his convictions, and the record indicates that he continued to disregard the law as recently as 2009.

Because the Applicant has not demonstrated eligibility under section 212(h)(1)(A) of the Act, he must demonstrate that denial of the application would result in extreme hardship to a qualifying relative or relatives. In this case, his qualifying relatives are his U.S. citizen children. A waiver of inadmissibility under section 212(h)(1)(B) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse, parent, or child of the Applicant. Hardship to the Applicant can be considered only insofar as it results in hardship to a qualifying relative.

The Applicant does not indicate whether his children would relocate with him to Cuba or remain in the United States. He provided a statement, dated 2008, from his former spouse and mother of three of his children, indicating that the children would suffer great emotional damage if they were separated from the Applicant. She further stated that the Applicant was the sole financial provider to the children. He also provides affidavits from his children.² The Applicant's [redacted] year old daughter states that she lived with the Applicant and her mother until they divorced in 2006. She states that she is very close to the Applicant and he supports her financially and emotionally.

In an affidavit, the Applicant's [redacted] year old son states that the Applicant has been his main source of support, emotionally and financially. He states that he lived with the Applicant until he graduated from high school. He states that he would suffer greatly if he could not be with the Applicant. He states that as a U.S. Marine, he could not travel to Cuba to visit the Applicant. The Applicant submits documentary evidence establishing that his son is a Marine.

The Applicant's 22-year old daughter states that she has a wonderful relationship with the Applicant and that he has been involved with every aspect of her life. She states that he has been financially and emotionally supportive. She states that she sees the Applicant often and would suffer if she

² The record also contains letters the children wrote in 2008, describing the Applicant as a good man, and photographs of the Applicant with his family.

could no longer see him. She states that it is well-known that Cuba is a terrible place to live and she would be very sad if the Applicant were removed there. She further asserts that she looks forward to having children and watching the Applicant foster a relationship with her children as their grandfather.

The record does not contain sufficient documentation to determine the degree of financial hardship the Applicant's children would experience if the application is denied. The record contains the Applicant's tax returns for 2007 and the years 2009 through 2013, indicating that he at times claimed one child and at others two of his children as dependents, which is evidence that he financially supported them during those periods. The record also contains evidence that the Applicant previously paid child support and provided health, dental, and life insurance for the children. The record does not include evidence of the Applicant's children's income or expenses. The record shows that the Applicant's children would experience emotional distress as the result of separation from him, but the record does not establish that the hardships they would face, considered in the aggregate, rise to the level of extreme.

The Applicant does not address hardship to his qualifying relatives in the event they relocated with him to Cuba. The Applicant submitted an excerpt from the U.S. Department of State, Bureau of Democracy, Human Rights and Labor, *County Reports on Human Rights for 2013*, which states that the principal human rights abuses in Cuba were abridgment of the right of citizens to change the government, and the use of government threats, extrajudicial physical violence, intimidation, mobs, harassment, and detentions to prevent free expression and peaceful assembly. The Applicant has not shown how this information, which reflects conditions dating back 3 years, relates to potential hardship to his qualifying relatives. While it may be reasonable to assume his qualifying relatives would experience some degree of hardship upon relocation, the Applicant provides no evidence concerning the nature of their hardship and showing it would be extreme.

In this case, the record does not contain sufficient evidence to show that the hardships faced by the qualifying relatives, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The Applicant also has not established that he has been rehabilitated.

C. Discretion

As the Applicant has not shown eligibility under section 212(h)(1), no purpose would be served in determining whether the Applicant merits a waiver as a matter of discretion. Although we need not make a discretionary determination at this time, the record reflects that he has been convicted of a "violent or dangerous crime." Thus, the Applicant must, at a minimum, meet the requirements of 8 C.F.R. § 212.7(d) to warrant 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 not met that burden. The record does not establish that he qualifies for a waiver related to his rehabilitation, under section 212(h)(1)(A) of the Act, or alternatively, that his U.S. citizen children would experience extreme hardship if the application is denied.

ORDER: The appeal is dismissed.

Cite as *Matter of R-S-S-H-*, ID# 121681 (AAO Sept. 19, 2016)