U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17944414

Date: FEB. 22, 2022

Appeal of Oakland Park, Florida Field Office Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant has applied to adjust status to that of a lawful permanent resident and seeks a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h).

The Director of the Oakland Park, Florida Field Office denied the Form I-601, Application to Waive Inadmissibility Grounds (waiver application), concluding that: (1) the Applicant is inadmissible under sections 212(a)(2)(A)(i)(I) and (II) of the Act for a crime involving moral turpitude and for a controlled substance violation; and (2) he did not establish that his qualifying relative (his U.S. citizen parent) would experience extreme hardship if he were denied admission into the country, as required to establish his statutory eligibility for a waiver of inadmissibility.

On appeal, the Applicant asserts that the Director incorrectly determined that he is inadmissible based on a conviction for a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, although he concedes that he requires a waiver for a controlled substance violation under section 212(a)(2)(A)(i)(II) of the Act. He requests consideration of additional evidence in support of his claim that his qualifying relatives would experience extreme hardship if the waiver application is denied.

The Administrative Appeals Office reviews the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will remand the matter to the Director for further consideration and entry of a new decision.

I. LAW

Section 212(a)(2)(A)(i)(I) of the Act provides that any noncitizen 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. In addition, any noncitizen who admits having committed acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible under section 212(a)(2)(A) of the Act.

Individuals found inadmissible under section 212(a)(2)(A) of the Act for a crime involving moral turpitude, and those found inadmissible for a controlled substance violation related to a single offense of simple possession of 30 grams or less of marijuana, may seek a discretionary waiver of inadmissibility under section 212(h) of the Act. Section 212(h)(1)(A) of the Act provides for a 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 noncitizen has been rehabilitated. Section 212(h)(1)(B) of the Act provides for a waiver if denial of admission would result in extreme hardship to the applicant's U.S. citizen or lawful permanent resident spouse, parent, son, or daughter.

A determination of whether denial of admission will result in extreme hardship depends on the facts and circumstances of each case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999) (citations omitted). We recognize that some degree of hardship to qualifying relatives is present in most cases; however, to be considered "extreme," the hardship must exceed that which is usual or expected. *See Matter of Pilch*, 21 I&N Dec. 627, 630-31 (BIA 1996) (finding that factors such as economic detriment, severing family and community ties, loss of current employment, and cultural readjustment were the "common result of deportation" and did not alone constitute extreme hardship). In determining whether extreme hardship exists, individual hardship factors that may not rise to the level of extreme must also be considered in the aggregate. *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994) (citations omitted).

In these proceedings, it is the applicant's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010).

II. ANALYSIS

On appeal, the Applicant contests that he is inadmissible for a crime involving moral turpitude under section 212(a)(1)(A)(i)(I) of the Act. Further, he submits additional evidence in support of his claim that his U.S. citizen father and lawful permanent resident mother will experience extreme hardship if he is denied admission and they remain in the United States, separated from him, or relocate with him to Cuba. Finally, the Applicant maintains that his application warrants a favorable exercise of discretion.

A. Crime Involving Moral Turpitude

The record reflects, and the Applicant does not dispute, that he pleaded nolo contendere to the charge of Petit Theft, 2nd Degree, in violation of section 812.014(3)(A) of the Florida Statutes on [redacted] 2005. The Applicant does not contest the Director's determination that this disposition is a conviction for immigration purposes.

The Director concluded, without analysis, that the Applicant's conviction under Florida Statutes section 812.014(3)(A) was for a "crime involving moral turpitude," and that the Applicant was therefore inadmissible under section 212(a)(2)(A)(i)(I) of the Act. On appeal, the Applicant contends that the crime of Petit Theft, as set forth in Florida Statutes section 812.014, is not a crime involving moral turpitude because the statute includes an intent to both permanently and temporarily deprive the

owner of property and is not divisible. In support of this claim, the Applicant cites *Descamps v. United States*, 133 S. Ct. 2276 (2013) and provides copies of unpublished BIA decisions in which the Board, citing *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), determined that a conviction for theft under Florida Statutes section 812.014 does not constitute a conviction for a crime involving moral turpitude.

The term "crime involving moral turpitude" is not defined in the Act. However, the Board of Immigration Appeals (the Board) held in *Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007), that "moral turpitude" generally refers to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to 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. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992). Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. *Id.* However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere. *Id.* For cases arising in the jurisdiction of the U.S. Court of Appeals for 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). This categorical approach focuses on whether moral turpitude necessarily inheres in the minimal conduct for which there is a realistic probability of prosecution under the statute. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-1685 (2013); *Gonzales v. Duenas-Alvarez,* 127 S. Ct. 815, 822 (2007)).

Where a criminal statute is divisible (encompasses multiple distinct offenses not all of which are crimes involving moral turpitude), we conduct a modified categorical inquiry by reviewing the record of conviction to discover which offense within the divisible statute formed the basis of the conviction, and then to determine whether that offense is categorically a crime involving moral turpitude. A divisible statute "(1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a "categorical match" to the relevant generic standard." *Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (citing *Descamps,* 113 S. Ct. at 2283). However, disjunctive statutory language only renders a statute divisible where "each statutory alternative defines an independent "element" of the offense, as opposed to a mere "brute fact" describing various means or methods by which the offense can be committed." *Id.* (citing *U.S. v. Mathis*, 136 S. Ct. 2243, 2248 (2016)). "Elements" are what the prosecution must prove to sustain a conviction: at trial, they are what the jury must find beyond a reasonable doubt to convict, and at a plea hearing, they are what the defendant necessarily admits when pleading guilty. *Mathis*, 136 S. Ct. at 2248. Means or methods are extraneous to the crime's legal requirements; they are circumstances or events that need neither be found by a jury nor admitted by a defendant. *Id.*

A theft (or larceny) offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016); *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016).

B. Florida Statutes Section 812.014

At the time of the Applicant's conviction in 2005, Florida Statutes section 812.014 provided, in pertinent part, that:

> (1) 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:
>
> > (a) Deprive the other person of a right to the property or a benefit from the property.
> >
> > (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> . . . .
>
> (3)(a) Theft of any property not specified in subsection (2) is petit theft of the second degree and a misdemeanor of the second degree . . .

Here, a plain reading of Florida Statutes section 812.014(1) reflects that it applies even if a temporary taking or appropriation of property is intended, and there is also no required element that the "theft" may occur under circumstances where the owner's property rights are substantially eroded. Because Florida Statutes section 812.014 does not differentiate between a theft being temporary, permanent, and/or one that occurs under circumstances where the owner's property rights are substantially eroded, we cannot find that a violation of this provision is categorically a crime involving moral turpitude.

To determine whether the statute is divisible into separate offenses, we turn to the Florida Supreme Court standard jury instructions. *See Descamps,* 570 U.S. at 2281 (explaining that resort to the modified categorical approach is appropriate only where the statute of conviction is "divisible," meaning "one or more of the elements of the offense [are set out] in the alternative"). We then look to whether jury unanimity is required with respect to the alternative portions of the statute of conviction. *See United States v. Estrella,* 758 F.3d at 1246.

For Florida Statutes section 812.014 purposes, the jury instructions at the time of the Applicant's conviction stated, in pertinent part that:

> 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 jury instructions, there is no required element that the theft occur under circumstances where the owner is permanently (as opposed to temporarily) deprived of their property, or under circumstances where their property rights are substantially eroded. The instructions also do not reflect that a jury must be unanimous regarding whether a defendant intended to temporarily deprive or permanently deprive an owner of their property rights. Accordingly, the statute is not divisible (in that it does not specify distinct criminal offenses, some of which involve moral turpitude and some which do not). We will therefore withdraw the Director's determination that the Applicant's conviction for Petit Theft under Florida Statutes section 812.014(3)(a) is a crime involving moral turpitude.

C. Basis for Remand

Although the Applicant is not inadmissible for a crime involving moral turpitude, he does not contest his inadmissibility under section 212(a)(1)(A)(i)(II) of the Act for violating a law relating to a controlled substance listed at section 802 of the Controlled Substances Act.

The Applicant was convicted under Florida Statutes section 893.13(6)(B) for Possession of Cannabis – Less then 20 Grams on [redacted] 2005. Because the Applicant has a single conviction for simple possession of 30 grams or less of marijuana, he may be statutorily eligible for a waiver of inadmissibility under section 212(h) of the Act.

The Director's decision reflects that he evaluated the Applicant's eligibility for a waiver under section 212(h)(1)(B) of the Act based on the Applicant's claim that his U.S. citizen father would experience extreme hardship if his waiver application is denied. The Director acknowledged the Applicant's claim that his father relies on him for physical and financial support but concluded that he did not submit sufficient corroborating evidence in support of those claims. The evidence submitted at the time of filing was limited to brief affidavits from the Applicant and his mother, and medical documentation for his father. He did not identify his mother as a qualifying relative on the waiver application.

On appeal, the Applicant asserts that both his U.S. citizen father and lawful permanent resident mother suffer from medical conditions that make them reliant on his physical and financial support and that they will experience extreme hardship if they are separated from him or they must relocate with him to Cuba. The evidence submitted on appeal includes more detailed affidavits from the Applicant and both of his parents, letters of support from the Applicant's siblings and employer, additional medical documentation for both parents, financial documentation for the Applicant and his parents, family photographs, and published reports from U.S. government agencies and other sources regarding

country conditions in Cuba. The Applicant explains that he prepared the initial waiver application without the services of an attorney and requests that the additional evidence be considered in making an extreme hardship determination.

We have reviewed the entire record, including the new documentation submitted on appeal. Because the record does not indicate that the Director had an opportunity to review this additional evidence before forwarding the appeal to our office, we deem it appropriate to return the matter for the Director to reevaluate the new claims of separation and relocation-related hardships and supporting documentation, and to make a discretionary determination should the Director find that extreme hardship has been established.

In addition, the record reflects that the activities that rendered the Applicant inadmissible under section 212(a)(1)(A)(i)(II) of the Act occurred in [redacted] 2005, more than 15 years ago. Accordingly, as the matter is being remanded, the Director should evaluate whether the Applicant is eligible for a discretionary waiver under section 212(h)(1)(A) of the Act based on evidence of his rehabilitation.

III. CONCLUSION

Based on the foregoing discussion, we will remand the matter to the Director to consider the new claims and evidence of extreme hardship, to evaluate the Applicant's eligibility for a rehabilitation waiver under section 212(h)(1)(A) of the Act, and, if the Applicant is found to be statutorily eligible, to determine whether the Applicant warrants a waiver in the exercise of discretion.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.