U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20664162

Date: MAY 31, 2022

Appeal of Nebraska Service Center Decision

Form I-601, Application to Waive Inadmissibility Grounds

The Applicant, a native and citizen of Colombia, has applied for an immigration benefit and seeks a waiver under section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h). Section 212(h) of the Act provides a waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), if denial of admission would result in extreme hardship to a qualifying U.S. citizen or lawful permanent resident spouse, parent, or child of the noncitizen.

The Director of the Nebraska Service Center denied the application, observing that the Applicant was convicted on [redacted], 1998, of "1 count Grand Theft in violation of Florida statute 812.014(2)(B) and 2 counts of Grand Theft in violation of Florida statute 812.014(2)(C)." The Director noted that, in January 2000, an Immigration Judge ordered the Applicant removed from the United States under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). The Director also noted that, based on those convictions, the U.S. Department of State found the Applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act because the offenses were crimes involving moral turpitude and not purely political offenses. The Director separately concluded that the Applicant's conviction was for an "aggravated felony," as defined at section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), for which there is no waiver. *See* section 212(h)(2) of the Act, 8 U.S.C. § 1182(h)(2). On appeal, the Applicant asserts that her conviction is not necessarily an "aggravated felony" and, therefore, she is not barred from a waiver under section 212(h) of the Act.

In these proceedings, it is the Applicant's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

A noncitizen who has been convicted of an "aggravated felony" is inadmissible for 20 years subsequent to the noncitizen's departure or removal from the United States. Section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). An "aggravated felony" includes, in relevant part, "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." Section 101(a)(43)(G) of the Act. Taking property constitutes a theft offense, as provided at section 101(a)(43)(G) of the Act, whenever there is a criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See*

Matter of V-Z-S-, 22 I&N Dec. 1338, 1346 (BIA 2000). There is no waiver for inadmissibility under section 212(a)(9)(A)(ii) of the Act. Section 212(h)(2) of the Act.

II. ANALYSIS

The dispositive issue of the Director's decision is whether the Florida statute under which the Applicant was convicted is an "aggravated felony," as defined at section 101(a)(43)(G) of the Act. As previously stated, a theft offense or burglary offense for which the term of imprisonment is at least one year is an aggravated felony. Section 101(a)(43)(G) of the Act.

In relevant part, the Florida statute under which the Applicant was convicted provides:

> (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:
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> (a) Deprive the other person of a right to the property or 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.

Fla. Stat. § 812.014(1). On appeal, the Applicant establishes that Fla. Stat. § 812.014, as it is written now, and as it was written at the time of the acts in question and at the time of the Applicant's conviction, is not necessarily "a theft offense."

After the Applicant's conviction, the Eleventh Circuit deemed Fla. Stat. § 812.014 to be a divisible statute, meaning that "it contains some offenses that are aggravated felonies and others that are not." *Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1354-55 (11th Cir. 2005) (citing *In re Sweester*, 22 I&N Dec. 709, 713-14 (BIA 1999)).[1] Specifically, violations implicating Fla. Stat. § 812.014(1)(a) are thefts and, therefore, aggravated felonies; whereas violations implicating Fla. Stat. § 812.014(1)(b) are not necessarily thefts and, therefore, not necessarily aggravated felonies. *Id.* at 1355.

On appeal, the Applicant asserts that Fla. Stat. § 812.014 is categorically overbroad and, therefore, unsuited for the modified categorical approach to divisible statutes.[2] The Applicant references *U.S. v.*

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[1] Jaggernauth petitioned the Eleventh Circuit for review of the Board of Immigration Appeals' (the Board's) order affirming an Immigration Judge's order of removal based on a finding that her conviction for grand theft under Fla. Stat. § 812.014(1) constituted an aggravated felony under section 101(a)(43)(G) of the Act. In the removal proceeding, the burden was on the government to show by clear and convincing evidence that her conviction was an aggravated felony. *See Jaggernauth*, 432 F.3d at 1352. The Eleventh Circuit stated that her conviction documents did not sufficiently establish that the grand theft conviction was for a taking with the intent to deprive another of their rights or benefits of property under Fla. Stat. § 812.014(1)(a). Instead, the documents showed that she was charged in the disjunctive: she "did unlawfully and knowingly obtain or endeavor to obtain or to use the property of another . . . or to appropriate the property to the use of the taker or to the use of any person not entitled thereto." *Jaggernauth*, 432 F.3d at 1354 n.4. Thus, the court stated that record did not support the conclusion that she was charged under subpart (a) rather than subpart (b) of Fla. Stat. § 812.014(1).

[2] The categorical approach applies to statutes that criminalize only categorically generic crimes; however "[i]n applying the modified categorical analysis, courts 'look to the fact of conviction and the statutory definition of the prior offense, as

Estrella, 758 F.3d 1239, 1246 (11th Cir. 2014), following the analysis provided in *Descamps v. U.S.*, 570 U.S. 254 (2013), as applied to Fla. Stat. § 790.19.[3] In *Estrella*, the Eleventh Circuit concluded that the modified categorical approach is appropriate for analyzing the divisible Fla. Stat. § 790.19 because it "clearly does . . . 'effectively create several different crimes.'" *Id.* at 1249 (quoting *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013)). The court in *Estrella* stated that "[o]nce a court confirms that the statute of prior conviction is divisible, then—and only then—can it analyze the conviction under the modified categorical approach." *Id.* at 1246. *Estrella* does not require us to disregard the Eleventh Circuit's conclusion that Fla. Stat. § 812.014 is divisible and "contains some offenses that are aggravated felonies and others that are not," *Jaggernauth*, 432 at 1354-55, nor does the Applicant identify a binding case that otherwise does. As stated in *Jaggernauth,* "Florida courts... have consistently interpreted [Fla. Stat. § 812.014(1)] in the disjunctive, to articulate two distinct levels of intent." *Jaggernauth*, 432 F.3d at 1353.

Where a criminal statute is divisible, we will consider the conviction documents in the record to determine which offense within the divisible statute formed the basis of the applicant's conviction. *Shepard v. U.S.*, 544 U.S. 13, 16 (2005). If the applicant was convicted under a portion of the divisible statute that involves an aggravated felony, then the applicant is ineligible for a waiver under section 212(h) of the Act. The burden of proof rests solely with the Applicant. Section 291 of the Act, 8 U.S.C. § 1361; *see also Yepes v. U.S. Att'y Gen.*, 479 F. App'x. 320, 324 (2012 WL 2755928) (distinguishing *Jaggernauth* and indicating that the applicant for cancellation of removal had to show by a preponderance of the evidence that he had not committed an aggravated felony, *see* 8 U.S.C. § 1229b(a); 8 C.F.R. § 1240.8(d)).

Here, the charging document, titled "Information," for the Applicant's criminal case provides both Fla. Stat. § 812.014(1)(a) and Fla. Stat. § 812.014(1)(b) in the conjunctive for all of the charges brought against the Applicant. The judgement document for the case indicates that the Applicant entered a plea of *nolo contendere* to one violation of Fla. Stat. § 812.014(2)(b) and two violations of Fla. Stat. § 812.014(2)(c), among the five charges in the charging document. The judgement document does not indicate whether the Applicant's plea implicated Fla. Stat. § 812.014(1)(b), to the exclusion of Fla. Stat. § 812.014(1)(a), for any of the three violations. Furthermore, the judge sentenced the Applicant to a term of imprisonment of 15 months, followed by 13 years on probation, which exceeds the one-year term-of-imprisonment threshold. *See* Section 101(a)(43)(G) of the Act. Therefore, the Applicant has not established that her convictions are not aggravated felonies.[4] Accordingly, since the Applicant's theft offenses may be "aggravated felonies" as defined at section 101(a)(43)(G) of the Act, the Applicant has not established that she is eligible for a waiver. Section 212(h)(2) of the Act.

We note that the Applicant's reliance on dicta in the Board's dismissal of the Applicant's motion to reconsider is misplaced. The Applicant mentions on appeal that the Board opined that the "statute of

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well as any charging paper and jury instructions to ascertain whether, as a formal matter, committing the offense required committing a "crime of violence"' [when a divisible statue] 'sets out one or more elements of the offense in the alternative.'" *U.S. v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014) (quoting *U.S. v. Rosales-Bruno*, 676 F.3d 1017, 1020 (11th Cir. 2012) and quoting *Descamps v. U.S.*, 570 U.S. 254, 257 (2013)).

[3] Fla. Stat. § 790.19 prohibits wantonly or maliciously shooting, throwing, or otherwise projecting any hard substance that could cause at least great bodily harm within an occupied or unoccupied, private or public building, or any occupied land, water, or air vehicle.

[4] Unlike in *Jaggernauth*, the burden here is on the Applicant to show that her convictions were not aggravated felonies.

conviction was held not to constitute a categorical aggravated felony offense as early as 2005." The Applicant characterizes this as "the [Board's] determination that her conviction no longer constitutes an aggravated felony." However, the Board merely observed that violations implicating Fla. Stat. § 812.014(1)(a) are thefts and, therefore, aggravated felonies; whereas violations implicating Fla. Stat. § 812.014(1)(b) are not necessarily thefts and, therefore, not necessarily aggravated felonies. *See Jaggernauth*, 432 F.3d. at 1355. The Board did not conclude that "[the Applicant's] conviction no longer constitutes an aggravated felony," as she asserts on appeal.

The Applicant has not met her burden of proof in this case and, therefore, we will dismiss the appeal.

ORDER: The appeal is dismissed.