U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 26982973

Date: AUG. 4, 2023

Appeal of Boston, Massachusetts Field Office Decision

Form I-601, Application for Waiver of Grounds of Inadmissibility

The Applicant, a native and citizen of Colombia currently residing in the United States, has applied to adjust status to that of a lawful permanent resident (LPR). A noncitizen seeking to be admitted to the United States as an immigrant or to adjust status must be "admissible" or receive a waiver of inadmissibility. The Applicant has been found inadmissible for a crime involving moral turpitude and seeks a waiver of that inadmissibility. *See* Immigration and Nationality Act (the Act) section 212(h), 8 U.S.C. § 1182(h). 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.

The Director of the Boston, Massachusetts Field Office denied the application, concluding that the record did not establish that her spouse would experience extreme hardship. The matter is now before us on appeal. 8 C.F.R. § 103.3. On appeal, the Applicant argues that her conviction for theft in Florida is not a CIMT and she is therefore admissible to the United States.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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, consideration of current precedent caselaw, and based on the circumstances in this matter, we conclude that the Applicant's conviction for theft under Florida Statutes Annotated (Fla. Stat. Ann.) § 812.014 does not constitute a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. As such, the Applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act and thus does not require a waiver. Accordingly, the matter before us is dismissed as moot.

I. LAW

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.

In assessing whether a conviction is a crime involving moral turpitude, we must first "determine what law, or portion of law, was violated." *Matter of Esfandiary*, 16 I&N Dec. 659, 660 (BIA 1979); see also *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (Board of Immigration Appeals (Board) engaged in a categorical inquiry of the entire criminal statute addressing discharge of a firearm rather than a specific subsection because the amended charging document to which the respondent pled guilty "did not specifically allege . . . any one portion of the statute to the exclusion of any other"). We then engage in a categorical inquiry of the statute, considering the "inherent nature of the crime as defined by statute and interpreted by the courts," not the underlying facts of the criminal offense. *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); see also *Matter of Louissaint*, 24 I&N Dec. 754,757 (BIA 2009) (citing Taylor v. United States, 495 U.S. 575, 599-600 (1990)). 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 the statute does not contain a single, indivisible set of elements but rather encompasses multiple distinct criminal offenses, "some . . . of which involve moral turpitude and some which do not," we determine whether a statute is "divisible" and accordingly, a modified categorical inquiry is necessary. *Short*, 20 I&N Dec. at 137-138; *Silva-Trevino*, 26 I&N Dec. at 833 (citing *Descamps v. U.S.*, 133 S. Ct. 2276, 228, 2283 (2013); *Chairez*, 26 I&N Dec. at 819-20). A criminal statute can be considered divisible if it sets out elements in the alternative. *See, e.g., United States v. Carter*, 752 F. 3d 8, 17-18 (1st Cir. 2014) (citing *Descamps*, 133 S. Ct. at 2281).

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. at 822 (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.*

There are various sources for confirming whether alternatives in a statute are elements or means. One such source is the record of conviction itself for the sole and limited purpose (at this stage of the analysis) of resolving the divisibility question. *Mathis*, 136 S. Ct. at 2257. For example, the indictment or jury instructions might just reiterate all the alternatives, or use a single umbrella term for various alternatives, indicating that these alternatives are means of commission for which the jury did not need to make a unanimous decision. *Id.* On the other hand, the record of conviction could indicate "by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements. . . ." *Id.*

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. *See Short*, 20 I&N Dec. at 137-38, *see also Descamps*, 133 S. Ct. at 2285-86.

II. ANALYSIS

The Applicant entered the United States in September 2016 as a non-immigrant visitor. She married M-C-L-[1], a U.S. citizen, in [redacted] 2017. In [redacted] 2016 the Applicant was arrested and charged with two counts of Grand Theft in the Third Degree under Fla. Stat. Ann. § 812.014(2)(C)(1) and one charge of Conspiracy to Commit Retail Theft under 812.015(8). The conspiracy charge was later dropped. However, the Applicant plead no contest to the two charges of Grand Theft and the court withheld adjudication ordering that the Applicant receive 2 days in jail and pay fines in the amount of $2,093. In addition, during the pendency of her application, the Applicant was charged with petit larceny under Fla. Stat. Ann. § 812.014(2)(E). The Applicant was found guilty in [redacted] 2021.

For immigration purposes, a non-citizen will be deemed to have been convicted of an offense if adjudication is withheld when they make a formal plea of guilt, or no contest and the judge orders some form of punishment, penalty, or a restraint on the non-citizen's liberty. Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). Since the Applicant plead no contest and the court ordered a penalty be imposed, the Applicant's offense is a conviction for immigration purposes.

On Appeal the Applicant argues that Florida's theft statute is not categorically a CIMT and that it is not a divisible statute requiring analysis under the modified categorical approach.[2] The issue on appeal is whether the Applicant is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of a crime involving moral turpitude for her 2016 and 2021 convictions under Fla. Stat. Ann. § 812.014.

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to deprive the owner of property either permanently or under circumstances where the owner's property rights are substantially eroded. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 853 (BIA 2016) (citing to *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) and its differentiation between permanent and temporary takings when evaluating whether theft offenses involve moral turpitude but clarifying that, based on significant changes to criminal law since addressing the issue, a "literally permanent taking" is not always required) (emphasis in original). The language of Fla. Stat. § 812.014, the provision the Applicant was convicted under, however, reflects that it may 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. Fla. Stat. § 812.014(1) (West 2022). It does not otherwise require the substantial erosion of the owner's property rights. *Id.* As a result, the minimum conduct needed for a conviction under the

[1] We use initials to protect the privacy of individuals.

[2] The Applicant further argues that she is eligible for adjustment of status, however, inquiry into whether the applicant meets the eligibility requirements for adjustment of status is beyond the scope of this appeal.

statute does not involve moral turpitude and its violation is, therefore, not categorically a crime involving moral turpitude.

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. *Florida Standard Jury Instructions*, Criminal Ch. 14.1. While the language "with intent to, either temporarily or permanently," may be phrased in the disjunctive, it does not render the statute divisible so as to warrant a modified categorical inquiry in this context. Therefore, the Applicant's theft convictions are not crimes involving moral turpitude which would render her inadmissible under section 212(a)(2)(A)(i)(I) of the Act and the waiver application is not necessary. Accordingly, the matter before us is dismissed as moot.

ORDER: The appeal is dismissed as moot.