U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27370344

Date: SEPT. 18, 2023

Appeal of Jacksonville, Florida Field Office Decision

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

The Applicant was found inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on convictions for crimes involving moral turpitude (CIMT). She seeks a waiver of inadmissibility under section 212(h) of the Act to adjust status to that of a lawful permanent resident in the United States.

The Director of the Jacksonville, Florida Field Office denied the waiver request, concluding that the Applicant did not establish that refusal of admission would cause extreme hardship to her U.S. citizen spouse. The matter is now before us on appeal. 8 C.F.R. § 103.3.

On appeal, the Applicant submits her own statement asserting her rehabilitation and mitigating circumstances surrounding her criminal history together with additional evidence of hardship on her U.S. citizen husband. The Applicant contends that, assuming two of her convictions constitute CIMTs, the Director did not properly evaluate the previously provided evidence of hardships, which she claims shows that her spouse will suffer extreme hardship if the waiver is not granted.

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). The matter is now before us on appeal. 8 C.F.R. § 103.3. Upon review of the record and consideration of current precedent caselaw, we conclude that the Applicant's convictions for petty theft under Florida Statute (Fla. Stat.) § 812.014 do not constitute crimes 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 will be dismissed as moot.[1]

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.

[1] The only matter before us is whether the Applicant merits a waiver under section 212(h) of the Act.

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 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. The Applicant had three convictions:

- Two convictions in 2010 for petty theft under Fla. Stat. § 812.014 which are both first degree misdemeanors; and,
- One conviction in 2011 for disorderly conduct under Fla. Stat. § 877.03 which is a second-degree misdemeanor.

In addition to these convictions, the Applicant has two citations for driving with a suspended license, one citation in 2016 and one citation in 2017. In 2014, the Applicant was arrested for battery, but that arrest did not result in a conviction.[2]

The Director found the Applicant inadmissible based on the two convictions for petty theft, which the Director found, without analysis, to be CIMTs. On appeal, we find that the convictions for petty theft do not constitute CIMTs.

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). It does not otherwise require the substantial erosion of the owner's

[2] At the Applicant's adjustment of status interview, she stated that she was in possession of under 20 grams of marijuana at the time of the second arrest for petty theft, however this statement correctly did not result in the Director making a finding of inadmissibility for controlled substance possession. We agree that the Applicant's statement during the interview did not render the Applicant inadmissible. In order for the admission of a crime or acts constituting the essential elements of a crime to be properly used as a basis for inadmissibility, three conditions must be met: 1) the admitted acts must constitute the essential elements of a crime in the jurisdiction in which they occurred; 2) the respondent must have been provided with the definition and essential elements of the crime, in understandable terms, prior to making the admission; and 3) the admission must have been voluntary. Matter of K-, 7 I&N Dec. 594, 597 (BIA 1957); see also Matter of G-M-, 7 I&N Dec. 40, 70 (BIA 1955).

property rights. Id. As a result, the minimum conduct needed for a conviction under the 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. As no other grounds of inadmissibility have been raised, the waiver application is not necessary. Accordingly, the matter before us will be dismissed as moot.

ORDER: The appeal is dismissed as moot.