



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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**Name: CANALES AVILA, MANUEL DEJ...      A 090-104-314**

**Date of this notice: 1/17/2018**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

*Donna Carr*

Donna Carr  
Chief Clerk

Enclosure

Panel Members:  
Grant, Edward R.

User team: Docket

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Falls Church, Virginia 22041

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File: A090 104 314 – Charlotte, NC

Date:

In re: Manuel Dejesus CANALES AVILA

JAN 17 2018

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Nitin K. Goyal, Esquire

APPLICATION: Reconsideration

On June 19, 2014, the Board dismissed the respondent's appeal from the Immigration Judge's September 26, 2012, decision denying his application for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (1995), and on September 24, 2014, the Board denied the respondent's motion to reconsider our June 19, 2014, decision. The respondent now moves the Board again to reconsider our June 19, 2014, decision. The motion exceeds the time and number limitations imposed on motions to reconsider. *See* sections 240(c)(6)(A), (B) of the Act, 8 U.S.C. §§ 1229a(c)(6)(A), (B) (2017); 8 C.F.R. § 1003.2(b)(2) (2017). The respondent, however, specifically requests the exercise of the Board's authority to reconsider our prior order sua sponte. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. § 1003.2(a). The respondent argues, inter alia, that based on the Supreme Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), the charge of removability entered against him cannot be sustained. The Department of Homeland Security has not opposed this motion. The motion will be granted.

The Notice to Appear (NTA) alleges that the respondent, a native and citizen of El Salvador, was convicted of following crimes: misdemeanor assault with a deadly weapon, in violation of North Carolina General Statutes, on September 29, 2003; misdemeanor burglary in violation of California Penal Code § 459, on July 6, 1994; and felony burglary in violation of California Penal Code § 459, on January 24, 1994. Based on these allegations, the respondent was charged with removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The respondent admitted to the allegations and conceded his removability as charged.

To determine whether a conviction is for a crime involving moral turpitude, the Board compares the elements of the offense to the elements of the generic crime involving moral turpitude to determine if there is a categorical match. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831-32 (BIA 2016). Generally, "moral turpitude" refers to offenses involving fraud or deception and conduct that is inherently vile, base, or depraved and violates accepted moral standards. *Id.*, at 834. An offense is broader than the generic crime if there is a "realistic probability" that the statute would be applied to acts not covered by the generic crime. *Id.*, at 832.

If the statute of conviction includes some crimes that involve moral turpitude and some that do not, we must determine if the statute is divisible. *Id.*, at 833. A statute is divisible only if (1) it 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. See *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016), citing *Descamps v. United States*, 133 S. Ct. at 2281, 2283.


The statute of conviction at issue, California Penal Code § 459, has three elements: (1) entry (2) into any building, certain vehicles and vessels, or other listed structures or containers, (3) with the intent to commit larceny or any felony. *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1101 (9th Cir. 2011), and the cases cited therein. Assuming that the generic crime of burglary is a crime involving moral turpitude, burglary under California Penal Code § 459 is broader than generic burglary, which requires an unlawful entry, e.g., breaking and entering or similar conduct. *Mathis v. United States*, 136 S. Ct. at 2248; *Descamps v. United States*, 133 S. Ct. at 2295. In addition, in *Hernandez-Cruz v. Holder*, wherein it was determined that the petitioner’s offense was not a crime involving moral turpitude, the United States Court of Appeals for the Ninth Circuit effectively found that California Penal Code § 459 was not a categorical crime involving moral turpitude.

Because a conviction for burglary under California Penal Code § 459 is not categorically for a crime involving moral turpitude, we may proceed to apply the modified categorical approach only if the statute is divisible. *Mathis v. United States*, 136 S. Ct., at 2249. The United States Supreme Court, however, has determined that California Penal Code § 459 is not divisible. *Descamps v. United States*, 133 S. Ct. at 2293 (concluding that because generic unlawful entry is not an element, or an alternative element of California Penal Code § 459, a conviction under that statute is never for generic burglary). Thus, the modified categorical approach cannot be applied to determine whether the respondent was convicted of a crime involving moral turpitude.

In conclusion, under the current analytical framework, the respondent’s 1994 convictions under California Penal Code § 459 are not for crimes involving moral turpitude. Inasmuch as two of the three crimes listed on the NTA are not crimes involving moral turpitude, the sole charge of removability under section 237(a)(2)(A)(ii) of the Act (alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct) cannot be sustained. Accordingly, the respondent’s motion to reconsider will be granted sua sponte, and the proceedings will be terminated. See *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); 8 C.F.R. § 1003.2(a).

ORDER: The motion to reconsider is granted.

FURTHER ORDER: The removal proceedings are terminated.

  
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FOR THE BOARD