U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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P.O. Box 25158
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Name: DOMINGUEZ-GUTIERREZ, GILBERTO **A201-021-861**

Date of this notice: 3/21/2011

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
King, Jean C.

U.S. Department of Justice

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DOMINGUEZ-GUTIERREZ, GILBERTO
A# 201-021-861
1705 EAST HANNA ROAD
ELOY, AZ 85131

DHS/ICE Office of Chief Counsel - ELO
P.O. Box 25158
Phoenix, AZ 85002

Name: DOMINGUEZ-GUTIERREZ, GILBERTO **A201-021-861**

Date of this notice: 3/21/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Guendelsberger, John
King, Jean C.

File: A201 021 861 - Eloy, AZ

Date: MAR 21 2011

In re: GILBERTO DOMINGUEZ-GUTIERREZ

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alex E. Navidad, Esquire

ON BEHALF OF DHS: Julie Nelson
Assistant Chief Counsel

APPLICATION: Redetermination of custody status

The respondent, a native and citizen of Mexico, has appealed from the November 29, 2010, decision of an Immigration Judge. The Immigration Judge issued a bond memorandum dated January 18, 2011, setting forth the reasons for her bond decision. The appeal will be sustained and the record will be remanded for further proceedings consistent with this decision.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(I); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration and Nationality Act prescribes mandatory detention for certain aliens, including those who, like the respondent, have been charged with removability for the commission of a crime involving moral turpitude. *See* section 236(c)(1)(A) of the Act; 8 U.S.C. § 1226(c)(1)(A). The regulations generally do not confer jurisdiction on an Immigration Judge over custody or bond determinations governing those aliens who are subject to mandatory detention. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). However, an alien may seek a determination by an Immigration Judge that the alien is "not properly included within" certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue in this matter. *See* 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph,* 22 I&N Dec. 799, 802 (BIA 1999). An alien will not be considered "properly included" within a mandatory detention category only when an Immigration Judge determines that the Department of Homeland Security is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention. *See Id.*

The record indicates that the respondent was convicted on October 4, 2010, in the Superior Court of Arizona, Maricopa County, for the offense of Solicitation to Commit Taking the Identity of

Another in violation of Arizona Revised Statutes sections 13-1002, 2001, 2008, 701, 702, and 801. The respondent was sentenced to an 18 month term of probation for this offense.

In *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184-85 (9th Cir. 2000), the Ninth Circuit held that in similar circumstances Congress clearly intended that the use of a false Social Security number to further otherwise legal behavior such as employment is not a crime involving moral turpitude. Here, the respondent was convicted of similar conduct as the underlying criminal offense is Taking the Identity of Another in violation of section 13-2008 of Arizona Revised Statutes, which provides in pertinent part:

> A person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense, or with the intent to obtain or continue employment.

Given the breadth of the Arizona statute under which the respondent was convicted, we find that there is a "realistic probability" that an individual might be prosecuted under the statute for conduct that is not turpitudinous. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90, 696-97 (A.G. 2008); *Beltran-Tirado v. INS, supra*. For example, the third prong of the statute under which the respondent was convicted requires the use of identity or fictitious identity "with the intent to obtain or continue employment." We are unable to determine based upon the scant evidence regarding the respondent's conviction whether he is properly included in the ground of inadmissibilty under section 212(a)(2)(A)(i)(I) of the Act pursuant to *Matter of Joseph, supra*. We will therefore remand the record to the Immigration Judge for further development of the factual record and the entry of a new decision.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1705 EAST HANNA ROAD, SUITE 366
ELOY, AZ 85231

IN THE MATTER OF:	)	**IN BOND PROCEEDINGS**
DOMINGUEZ-GUTIERREZ, Gilberto	)	**FILE NO.** A201-021-861
RESPONDENT	)	**DATE:** January 18, 2011

ON BEHALF OF THE RESPONDENT:

Alex Navidad, Esq.
Law Offices of Navidad, Leal & Silva, PLC
323 West Roosevelt, Ste. #200
Phoenix, AZ 85003

ON BEHALF OF THE DEPARTMENT:

Assistant Chief Counsel
Department of Homeland Security
1705 East Hanna Road
Eloy, AZ 85231

MEMORANDUM DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL HISTORY

The respondent is a native and citizen of Mexico. (Exh. 1, Form I-862, 1.) He "entered the United States at an unknown place on an unknown date" in 1997. (Exh. 1a, Form I-261.) He was "not then admitted or paroled after inspection by an Immigration Officer." (Exh. 1, Form I-862, 1.) He was, "on October 4, 2010, convicted in the Superior Court of Arizona, Maricopa County for the offense, Count 1 (amended) Solicitation to Commit Taking Identity of Another, a Class 6 designated felony, in violation of A.R.S. Sections 13-2001, 2008, 701, 702, 801, for which [he was] sentenced to eigh[]teen (18) months probation with the Adult Probation Department." (*Id.*)

On October 6, 2010, based on these allegations, the Department of Homeland Security ("DHS" or "the Department") issued a Notice to Appear, charging the respondent as removable from the United States pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"), "as amended, in that [he is] an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General." (Exh. 1, Form I-862, 3.) The Department further charged the respondent as removable pursuant to INA § 212(a)(2)(A)(i)(I), "as amended, in that, [he is] an alien who has been 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." (*Id.*)

On October 7, 2010, the respondent was detained in the custody of the Department. (Bond Exh. 1, Form I-286.) The respondent requested a redetermination of his custody status

pursuant to 8 C.F.R. § 1236.1(d), and a hearing was convened to consider his request on November 29, 2010.

II. STATEMENT OF LAW

Pursuant to the provisions of Section 236(a) of the Act, the Court undertakes a two-step analysis to determine whether the respondent is eligible for bond. First, a criminal alien must establish to the satisfaction of the Immigration Judge that he or she does not present a danger to property or persons in the community and is not a threat to national security. *Matter of Guerra*, 24 I&N Dec. 37, 38 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102, 1115 (BIA 1999); *Matter of Patel*, 15 I&N Dec. 666, 667 (BIA 1976). An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings. *Matter of Guerra*, 24 I&N Dec. at 38 (*citing Matter of Drysdale*, 20 I&N Dec. 815 (BIA 1994)). Second, if the alien does not pose a danger to the community, a determination must be made as to whether an alien poses a flight risk or is likely to abscond and unlikely to appear for future proceedings. *Matter of Adeniji*, 22 I&N Dec. at 1115; *Matter of Patel*, 15 I&N Dec. at 667. *Matter of Guerra*, 24 I&N Dec. at 40.

The Court has broad discretion in deciding the factors that it may consider in custody redeterminations and it may choose to give greater weight to one factor over others, as long as the decision is reasonable. *Matter of Guerra*, 24 I&N Dec. at 40. When determining whether an alien merits release from bond, as well as the amount of bond that is appropriate, the Court may look at any or all of the following factors:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.

Id.; *see also Matter of Saelee*, 22 I&N Dec. 1258 (BIA 2000); *Matter of Drysdale*, 20 I&N Dec. at 817; *Matter of Andrade*, 19 I&N Dec. 488 (BIA 1987); *Matter of Patel*, 15 I&N Dec. at 667; *Matter of Sugay*, 17 I&N Dec. 637, 638-39 (BIA 1981); *Matter of San Martin*, 15 I&N Dec. 167, 168-69 (BIA 1974); *Matter of S-Y-L-*, 9 I&N Dec. 575, 577 (BIA 1962).

Conversely, an Immigration Judge may not redetermine custody conditions for aliens described in section 236(c) of the Act. 8 C.F.R. § 1003.19(h)(2)(i)(D). Pursuant to INA § 236(c)(1), the Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in section 212(a)(2) (criminal and related grounds) or section 212(a)(3)(B) (terrorist activities); or is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii) (multiple criminal convictions), (A)(iii) (aggravated felony), (B) (controlled substances convictions), (C) (certain firearms convictions), (D) (miscellaneous crimes), or section 237(a)(4)(B) (security and related grounds); or is deportable

under section 237(a)(2)(A)(i) (crime of moral turpitude) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least one year. INA § 236(c)(1); 8 C.F.R. § 236.1(c). The alien shall be taken into custody when he or she is released without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense. INA § 236(c)(1).

An Immigration Judge may determine whether he or she has jurisdiction over a bond proceeding "based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the [Department]." 8 C.F.R. § 1003.19(d). An alien may seek a custody redetermination before the Immigration Judge if it is determined that the respondent is not "properly included" within a mandatory detention category. 8 C.F.R. § 1003.19(h)(2)(ii). The respondent will not be properly included if, on the basis of the bond record as a whole, it is "substantially unlikely" that the Department would prevail on a charge of removability specified in Section 236(c)(1) of the Act. *Matter of Joseph*, 22 I&N Dec. 799, 802 (BIA 1999).

III. FINDINGS AND ANALYSIS

The Court lacks jurisdiction to redetermine the respondent's custody status, as he has failed to meet his burden to prove that he is not "properly included" within the provision subjecting him to mandatory detention, here, INA § 212(a)(2)(A)(i)(I).

A. Legal Standard

Among those subject to the mandatory detention under section 236(c) of the Act, include those who have been convicted of a crime involving moral turpitude, pursuant to INA § 212(a)(2)(A)(i)(I). A crime involving moral turpitude ("CIMT") involves "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 910 (9th Cir. 2009) (citing *Matter of Perez-Contreras*, 20 I&N Dec. 615, 618 (BIA 1992).). It must involve both reprehensible conduct and some degree of scienter. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008); *See also Marmolejo-Campos v. Holder*, 558 F.3d 903, 910-11 (9th Cir. 2009) (according Chevron deference to the Board of Immigration Appeals' ("Board") definition of a CIMT). The degree of scienter required may be "specific intent, deliberateness, willfulness, or recklessness." *Silva-Trevino*, 24 I&N Dec. at 687. Moral turpitude also has been defined as a willful act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, such that it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006); *see also Matter of Torres-Varela*, 23 I&N Dec. 78, 85 (BIA 2001); *see also Matter of Franklin, supra; Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996). Moral turpitude does not depend on felony or misdemeanor distinction. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). Nor does the seriousness of a criminal offense or the severity of the sentence imposed determine whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992).

To determine whether a specific crime constitutes a crime involving moral turpitude, the Court employs the categorical approach and then, if necessary, the modified categorical approach, both set forth in *Taylor v. United States*, 495 U.S. 575 (1990).[1] Under the categorical approach, the Court must first compare the language and elements of the statute to a federal generic definition of the crime to determine "whether conduct proscribed by the statute is broader than the generic federal definition." *Quintero-Salazar v. Keisler*, 506 F.3d 688, 692 (9th Cir. 2007) (*citing Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017 (9th Cir. 2005)); *see also Matter of Torres-Varela, supra*, at 84; *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999); *Matter of Y-*, 1 I&N Dec. 137 (BIA 1941). In making this comparison, the immigration judge can only consider the statutory definition of the crime which the individual was convicted of, and not the actual underlying facts, conduct, or circumstances surrounding that crime. *United States v. Corona-Sanchez*, 291 F.3d 1201, 1203 (9th Cir. 2002).

If all of the conduct proscribed by the statute falls within the generic federal definition of a crime involving moral turpitude, then the crime categorically qualifies as a crime involving moral turpitude. Conversely, if there is a "realistic probability" that the statute in question is broader than the generic federal definition, in that the state offense punishes both morally turpitudinous and non-morally turpitudinous conduct, then the conviction does not categorically qualify as a crime involving moral turpitude, and the Court must use the Ninth Circuit's modified categorical approach to determine whether the respondent has been convicted of a CIMT.

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[1] The Attorney General's categorical and modified categorical approach, as espoused in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 689-90 (A.G. 2008), sets forth that:

> First, in evaluating whether an alien's prior offense is one that categorically involves moral turpitude, immigration judges must determine whether there is a "realistic probability, not a theoretical possibility," that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude.
>
> Second, where this categorical analysis does not resolve the moral turpitude inquiry in a particular case, an adjudicator should proceed with a "modified categorical" inquiry. In so doing, immigration judges should first examine whether the alien's record of conviction—including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea and the plea transcript—evidences a crime that in fact involved moral turpitude. When the record of conviction is inconclusive, judges may, to the extent they deem it necessary and appropriate, consider evidence beyond the formal record of conviction. The goal of this inquiry is to discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information; it is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding.

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") provides that courts must follow the categorical and modified categorical approach as espoused in *Taylor v. United States*, 495 U.S. 575 (1990) and *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007), when determining the elements of an alien's conviction. *See, e.g., Uppal v. Holder*, 605 F.3d 712 (9th Cir. 2010); *Morales-Garcia v. Holder*, 567 F.3d 1058, 1062 (9th Cir. 2009); *Marmolejo-Campos*, 558 F.3d at 912. As such, this Court follows the precedent as set forth by the Ninth Circuit. *See, e.g., Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989); 8 C.F.R. § 1003.1(g). *National Cable & Telecommunications Ass'n v. Brand X Internet Services et al.*, 545 U.S. 967, 125 S.Ct. 2688 (2005). Under the Ninth Circuit's modified categorical approach, the Court will "consider whether documentation or other judicially noticeable facts in the record indicate that [the respondent] was convicted of the elements of the generically defined crime." *Huerta-Guevera*, 321 F.3d 883, 887 (9th Cir. 2003). The Court may consider documents that are part of the record of conviction, but may not look beyond the record of conviction to the particular facts underlying the conviction. *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004).

Navarro-Lopez v. Gonzales, 503 F.3d at 1072 (*quoting Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007)); *see also Silva-Trevino*, 24 I&N Dec. 687; *Morales-Garcia*, 567 F.3d at 1065.

B. Ariz. Rev. Stat. §§ 13-1002, 13-2008

The administrative record of bond proceedings reflects that on October 4, 2010, the respondent was convicted by guilty plea of the offense of solicitation to commit taking the identity of another, a class 6 designated felony, in violation of Sections 13-1002 and 13-2008 of the Arizona Revised Statutes ("A.R.S."). (Bond Exh. 4 and 6.)

"Solicitation" in Arizona, pursuant to A.R.S. § 13-1002, is an inchoate offense which is distinct from the crime solicited. *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903 (9th Cir. 2007). Thus, the Court looks to the underlying offense to determine whether the respondent's conviction constitutes a crime involving moral turpitude. The statutory language of the respondent's offense reads:

> [a] person commits taking the identity of another person or entity if the person knowingly takes, purchases, manufactures, records, possesses or uses any personal identifying information or entity identifying information of another person or entity, including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense, or with the intent to obtain or continue employment.

A.R.S. § 13-2008(A).

"Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." *Tijani v. Holder*, --- F.3d ---, 2010 WL 4925449, *8 (No. 05-70195) (9th Cir. Dec. 6, 2010) *amending* 598 F.3d 647 (9th Cir. 2010) (quoting *Jordan v. De George*, 341 U.S. 223, 227 (1951).). "A crime involves fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is either 'explicit in the statutory definition' of the crime or 'implicit in the nature' of the crime." *Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) (citing *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993).). An offense is inherently fraudulent where one seeks to obtain something of value by means of his misrepresentation. *See Tijani v. Holder*, 2010 WL 4925449, *4 (finding fraud is implicit in the nature of a crime committed by "making a false statement with the intent that it be relied upon to obtain 'the delivery of personal property, the payment of cash, the making of a loan or credit.'"); *Tall v. Muskasey*, 517 F.3d 1115, 1119 (9th Cir. 2008); *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007) (en banc).

Based upon the statute of conviction, an offense in violation of A.R.S. § 13-2008 is categorically a crime involving moral turpitude. While an "intent to defraud" is not explicit in the language of the statute, the full range of conduct encompassed by it is inherently fraudulent. Here, the government must necessarily prove that the offender knowingly dealt in another's identifying information without consent, and did so with the intent to obtain or use it for an

unlawful purpose through means of the false representation put forth by that identifying information. As such, an intent to defraud is "implicit in the nature of the crime," and therefore, moral turpitude necessarily adheres to the statute of conviction. *Cf. Matter of Serna*, 20 I&N Dec. 579, 585-86 (BIA 1992) (holding that "possession of an altered immigration document with knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a conviction for a crime involving moral turpitude").

Conversely, the respondent asserts that an offense in violation of A.R.S. § 13-2008 is not categorically a crime involving moral turpitude, because it encompasses the taking of an identity of another for an underlying purpose which may not be morally turpitudinous, such as for securing employment. (Bond Exh. 6.) To support his argument, the respondent cites to *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), in which the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") held that the crime of using a false social security card, 42 U.S.C. § 408(a)(7)(B), was not a crime of moral turpitude. In arriving at this conclusion, the Ninth Circuit considered the congressional history of 42 U.S.C. § 408, which was amended in 1990 to provide "aliens who had been granted permanent resident status under the amnesty or registry statutes were exempted from prosecution for certain past use of false Social Security numbers"[2] (such as, appropriating a false social security number for the purpose of establishing credit and work in the United States). *Id.* at 1183. The Ninth Circuit noted that, in amending the statute, the congressional conference report provided that "*individuals who are provided exemption under this proposal should not* be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the Immigration and Naturalization Service." *Id.* (quoting H.R. Conf. Rep. No. 101-964 at 948 (1990).). (emphasis added). As such, the Ninth Circuit neither explicitly or implicitly expressed an intent for its holding in *Beltran-Tirado* to apply to matters unrelated to determining the eligibility of an individual who has engaged in conduct described in 42 U.S.C. § 408 to seek permanent resident status under the amnesty or registry statutes.

Nevertheless, in the instant case, the bond record does not establish that the respondent's offense was pursuant to the use of a false identity in order to secure employment. Even if the respondent engaged in fraudulent conduct while harboring an intent to use the profit of the crime in a manner which, independently, might not be considered "base, vile, or depraved," it does not alter that A.R.S. § 13-2008 necessarily involves the knowing dealing or using identifying information of another, *without their consent,* and with the intent that someone else will rely on that fraudulent misrepresentation. *See Tijani v. Holder,* 598 F.3d 647, 651-652 (9th Cir. 2010).

Lastly, the respondent's offense does not fall under the "petty offense" exception. *See* INA § 212(a)(2)(A)(ii)(II). The petty offense exception applies where the maximum penalty possible for the crime does not exceed a term of imprisonment of one year, and the respondent was not sentenced to a term of imprisonment *in excess* of six months. *Id.* Here, the respondent's

[2] Section 408(d)(1) grants immunity from certain prosecutions to aliens who achieve permanent resident status under: 8 U.S.C. §§ 1160 or 1255a; § 902 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989; § 202 of the Immigration Reform and Control Act of 1986; or 8 U.S.C. § 1259 (the registry statute). It also confers immunity on aliens who are granted special immigrant status under 8 U.S.C. § 1101(a)(27)(I). *See* 42 U.S.C. § 408(d)(1).

offense does not fall under the petty offense exception, as the maximum penalty possible for A.R.S. § 13-2008, a class six felony, is 1.5 years of incarceration. *See* A.R.S. § 13-702(D).

Therefore, the Court finds that the respondent has failed to meet his burden to prove that it is "substantially unlikely" that the Department will prevail on the charge of removability pursuant to INA § 212(a)(2)(A)(i)(I), a crime involving moral turpitude. As the respondent is "properly included" within a provision specified in Section 236(c)(1) of the Act, he is subject to mandatory detention. INA § 236(c)(1)(A); 8 C.F.R. § 1003.19(h)(2)(i) (D); *Matter of Joseph*, 22 I&N Dec. 799, 802 (BIA 1999). As such, the Court lacks jurisdiction to redetermine his custody status. *Id.*

IV. CONCLUSION

Accordingly, the Court will enter the following Order:

ORDER: **IT IS HEREBY ORDERED THAT** the respondent's request for custody redetermination be **DENIED** due to lack of jurisdiction.

Linda I. Spencer-Walters
United States Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (M) ALIEN'S ATT/REP ( ) DHS
DATE: 1/18/11 BY COURT STAFF:
Attachments: ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other