U.S. Department of Justice

Executive Office for Immigration Review

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Name: NGUYEN, THIEN THIN

A 073-279-229

Date of this notice: 5/16/2017

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

File: A073 279 229 – Los Angeles, CA Date: MAY 16 2017

In re: THIEN THIN NGUYEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Don H. Dao, Esquire

APPLICATION: Voluntary departure

The respondent, a native and citizen of Vietnam, appeals the June 25, 2014, decision of the Immigration Judge denying his application for voluntary departure under section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c. The record will be remanded.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion, and judgement, and all other issues raised in an Immigration Judge's decision are reviewed on a de novo basis. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The record reflects that the respondent was convicted in 2008 for the offense of identity theft in violation of Cal. Penal Code § 530.5(a), and sentenced to a period of confinement of 8 months. That statute provides that a person commits an offense when he or she willfully obtains "personal identifying information" belonging to another, without the other's consent, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person.[1]

The Immigration Judge determined that the respondent's conviction for the offense of identity theft was a categorical crime involving moral turpitude (CIMT) (I.J. at 3). However, while the appeal in this matter was pending, the United States Court of Appeals for the Ninth Circuit, in

[1] For purposes of this statute, the phrase "personal identifying information" means "the name, address, telephone number, health insurance identification number, taxpayer identification number, school identification number, state or federal driver's license number, or identification number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voice print, retina or iris image, or other unique physical representation, unique electronic data including identification number, address, or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person." Cal. Penal Code § 530.5(b).

which this case arises, ruled in *Linares-Gonzalez v. Lynch* 823 F.3d 508 (9th Cir. 2016), that a conviction for identity theft under California Penal Code (CPC) § 530.5(a) is not a categorical CIMT. Inasmuch as the Immigration Judge found the respondent was inadmissible based on a conviction for a CIMT, we find that a remand is warranted to allow the Immigration Judge to consider the respondent's removability and eligibility for relief. On remand, the Immigration Judge should allow the respondent to file any applications for relief, including voluntary departure. Thereafter, the Immigration Judge should issue a new decision.[2]

ORDER: The record is remanded to the Immigration Court for further proceedings and a new decision.

FOR THE BOARD

[2] The Immigration Judge based his denial of voluntary departure on a finding that the respondent had been convicted of an aggravated felony based on a conviction for the offense of taking a vehicle without owner's consent in violation of section 10851(a) of the California Penal Code. However, the Department of Homeland Security withdrew the lodged charge regarding the aggravated felony offense, and the record does not reflect that the charge was renewed (Tr. at 45).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: A073-279-229 June 25, 2014

In the Matter of

THIEN THIN NGUYEN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as amended, in that you are an alien who has been convicted of, or who admits committing, or has been convicted of a crime containing the essential elements of a crime involving moral turpitude.

APPLICATIONS: Voluntary departure pursuant to Section 240B(b)(1)

ON BEHALF OF RESPONDENT: DON DAO, Esquire
16040 Harbor Boulevard, Suite K
Fountain Valley, California 92708

ON BEHALF OF DHS: CHRISTIE E. WOO-THIBODEAUX, Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION AND PROCEDURAL SUMMARY

Respondent is a male, native and citizen of Vietnam. The United States Department of Homeland Security (DHS) has brought these removal proceedings against respondent under the authority of the Immigration and Nationality Act (Act or

INA). Proceedings were commenced at the filing of the Notice to Appear (NTA) with this Court on January 31, 2013. See Exhibit 1.

Government, on July 24, 2013, filed with the Court a lodged charge. That document is contained in the record at Exhibit 1-A. On February 6, 2014, respondent, through counsel, entered his pleadings at which time he admitted factual allegations 1, 2, 3 and 5 on the Notice to Appear, but denied allegation 4 on the I-261. Respondent also denied inadmissibility as charged on the Notice to Appear under Section 212(a)(2)(A)(i)(I) of the Act. In support of their Notice to Appear and I-261, Government filed with the Court conviction records, which have been admitted into the record at Exhibit 2.

A review of the conviction documents indicate that respondent was, in fact, convicted on February 4, 2008 in the Superior Court of California for the offense of identity theft, in violation of Section 530.5(a) of the California Penal Code. Although Government on the I-261 states that respondent was sentenced to two years imprisonment on this offense to run concurrently, respondent was actually given eight months on this charge, but overall, was sentenced to two years in prison on all of the charges. According to the plea form, respondent was given eight months. However, a review of the minute orders, it appears that respondent was sentenced to state prison for two years on the offense of 530.5(a). And the sentence was to be served concurrent with the remaining counts that respondent pled guilty to. Although it is not completely clear what respondent's sentence was on this charge, what is clear is that he was, in fact, guilty and sentenced to time in prison for the offense of 530.5(a) and that this offense was clearly a felony.

Therefore, the Court finds the Government has shown by clear and convincing evidence the respondent was convicted of a violation of Section 530.5(a), as

alleged on allegation 4, and therefore, sustains that allegation. Moreover, the Court also finds that respondent is inadmissible under Section 212(a)(2)(A)(i)(I) of the Act in that he has been convicted of an offense constituting a crime involving moral turpitude. Based on the allegation at Exhibit 4 and that because it was a felony with at least an eight-month sentence, if not a two-year prison sentence, respondent would not fall into the petty offense exception. Therefore, respondent is inadmissible as charged on the Notice to Appear.

The Court would note, in finding that respondent's conviction for an offense under Section 530.5(a) being a crime involving moral turpitude, that the section specifically states that any person who willfully obtains personal identifying information shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment in the state prison. Therefore, it is clear that respondent's conviction in this case subjects him to a felony offense, and in fact, it was a felony. After thorough review of research, the Court finds that a conviction under Section 530.5 of the California Penal Code is, in fact, a crime involving moral turpitude. After analyzing state law and other comparable sections, the Court finds that there is no direct case on point regarding this subsection. However, crimes are deemed to be offenses of moral turpitude if they are base, vile or depraved, if they offend society's most fundamental values or shocks the society's conscience. See Navarro-Lopez v. Gonzales, 503 F3d. (9th Cir. 2007). In general, therefore, such offenses are those that are intrinsically wrong or require evil intent. See Uppal v. Holder, 605 F3d. 712 (9th Cir. 2010). In addition, a crime in which fraud is an ingredient involves moral turpitude. Jordan v. De George, 341 U.S. 223 (1951).

Because the term "crime involving moral turpitude" is not specifically defined and there are no specific rules for determining whether a crime involves such moral

turpitude, one must look to whether a stated crime involves moral turpitude by comparing it with other crimes. See Nunez v. Holder, 594 F3d. 1124 (9th Cir. 2010). As noted, Section 530.5(a) states that every person who willfully obtains personal identifying information, as defined in (b) of Section 530.55, states that another person uses that information for an unlawful purpose, including to obtain or attempt to obtain credit, goods, services, real property or medical information without the consent of that person is guilty of a public offense.

In turn, Section 530.55(b) defines personal identifying information as any name, address, telephone number, health insurance number, tax payer ID number, school ID number, state or federal driver's license, or identification numbers, Social Security Numbers, place of employment, employment ID numbers, professional occupational numbers, mother's maiden name, demand deposit account numbers, savings account numbers, checking account numbers, personal ID numbers or passwords, or alien registration numbers, Government passport numbers, date of birth, unique biometric data, including fingerprints, facial scan identities, voice print, retina, iris images, or other unique physical representation, unique electronic data, including information, identification numbers assigned to the person, address or routing codes, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card numbers of an individual person, or equivalent form of identification.

The elements of the crime defined by the language of the statute may be summarized as follows: First, a person willfully obtained personal identifying information belonging to someone else, that the person uses that information for any unlawful purpose, and that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being

used. See In re: Rolando S., 197 Cal.App.4th 936 (2011).

Section 530.5(a) is intended to protect the person or entity whose personal information has been misappropriated or used for an unlawful purpose. See People v. Valenzuela, 204 Cal.App.4th (2012). The Senate Committee on Public Safety notes that the facts of Section 530.5 addresses disruptions caused in victim's lives when their personal identifying information is used even if those victims may not have been financially harmed as a result of the defendant's conduct. See People v. Valenzuela, id. The Senate Committee on Public Safety Notes go on to state that crimes of identity theft and complementary statutory provisions were created because the harm suffered by identity theft victims went well beyond the actual property obtained through the misuse of person's identities. Identity theft victims' lives are often severely disrupted even if there is no personal financial loss to an individual. The Senate Note goes on to reflect examples of when an individual may not have lost an actual monetary loss, but the loss to the victim as a result of his identity being taken. The Senate then went on to conclude that identity theft in the electronic age is an essentially unique crime, not simply another form of grand theft.

This Court finds that the effects of taking another's identity and using it for your own personal purposes regardless of whether there is any direct monetary loss violates society's most fundamental values and duties owed from one individual in society to another. The consequences of using another person's identity and providing someone else's identifying information for any purpose severely disrupts and affects the victims' lives and is intrinsically wrong, given the current times that we are living in and the electronic age that is now before us. The Court therefore finds that although there is no specific mention of fraud, that fraud itself is inherent in a violation of Section 530.5, because an individual must willfully obtain the personal identifying information from

someone knowing that it does not have consent to use that information from the person it belongs to, and that it is going to be used for unlawful purposes.

The Court therefore finds that the elements defined in Section 530.5 do involve a violation of moral turpitude, and as such, the conviction itself is one of moral turpitude. Although the Court will note that the Ninth Circuit has found that an Oregon identity theft statute does not categorically qualify as an aggravated felony theft offense, see Madujano-Real v. Mukasey, 526 F3d. 585 (9th Cir. 2008), this Court concludes that the California statute at 530.5(a) is a crime involving moral turpitude, unrelated to any direct theft offense, as defined under Section 101(a)(43)(G). The Court does not find that this section meets the definition necessarily of a direct theft offense, but nevertheless, is another category of crimes involving moral turpitude in which the use of another person's identifying information violates the norms of society and duties that one individual owes to another.

For these reasons, the Court finds that respondent has been convicted of a crime involving moral turpitude, and therefore, his crime falls under Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, leaving respondent inadmissible to the United States. As such, the Court sustains the charge of inadmissibility.

Respondent has filed no applications for relief before this Court other than a request for post-hearing voluntary departure. Counsel for respondent today again asks for another continuance to look into these issues. The Court will note, however, that respondent has had ample opportunity to file all relief applications. In particular, at a hearing held on February 6, 2014, respondent and counsel were warned that when they returned on March 18, 2014 at 1:00 that they must be prepared to state any further objections or basis for contesting removability, because the Court was inclined to find respondent inadmissible as charged, and to have ready for filing all relief applications.

Counsel and respondent were warned that if they did not have applications ready to file with the Court on March 18, 2014 at 1:00, the Court would enter an order accordingly.

On March 18, 2014, however, an attorney in replace of the primary attorney appeared on his behalf and, essentially, had no idea what was going on in the proceedings. Also, DHS wanted to look into the issue of possibly lodging another I-261 with respondent's other convictions, so the Court agreed to continue the case and not enter an order on that day. However, respondent was warned, as well as counsel that was present, and to advise any other counsel that may show up on his behalf that at the hearing on June 25, 2014, all applications for relief must be ready for filing, that the Court was going to enter an order finding respondent inadmissible as charged, and that counsel must be ready for filing any and all relief applications. It also gave DHS an opportunity to file a new I-261 if they so desired. Not only was respondent and counsel present at the hearing on March 18, 2014 warned orally that relief applications must be filed, it was placed in writing on the hearing notice so that there would be no issues regarding the Court's intention to enter a final order if no relief applications were received. See hearing notice dated March 18, 2014 as part of the record.

At the hearing on June 25, 2014, another counsel appeared on behalf of the primary attorney and presented to the Court a legal point and authorities in support of relief applications. However, counsel had no relief applications to file once again. As respondent was warned that if he did not have any relief applications ready for filing not once, but twice, the Court denied any further continuance for this purpose.

Respondent was given an opportunity to qualify himself for a post-hearing voluntary departure, as an earlier brief provided by counsel for respondent indicated a desire to proceed on voluntary departure, the Court allowed respondent to request this relief.

POST-HEARING VOLUNTARY DEPARTURE

To establish eligibility for voluntary departure, respondent must prove that he has been physically present in the United States for at least one year immediately preceding service of the NTA, is and has been a person of good moral character for at least five years immediately preceding his application for voluntary departure, has not been convicted of an aggravated felony or removable for a security-related ground and has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. See INA Section 240B(b)(1).

A review of the record indicates that respondent was convicted on February 4th, 2008 for the offense of taking a vehicle without owner's consent, in violation of Section 10851(a) of the California Vehicle Code, and sentenced to two years in prison. Respondent's conviction under Section 10851, after review of the conviction documents at Exhibit 2 indicates that he has, in fact, been convicted of an aggravated felony under Section 101(a)(43)(G) of the Act. See Duenas-Alvarez v. Holder, 733 F3d. 812 (9th Cir. 2013).

As respondent has been convicted of an aggravated felony, he is statutorily ineligible for post-hearing voluntary departure. Moreover, even if respondent's conviction was not for an aggravated felony, when specifically asked whether the respondent would leave the United States, he stated he would not. The Court took it upon itself to fully explain to respondent what it meant to voluntarily depart the United States, and that if he is not amenable to leave the United States, that the Court could not grant him voluntary departure. Respondent continued to assert that he works here and his life is here, and therefore, he would not leave the United States. It is clear, then, that respondent has not established the intention to leave the United States nor does he have the means to depart the United States. As he stated, he does not have

the money to post even a $500 voluntary departure bond more or less money to actually depart. For all of these reasons, the Court finds the respondent is statutorily ineligible for voluntary departure and denies the request.

ORDER

IT IS HEREBY ORDERED that respondent's request for post-hearing voluntary departure is denied.

IT IS FURTHER ORDERED that respondent be removed from the United States to Vietnam on the charge contained in the Notice to Appear.

TARA NASELOW-NAHAS
Immigration Judge