U.S. Department of Justice

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Name: MARTINEZ LINO, JOSE LUIS

A 205-308-491

Date of this notice: 10/23/2017

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:
Kelly, Edward F.
Pauley, Roger
Adkins-Blanch, Charles K.

Userteam: Docket

File: A205 308 491 – New York, NY Date: OCT 23 2017

In re: Jose Luis MARTINEZ LINO a.k.a. Jose Martinez a.k.a. Luis Martinez a.k.a. Orlando Martir

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Zan Khan, Esquire

ON BEHALF OF DHS: Leslie S. Evans
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act

The respondent, a native and citizen of Ecuador, appeals from the Immigration Judge's August 19, 2015, decision denying the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and ordering his removal from the United States. The appeal will be sustained and the record will be remanded.

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). 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).

On or about March 19, 2013, the respondent was convicted of Offering a False Instrument for Filing in the Second Degree under New York Penal Law (NYPL) section 175.30 (IJ at 1). The Immigration Judge determined that this offense constitutes a crime involving moral turpitude (CIMT) under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), thus rendering the respondent ineligible for cancellation of removal under section 240A(a) of the Act (IJ at 4-5). *See* section 240A(b)(1)(c) of the Act.

We recently clarified that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a CIMT. *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). Unless circuit law dictates otherwise, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, is applied in determining whether an offense is a categorical crime involving moral turpitude. *See id.*; *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Efstathiadis v. Holder*, 752 F.3d 591, 595 (2d Cir. 2014) (noting that the focus is on the question of whether or not the minimum conduct criminalized by the statute would support classification of a crime as a crime involving moral turpitude). If a statute of conviction is not categorically a crime involving moral turpitude, the next step is to determine whether the statute is divisible such that the modified categorical approach may be applied. *See Matter of Silva-Trevino*, 26 I&N Dec. at 833; *see also Matter of Chairez*, 26 I&N Dec. 819, 822 (2016).

Moral turpitude refers generally to conduct that is "inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between man and man, either one's fellow man or society in general." *See Mendez v. Mukasey*, 547 F.3d 345, 347 (2d 2008) (internal citations omitted); *see also Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007). Crimes involving fraud as an "ingredient" have long been regarded as involving moral turpitude. *See Mendez v. Mukasey*, 547 F.3d at 347 (*citing Jordan v. De George*, 71 S. Ct. 703 (1951)). However, where intent is not an element of the crime, generally, that crime does not involve moral turpitude. *See id.*; *see also Efstathiadis v. Holder*, 752 F.3d at 595 (noting that it is in the intent that moral turpitude inheres) (internal citations omitted).

Applying the Board's recently articulated framework for determining whether a crime is a CIMT, as stated above, we conclude that Offering a False Instrument for Filing in the Second Degree under NYPL section 175.30 is not categorically a CIMT because there is a realistic probability that the statute would be applied to conduct that is not morally turpitudinous. Specifically, we note that the crime of Offering a False Instrument for Filing is separated into two offenses: First Degree and Second Degree. *See* sections 175.30 and 175.35 of the NYPL. Offering a False Instrument for Filing in the First Degree under section 175.35 of the NYPL is a class E felony, while Offering a False Instrument for Filing in the Second Degree in violation of section 175.30 of the NYPL is a class A misdemeanor. Significantly, the difference between the two offenses is that the First Degree offense requires, as an element, an intent to defraud, while the Second Degree offense does not. *See Hricik v. McMahon*, 247 A.D.2.d 935 (4th Dept. 1998) (holding that an intent to defraud is not an element of the offense of Offering a False Instrument for Filing in the Second Degree).

The practice commentary to the statute indicates that the drafters of the statute purposefully separated the crime of Offering a False Instrument for Filing into two offenses, in order to "distinguish the level of culpability between, for example, a person who, out of vanity, knowingly falsifies his or her age in an application for a license in which the age of the applicant is not significant, and one who corruptly defrauds the State out of huge sums through false documents submitted in connection with a building contract." *See also People v. English*, 441 N.Y.S.2d 928 (1981) (quoting the same practice commentary); *Hricik v. McMahon*, 247 A.D.2.d at 296-97 (upholding conviction under section 175.30 where state trooper misrepresented date on which he acquired certain weapons on a weapons registration form, though the false date was "insignificant" to the registration, the purpose of which was to secure amnesty for possessing the weapons).

We recognize, as did the Immigration Judge, that a criminal statute need not have as an element an intent to defraud in order for the offense to be a CIMT (IJ at 3). *See e.g. Matter of Zaragoza-Vaquero*, 26 I&N Dec. 814, 816 (BIA 2016) (noting that crimes that are "inherently" fraudulent are CIMTs); *Matter of Flores*, 17 I&N Dec. 225, 229 (BIA 1980) (noting, in the context of crimes of fraud on government, that "it is enough to impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means."). However, we disagree with the Immigration Judge that section 175.30 of the NYPL falls into such a category. Specifically, in addition to lacking an intent to defraud element, the plain language of the statute lacks any requirement that the false statement be material so as to "impair" or "obstruct" a government function. As noted above, the false statement made in *Hricik v. McMahon* was not

"significant" to the purpose of the weapon registration; however, the state court (appellate division) upheld the conviction nonetheless. *See Matter of G-*, 8 I&N Dec. 315 (BIA 1959) (holding that federal offense of false writings containing false statements is not a crime involving moral turpitude where materiality is not an element of the offense); *see also Flores-Molina v. Sessions*, 850 F.3d 1150, 1164-65 (10th Cir. 2017) (holding that the Colorado offense of providing false information to a city official during an investigation is not a crime involving moral turpitude because, inter alia, the statute does not require an intent to defraud or that the statement be material). Compare *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013). [1]

Because we conclude that section 175.30 of the NYPL is not categorically a CIMT, and because the parties do not assert on appeal that the statute at issue is divisible or that the modified categorical approach applies, pursuant to *Descamps v. U.S.*, 133 S. Ct. 2276, 2286 (2013), "the inquiry is over." We will therefore remand the record for the Immigration Judge to determine if the respondent is otherwise eligible for cancellation of removal and deserving of relief in the exercise of discretion. The following orders will be entered.

ORDER: The appeal is sustained and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] The Immigration Judge relies, in part, on a 1975 New York trial court case, *People v. Altman*, 372 N.Y.S.2d 926 (Nassau Cnty. Ct. 1975), discussing the type of false information necessary to support a conviction under section 175.30 of the NYPL, and finding that the false statement must be material to the written instrument. However, the plain language of the statute, the legislative history of the statute (as discussed in the commentary to the statute) and subsequent higher New York state court decisions conflict with the trial court's discussion of NYPL section 175.30 in *People v. Altman*. We therefore decline to follow that case in reaching our decision in these proceedings.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: A 205-308-491

In the Matter of:	
MARTINEZ LINO, Jose Luis,	**IN REMOVAL PROCEEDINGS**
Respondent.	

CHARGE:	INA § 212(a)(6)(A)(i)	Alien present without admission or parole
APPLICATIONS:	INA § 240A(b)(1)	Cancellation of Removal for Certain Nonpermanent Residents

ON BEHALF OF RESPONDENTS
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Jose Luis Martinez Lino ("Respondent") is a native and citizen of Ecuador. [Exh. 1.] He entered the United States ("U.S.") without being admitted or paroled by an immigration officer at an unknown point of entry and on an unknown date. *Id.*; Respondent's Hearing (May 9, 2013). On March 19, 2013, the Respondent pled guilty to Offering a False Instrument for Filing in the Second Degree under N.Y.P.L. § 175.30. [Respondent's Proposed Exh. C.] On March 21, 2013, the U.S. Department of Homeland Security ("DHS") personally served the Respondent with a Form I-862, Notice to Appear ("NTA"), charging him with inadmissibility pursuant to INA § 212(a)(6)(A)(i), as an alien present in the U.S. without being admitted or paroled. [Exh. 1.]

On May 9, 2013, the Respondent appeared before the Court and, through counsel, conceded to proper service of the NTA, admitted the factual allegations contained therein, conceded to the removability charge, and designated Ecuador as the country of removal. Thus, removability was established by the Respondent's own admissions. 8 C.F.R. § 1240.10(c). At the same hearing, the Respondent submitted a form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

On January 30, 2014, the Respondent submitted a brief in which he argued that he is eligible for cancellation of removal because his conviction under N.Y.P.L. § 175.30 did not constitute a crime involving moral turpitude ("CIMT"). He submitted a second brief about the CIMT issue on February 6, 2014. DHS submitted a reply brief on July 21, 2014. At his hearings on March 26, 2015, and May 1, 2015, the Respondent stated that he is only seeking cancellation of removal and would not pursue other forms of relief. At the Respondent's May 1, 2015, hearing, the Court found that he was not eligible for cancellation of removal because he had committed a CIMT. For the reasons that follow, the Court will deny his application for cancellation of removal.

II. EXHIBIT

Exh. 1: Respondent's NTA, served on March 21, 2013.

III. LEGAL STANDARDS AND ANALYSIS

A. Cancellation of Removal under INA § 240A(b)(1)

A respondent who is inadmissible to the U.S. is eligible for cancellation of removal and adjustment of status to that of a lawful permanent resident if he: (a) has been continuously physically present in the U.S. for not less than ten years immediately preceding the date of such application; (b) has been a person of good moral character during that ten-year period; (c) has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3), unless a domestic violence waiver pursuant to INA § 240A(b)(5) is granted; and (d) establishes that removal would result in exceptional and extremely unusual hardship to the alien's U.S. citizen or lawful permanent resident spouse, parent, or child. INA § 240A(b)(1). CIMTs are offenses under INA §§ 212(a)(2) and 237(a)(2). The applicant bears the burden to prove that he is statutorily eligible and merits a favorable exercise of discretion. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d).

1. Crime involving moral turpitude

The Court begins by employing the categorical approach to determine whether the Respondent's conviction under N.Y.P.L. § 175.30 constitutes a CIMT. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Matter of Chairez*, 26 I&N Dec. 349, 353 (BIA 2014) ("*Chairez I*") (adopting *Descamps v. United States*, 133 S. Ct. 2276 (2013) in the immigration context), *vacated in part by Matter of Chairez*, 26 I&N Dec. 478, 484 (BIA 2015) (indicating Immigration Judges should follow the *Chairez I* approach to divisibility "absent applicable

circuit court authority to the contrary"). Under this approach, the "singular circumstances" of an individual Respondent's crimes are not considered. *Moncrieffe*, 133 S. Ct. at 1684 (holding that under the categorical approach, actual conduct is "irrelevant"). Rather, the Court assesses the minimum conduct necessary to sustain a conviction under the statute in question. *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137, 143 (2d Cir. 2008).

The Respondent argues that he did not commit a CIMT because "[i]t is well settled that 'intent to defraud is not an element of offering a false instrument for filing in the second degree as defined by [N.Y.P.L.] § 175.30.'"[1] Respondent's Brief (Feb. 5, 2014), at 1 (citing *Hricik v. McMahon*, 247 A.D.2d 935, 936 (N.Y. App. Div. 1998)). However, a statute's intent element is not outcome determinative of whether it is a CIMT.

An offense can be a CIMT if "fraudulent conduct is implicit in the statute," even where the statute does not require a finding of fraud for a conviction and the intent to defraud is not an essential element of the statute. *Matter of Flores*, 17 I&N Dec. 225, 229-30 (BIA 1980); *see Matter of K*, 7 I&N Dec. 178 (BIA 1956);[2] *Matter of Kochlani*, 24 I&N Dec. 128, 131 (BIA 2007). In other words, "where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude." *Matter of Flores*, 17 I&N Dec. at 228 (citations omitted). "The courts have also subscribed to the logic that where fraud is so inextricably woven into the statute as to clearly be an ingredient of the crime, it necessarily involves moral turpitude." *Id.* Additionally, for an offense involving fraud of the government, the crime involves moral turpitude even if the government is not deprived of money or property; "[i]t is enough to impair or obstruct an important function of a department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means." *Id.* at 229 (citations omitted); *see Matter of M*, 1 I&N Dec. 619 (BIA 1943) and *Matter of R*, 5 I&N Dec. 29 (BIA 1952) (holding in both cases that making false representations on documents to evade military service was a CIMT because affirmative acts calculated to deceive the government are inherently fraudulent).

For example, in *Matter of Flores*, *supra*, the BIA held that an offense involving fraud of the government was a CIMT, even though the statute of conviction did not have an element of intent to defraud. There, the respondent was convicted of "uttering and selling false and

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[1] A person is guilty of offering a false instrument for filing in the second degree when, knowing that a written instrument contains a false statement or false information, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.

N.Y.P.L. § 175.30.

[2] In *Matter of Flores*, the BIA overruled in part *Matter of K*, 7 I&N Dec. 178 (BIA 1956). The BIA explained that in *Matter of K*, "we held [] both the making and possessing of dies or molds of United States coins implicitly contained the element of intent to defraud and, therefore, were crimes of moral turpitude, although the statute required no finding of fraud for conviction." *Matter of Flores*, 17 I&N Dec. at 230. However, *Matter of K*, 7 I&N Dec. at 180, also held that a statute criminalizing the making of forged coins was a purely regulatory offense, did not have an intent element, and was not a CIMT. In *Matter of Flores*, 17 I&N Dec. at 230, the BIA overruled the second holding from *Matter of K* because "we are unable to distinguish between the making of molds to counterfeit coins and the making of the coins themselves, we find that both offenses inherently contain the element of intent to defraud" and are CIMTs.

counterfeit papers relating to registry of aliens." *Id.* at 228. The BIA stated that "intent to defraud the government has not specifically been made an essential element of the [respondent's statute of conviction], although in order for a conviction to be obtained under that section, there must be proof of knowledge that the documents in question were false or counterfeit." *Id.* The BIA reasoned that "fraudulent conduct is implicit in the statute" because "knowledge of [the document's] counterfeit nature inherently involves a deliberate deception of the government and an impairment of its lawful functions." *Id.* at 230.

In the instant case, Offering a False Instrument for Filing in the Second Degree under N.Y.P.L. § 175.30 is analogous to the statute analyzed in *Matter of Flores*. Both statutes lack the intent to defraud as an essential element of the offense. Both statutes also require that a defendant know the false or counterfeit nature of their documents. Finally, both statutes are CIMTs because they implicitly involve fraud against the government.

a. The Respondent was convicted of a CIMT

Offering a False Instrument for Filing in the Second Degree "impair[s] or obstruct[s] an important function of a department of the government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means." *Matter of Flores*, 17 I&N Dec. at 229. Therefore, like the statute analyzed in *Matter of Flores*, the Respondent's statute of conviction necessarily involves fraudulent conduct against the government and is a CIMT.

First, the offense affects government operations and functions because the statute requires a defendant to have provided a written instrument to a "public office or public servant" with the "knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant." N.Y.P.L. § 175.30. Clearly, submitting written instruments that become a part of government records affects government operations and functions.

Second, the offense impairs or obstructs the efficiency and value of government operations. The statute requires that a defendant know the written instrument contains false information. *Id.* The type of false information that would support a conviction under N.Y.P.L. § 175.30 has been described as follows:

> The law does not intend prosecutions for words written in vanity, boast, feign, silliness or the like, nor should citizens be compelled to defend their written answers to nonessential questions propounded by bureaucratic busybodies. The use of the words "knowingly" and "falsely" imply otherwise. It seems clear, therefore, that the false statement or information must be material to the written instrument in which it is contained. There must be a sufficient nexus between that which the complete instrument is intended to accomplish and those portions of it which are not accurate. The inaccurate facts or statements must be such as will determine the effectiveness of the whole writing or go to the integrity of the entire instrument. It must reasonably appear that the erroneous information will cause, influence or determine a result that would not otherwise occur.

People v. Altman, 372 N.Y.S.2d 926 (Nassau Cnty. Ct. 1975). Accordingly, the statute requires that a defendant know the written instrument contains materially false information that would affect the outcome of the instrument's purpose, which impairs government functions "by defeating its efficiency or destroying the value of its lawful operations." *Matter of Flores*, 17 I&N Dec. at 229; *see Depamphilis v. Kelly*, 944 N.Y.S.2d 861, 868 (Sup. Ct. 2012) *aff'd*, 967 N.Y.S.2d 645 (App. Div. 2013) ("The act of Offering a False Instrument for Filing in the Second Degree is a corruption of purpose.") (citations and quotations omitted); *Matter of Flores*, 17 I&N Dec. at 229 ("Clearly, the sale of counterfeit documents relating to alien registry impairs the lawful procedures of the Immigration and Naturalization Service and thwarts its purpose of requiring aliens to have proper documentation to enter the United States.").

Third, the offense also impairs or obstructs government functions by "deceit, graft, trickery, or dishonest means." *Id.* The statute's use of the word "'false'[] requires proof of something more than the untrue. Its use imports an intention to deceive. It implies an evil intent, a corrupt motive, or an intent to perpetrate some treachery or fraud." *Altman*, 372 N.Y.S.2d at 926 (citing Black's Law Dictionary, 4th ed.) (other citations omitted); *see Depamphilis*, 944 N.Y.S.2d at 868 ("[A] calculated disregard for honest dealings is inherent in the elements of [N.Y.P.L. § 175.30]."). Accordingly, a defendant convicted under N.Y.P.L. § 175.30 would have used materially false information to deceive the government. *See also Matter of M*, 1 I&N Dec. at 619 and Matter of R, 5 I&N Dec. at 29 (holding that an offense is inherently fraudulent and a CIMT if it involves affirmative misrepresentations that are calculated to deceive the government).

In sum, Offering a False Instrument for Filing in the Second Degree under N.Y.P.L. § 175.30 is categorically a CIMT even though it does not have an element of intent to defraud. Similar to the statute analyzed in *Matter of Flores*, "fraudulent conduct is implicit in" N.Y.P.L. § 175.30 because the statute's knowledge requirement of materially false information "involves a deliberate deception of the government and an impairment of its lawful functions." *Matter of Flores*, 17 I&N Dec. at 230. Therefore, the offense is categorically a CIMT. *See Id.*; *Matter of M*, 1 I&N Dec. at 619; *Matter of R*, 5 I&N Dec. at 29.

V. CONCLUSION

The Court finds that the Respondent is ineligible for cancellation of removal under INA § 240A(b)(1) because his conviction under N.Y.P.L. § 175.30 constitutes a CIMT.

Accordingly, after a careful review of the record, the following Orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the Respondent's application for cancellation of removal under INA § 240A(b)(1) be **DENIED**.

IT IS FURTHER ORDERED that Respondent be removed to Ecuador on the sustained charge of removability contained in the NTA.

Date August 19, 2015

Brigitte Laforest
Immigration Judge