U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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4808 Bergenline Avenue
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DHS/ICE Office of Chief Counsel - NEW
970 Broad Street, Room 1104B
Newark, NJ 07102

Name: MOLINA PENA, CLAUDIA

A 089-526-024

Date of this notice: 10/25/2016

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:
Holiona, Hope Malia

Userteam: Docket

File: A089 526 024 – Newark, NJ

Date:

OCT 25 2016

In re: CLAUDIA MOLINA PENA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Moises A. Flores, Esquire

ON BEHALF OF DHS: Anita C. DiNella
Assistant Chief Counsel

ORDER:

This Board has been advised that the Department of Homeland Security's ("DHS") appeal has been withdrawn. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals, Office of the Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

CORRECTION MEMORANDUM TO THE FILE

Name: CLAUDIA MOLINA PENA Date: October 26, 2016

A#: 089-526-024

PLEASE NOTE:

- ☐ The Immigration Judge's decision in this case is complete; however, it is incorrectly paginated. Explanation: _____.
- ☐ The Immigration Judge's / DD's visa decision in this case is missing a page. Explanation: _____.
- ☐ The A# number on page (s) of the Immigration Judge's decision is incorrect. The correct A# is _____.
- ☐ The name of the beneficiary reflected in the first paragraph of the DD's Visa decision dated _____ is incorrect. The correct name is _____.
- ☐ The respondent's name as reflected in the Immigration Judge's decision is incorrect. The correct name is_____.
- ☐ The date on the Immigration Judge's decision should be correctly reflected as _____.
- ☐ The date in the footer of the Immigration Judge's decision is incorrect. The correct date is _____.
- ☒ The undated Immigration Judge's decision was rendered on **May 23, 2016.**
- ☐ Other: _____

Pamela D. Atkinson

Pamela D. Atkinson, Supervisory Case Management Specialist
Docket Team

Rev. 2-06-13 pda

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
970 BROAD STREET, ROOM 1200
NEWARK, NJ 07102

Youman Madeo & Fasano
Flores, Moises
4808 Bergenline Avenue
Suite 402
Union City, NJ 07087

IN THE MATTER OF
MOLINA PENA, CLAUDIA

FILE A 089-526-024

DATE: May 23, 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
970 BROAD STREET, ROOM 1200
NEWARK, NJ 07102

__ OTHER: Oral Decision and Order

COURT CLERK
IMMIGRATION COURT

FF

CC: JANICE MONTANA, ASSISTANT CHIEF COUNSEL
970 BROAD STREET, ROOM 1300
NEWARK, NJ, 07102

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
970 BROAD STREET, ROOM 1200
NEWARK, NJ 07102

In the Matter of:
MOLINA PENA, CLAUDIA

Case No: A089-526-024

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

After considering the facts and circumstances of this case and as there is no opposition from the parties, ~~it is HEREBY~~ ORDERED that these proceedings be terminated with / without prejudice.

NTA dated: May 17, 2015.

Reason for Termination:

see enclosed decision

SHIFRA RUBIN
Immigration Judge
Date: 5/23/16

Appeal Waived/Reserved by A/I: NO APPEAL
Appeal Due Date: 6/22/16

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] Alien's ATT/REP [ ] DHS
DATE: 05-23-16 BY: COURT STAFF
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

Form EOIR 35 - 6T (Termination)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File No.: A089-526-024	:	
In the Matter of	:	**In Removal Proceedings**
Claudia MOLINA PENA,	:	**INTERLOCUTORY ORDER**
Respondent	:	

ON BEHALF OF RESPONDENT

Moises A. Flores, Esq.
Youman, Madeo & Fasana, LLP
4808 Bergenline Avenue, Suite 402
Union City, New Jersey 07087

ON BEHALF OF DHS/ICE

Office of the Chief Counsel
Janice Montana, Assistant Chief Counsel
970 Broad Street, Room 1300
Newark, New Jersey 07102

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Facts and Procedural History

Claudia Molina Pena ("Respondent") is a native and citizen of Colombia. Exh. 1. On May 17, 2015, the Department of Homeland Security ("DHS") issued her a Notice to Appear ("NTA") alleging:

1) Respondent is not a citizen or national of the United States;
2) Respondent is a native and citizen of Colombia;
3) Respondent was accorded Lawful Permanent Resident status of the United States on November 30, 2007;
4) Respondent was, on February 25, 2010, convicted at the Woodbridge Municipal Court in the State of New Jersey for the offense of Theft by Unlawful Taking, in violation of New Jersey Statute 2C:20-3A;
5) Respondent was, on February 28, 2011, convicted at the Newark Municipal Court in the State of New Jersey for the offense of Theft by Unlawful Taking, in violation of New Jersey Statute 2C:20-3A;

6) Respondent, on May 17, 2015, arrived at Newark Liberty International Airport in Newark, New Jersey, and applied for admission to the United States as a Lawful Permanent Resident.

Exh. 1. The NTA also charged Respondent as removable pursuant to Section 212(a)(2)(A)(i)(I)[1] of the Immigration and Nationality Act ("INA").

On March 31, 2016, Respondent, through counsel, submitted a motion to terminate the proceedings. Respondent's basis for termination was that New Jersey law does not consider disorderly persons offenses to be crimes and that therefore, she was not convicted of a crime under the INA. The case was adjourned for the parties to provide dispositions. On April 7, 2016, DHS provided dispositions and filed an opposition to the motion to terminate. In opposition, DHS argued that Respondent was convicted of a crime and that both of her convictions constitute crimes involving moral turpitude ("CIMT"). The Court set the matter for a decision to April 13, 2016 but the Court has since decided to provide a written decision to the parties, which is the instant decision.

II. Legal Standard for Motions to Terminate

Once an NTA has been properly filed with the Immigration Court, proceedings may be terminated only in specific circumstances. First, DHS may move to terminate proceedings before the Immigration Judge if they determine that the NTA was improvidently issued. 8 C.F.R. §§ 239.2(a), 1239.2(a). Second, proceedings may be terminated if deportability or inadmissibility has not been established. *See* INA §§ 240(c)(2), (3); *see also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Third, pursuant to 8 C.F.R. § 1239.2(f), proceedings may be terminated "to permit the alien to proceed to a final hearing on a pending application or petition for naturalization when the alien has established *prima facie* eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." Finally, proceedings may be terminated if DHS moves to dismiss an NTA on the basis of one of the grounds contained in the regulations and the Immigration Judge determines that dismissal is appropriate. *See* 8 C.F.R. § 1239.2(c); 8 C.F.R. § 239.2; *see also Matter of W-C-B-*, 24 I&N Dec. 118, 122 (BIA 2007) (stating that once jurisdiction vests with an Immigration Judge, an NTA cannot be cancelled by DHS, unless DHS moves for dismissal of the matter on the basis of a regulatory ground).

[1] This provision reads: "Any 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." INA § 212(a)(2)(A)(i)(I).

III. Issues and Matters Before the Court

a. Whether a Conviction under (N.J. Stat. § 2C:20-3A) is a Crime within the meaning of INA

A disorderly persons offense is not a crime in New Jersey. Section 2C:1-4(b) of the New Jersey Statute provides that "disorderly persons offenses . . . are petty offenses and are not crimes within the meaning of the Constitution of this State." It provides further that "there shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses. Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime." *Id.* Respondent argues that since theft offenses at issue are not crimes under the laws of New Jersey, they likewise are not convictions for immigration purposes.

Although disorderly persons offenses are not classified as crimes under New Jersey law, the Board of Immigration Appeals ("BIA") has long held "that whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the vagaries of state law." *Matter of Ozkok*, 19 I&N Dec. 546, 551 n.6 (BIA 1988) ("We find no rational or legal reason for according these two aliens different immigration status based on the criminal procedures of the states where they committed a crime."); *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003) (holding that the state legislature cannot determine how the term "conviction" in the INA is to be construed). As such, this Court will look at whether Respondent's convictions of disorderly persons offenses are convictions under federal law, particularly under Section 101(a)(48)(A) of the INA.

A conviction under Section 101(a)(48)(A) of the INA is "a formal judgment of guilt of the alien entered by a court . . . where – (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty . . . and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." In *Matter of Eslamizar*, the BIA held that a "judgment of guilt" is considered a conviction for immigration purposes if the judgment was entered in "a *criminal proceeding*, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication." 23 I&N Dec. 684, 687 (BIA 2004). The BIA has also held that a finding of guilt constitutes a "conviction" as long as it is reached by a standard of beyond a reasonable doubt. *Id.*

In *Castillo v. Att'y Gen.*, the Third Circuit Court of Appeals reassessed the requirements of a criminal proceeding laid out in *Matter of Eslamizar*. 729 F.3d 296, 306 (3d Cir. 2013). The defendant in *Castillo* pleaded guilty to shoplifting in a municipal court in 1994 under Section 2C:20-11(b)(1) of the New Jersey Statute. The Third Circuit ruled that in addition to requiring a finding of guilt beyond a reasonable doubt, a more accurate reading of *Eslamizar* required a more "open-ended" inquiry into whether the proceeding was criminal in nature under the governing law. *Id.* at 306–07. The Third Circuit found that the factors relevant to that inquiry

included "how the prosecuting jurisdiction characterized the offense at issue, the consequences of a finding of guilt, and the rights available to the accused as well as any other characteristics of the proceeding itself." *Id.*

The Third Circuit also noted that the BIA has been unclear and highly inconsistent in its decisions of assessing whether defendants have committed convictions for immigration purposes. *Id.* at 306. The Third Circuit stated that to support the definition of a conviction provided by the INA in Section 101(a)(48)(A), the BIA has weighed several factors, often inconsistently, when determining what constitutes a criminal conviction and specifically a "formal judgment of guilt." *Id.* at 308. The following cases demonstrate the BIA's inconsistent findings.

In *Matter of Cuellar–Gomez*, 25 I&N Dec. 850, 853-55 (BIA 2012), a three-member panel found that a judgment entered by a Kansas municipal court finding an alien guilty of violating a city ordinance prohibiting the possession of marijuana, qualified as a conviction for immigration purposes. *Id.* at 852-55. "Under our precedents, a formal judgment of guilt entered by a court qualifies as a conviction under [Section 1101(a)(48)(A) of the INA] so long as it was entered in a 'genuine criminal proceeding,' that is, a proceeding that was 'criminal in nature under the governing laws of the prosecuting jurisdiction.'" *Id.* at 852–53 (quoting *Rivera–Valencia*, 24 I&N Dec. at 486–87). According to the BIA, the judgment at issue was entered in a genuine criminal proceeding under the laws of Kansas because municipal court judges possessed the power to enter judgments of guilt and impose fines or incarceration in marijuana possession cases; the prosecution was required to prove the charge beyond a reasonable doubt; and the judgment of guilt represented a conviction for purposes of calculating a defendant's criminal history. *Id.* The agency further rejected the alien's specific contentions regarding the absence of an absolute right to be represented by appointed counsel (purportedly unlike the approach to appointment of counsel used in the state's district courts) as well as the lack of a right to a jury trial. *Id.* at 853–54. Specifically, the BIA concluded that the municipal court trial qualified as a genuine criminal proceeding because, "[i]f the municipal court finds the defendant guilty, the defendant then has a constitutional and statutory right to appeal to a State district court for a trial de novo before a jury." *Id.* at 854 (citations omitted). In any case, the BIA looked to Kansas state law in order to determine whether the judgment was entered in a genuine criminal proceeding under the laws of the prosecuting jurisdiction and, in turn, considered more than the applicable standard of proof in that determination.

In *Matter of Bajric*, 2010 WL 5173974 (BIA 2010) (unpublished decision), the BIA sustained an appeal from a bond decision filed by an alien who was convicted in a Missouri municipal court of stealing in violation of a municipal ordinance. *Id.* In deciding whether this judgment was a conviction under Section 1101(a)(48)(A) of the INA, the BIA turned to *Eslamizar*. *Id.* While emphasizing the standard of proof and noting that certain constitutional protections, such as the right to a jury trial, need not be afforded in petty offense cases, the BIA "also recognized several other factors to be considered in determining whether a judgment would

qualify as a 'conviction' for immigration purposes." *Id.* "These include, but are not limited to, whether the sanctions resulting from such a conviction are punitive, whether there are constitutional safeguards normally attendant to a criminal adjudication, and whether a conviction for a municipal violation gives rise to any disability or legal disadvantage based on conviction of a crime." *Id.* The BIA explained that, "[a]lthough the respondent's 2008 municipal violation was quasi-criminal in that each element had to be proven beyond a reasonable doubt, his municipal violation clearly remained civil in nature in that it did not bar a prosecution for the same offense by the state, and his conviction for a violation of a municipal ordinance, unlike those for misdemeanors and felonies, [was] not admissible for impeachment purposes." *Id.* The court concluded that the defendant's municipal violation did not appear to meet the statutory definition of a criminal conviction under Section 1101(a)(48)(A) of the INA. *Id.*

In two unpublished single-member decisions addressing shoplifting offenses under New Jersey law, the BIA concluded that such offenses were convictions under Section 101(a)(48)(A) of the INA and *Eslamizar* solely because the respective aliens were found guilty under a "reasonable doubt" standard of proof (and were ordered to pay fines). *See Matter of Delgado*, 2008 WL 762624 (BIA 2008) (unpublished decision), *petition for review denied sub nom. Delgado v. Att'y Gen.*, 349 Fed.Appx. 809 (3d Cir. 2009) (per curiam); *Matter of Dilone*, 2007 WL 2463936 (BIA 2007) (unpublished decision).

In *Castillo*, the Third Circuit noted the inconsistency in the BIA's published and unpublished decisions on what constitutes a conviction under the INA. It particularly noted the difficulty in reconciling the BIA's decision in *Bajric* (non-precedential) and *Cuellar-Gomez* (precedential) and the two unpublished single-member decisions on the New Jersey shoplifting statutes, *Matter of Delgado* and *Matter of Dilone* (both non-precedential). The Third Circuit indicated that *Chevron* deference would not be appropriate in light of *Eslamizar* and the subsequent case law. "The BIA, to date, has offered no attempt to reconcile, reject, or otherwise explain its inconsistent decisions. In fact, it has not even recognized that there may be a problem with its own decisions in the present context. We therefore are confronted here with a clear case of 'erratic, irreconcilable interpretations.'" *Castillo v. Att'y Gen.*, 729 F.3d 296, 309-10 (3d Cir. 2013) (*quoting Valdiviezo–Galdamez*, 663 F.3d 582, 604 (3d Cir. 2011)).

b. Whether a Conviction under (N.J. Stat. § 2C:20-3A) Constitutes a CIMT

The Third Circuit has adopted the BIA's definition of a CIMT. *Partyka v. Att'y Gen.*, 417 F.3d 408, 413 (3d Cir. 2005) (*citing Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004)). Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *See Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of Olquin*, 23 I&N Dec. 896, 896 (BIA 2006). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude. *Matter of P-*, 6 I&N

Dec. 795 (BIA 1955). To qualify as a crime involving moral turpitude, a crime must include an element of scienter and be "accompanied by a vicious motive or a corrupt mind." *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 471 (3d Cir. 2009) (*quoting Matter of Perez-Contreas*, 20 I&N Dec. 615, 618 (BIA 1992)). Specifically, the Third Circuit has "drawn a line at recklessness, and has held that moral turpitude does not inhere in a crime merely requiring a mental state of negligence." *Mehboob v. Att'y Gen.*, 549 F.3d 272, 276 (3d Cir. 2008).

It is well-settled that when determining whether a conviction involves moral turpitude, a Court must first examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude. *See Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989); *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Knapik*, 384 F.3d at 88 (*quoting De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 635 (3d Cir. 2002)). If the statute defines a crime in which moral turpitude necessarily inheres, then the conviction is for a CIMT for immigration purposes, and the Court's analysis ends. *Short*, 20 I&N Dec. at 137-38. The Third Circuit presumptively applies the categorical approach to look at the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain the conviction. *Jean-Louis*, 582 F.3d at 471 (rejecting the BIA's interpretation set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)); *Partyka*, 417 F.3d at 411; *Tran v. Gonzales*, 414 F.3d 464, 481 (3d Cir. 2005). *See generally Partyka*, 417 F.3d 408 (finding that a conviction for aggravated assault was not a CIMT where it could not be determined that the defendant was convicted for the subsection of the statute requiring intentional, knowing or reckless infliction of bodily harm).

When a statute is divisible, i.e., it encompasses crimes which involve moral turpitude and others which do not, it is to be treated as a "divisible" statute and courts apply a modified categorical approach. *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999). In those cases, the Court is permitted to conduct a limited factual inquiry to examine the alien's record of conviction, which includes the indictment, plea, verdict, and sentence, to determine whether he has been convicted of a CIMT. *Id.*; *Jean-Louis*, 582 F.3d at 466; *Matter of Esfendiary*, 16 I&N Dec. 659 (BIA 1979). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude; it is the specific statute under which the conviction occurs that is controlling. *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992); *see also Matter of Khourn*, 21 I&N Dec. 1041, 1044 (BIA 1997); *Matter of Franklin*, 20 I&N Dec. 867, 868-69 (BIA 1994). Moral turpitude also does not depend on whether the crime at issue is a felony or misdemeanor. *Short*, 20 I&N Dec. at 139.

IV. Analysis

a. Is a Conviction for Disorderly Persons Offense under (N.J. Stat. § 2C:20-3A) a Crime within the meaning of INA?

Here, the record demonstrates that Respondent has been convicted twice of New Jersey's offense of Theft by Unlawful Taking, in violation of New Jersey Statute 2C:20-3A, once in 2010

and again in 2011. Exh. 1. Respondent argues that her conviction under Section 2C:20-3a of the New Jersey Statute is not a conviction for immigration purposes since it was classified as a disorderly persons offense under N.J. STAT. § 2C:20-2(b)(3). At the time of Respondent's conviction, a theft offense constituted a disorderly persons offense if the "amount involved was less than $200.00." N.J. STAT. § 2C:20-2(b)(3). Disorderly persons offense were defined as mutually exclusive from crimes, as "crimes are designated in this code as being of the first, second third or fourth degree," and that:

> Disorderly persons offenses and petty disorderly persons offenses are petty offenses and are not crimes within the meaning of the Constitution of this State. There shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses. Conviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime.

N.J. STAT. § 2C:1-4(a)-(b); *see also New Jersey v. Owens*, 54 N.J. 153, 156-57 (N.J. 1969)("A disorderly persons offense (and so too an ordinance violation) is deemed to be a "petty offense" rather than a "crime" within the provisions of our State Constitution relating to indictment (Art. I, para. 8) and trial by jury (Art I, para. 9)."). An individual convicted of a disorderly persons offense could be sentenced to imprisonment for a term not exceeding six months. N.J. STAT. § 2C:43-8 (2006); *New Jersey v. Owens*, 54 N.J. 153, 156-57 (N.J. 1969)("The maximum punishment authorized for a petty offense is below that authorized for crime, and a conviction for a petty offense carries none of the consequential civil disabilities which follow upon a conviction for crime.").

As the Third Circuit pointed out in *Castillo*, the BIA has been unclear and highly inconsistent in its decisions of assessing whether defendants have committed convictions for immigration purposes. 729 F.3d at 306. The Third Circuit stated that to support the definition of a conviction provided by the INA in Section 101(a)(48)(A), the BIA has weighed several factors, often inconsistently, while determining what constitutes a criminal conviction and specifically a "formal judgment of guilt." *Id.* at 308. Furthermore, the Third Circuit stated that while the "reasonable doubt" standard is a "necessary condition," it is not necessarily sufficient: The open-ended "criminal proceeding approach" also contemplates other factors, such as how the offense is characterized by the prosecuting jurisdiction, the consequences of a guilty finding, and other characteristics of the proceeding, such as the rights available to the accused. *Id.* at 307. Ultimately in *Castillo*, the Third Circuit found that the BIA's holding was unworthy of *Chevron* deference, and after detailing inconsistencies in the BIA's approach to defining convictions under the INA, remanded to the BIA to clarify *Eslamizar* and its reading of INA §§ 101(a)(48)(A) and 237(a)(2)(A)(ii). *Id.* at 309-11. To date, the BIA has not issued a precedential decision on the issue. Despite the enumeration of such factors, the court and the BIA have offered little guidance as to how the factors are to be weighed in determining whether a particular offense constitutes a conviction. Thus, the Court will follow an "open-ended" inquiry that the Third Circuit has articulated in *Castillo*.

First, a plain reading of New Jersey's statutory characterization of Respondent's 2010 and 2011 disorderly persons offenses suggests that the offense may not be a conviction under the INA. *Castillo*, 729 F.3d at 307; *Matter of Rivera-Valencia*, 24 I&N Dec. 484, 486-87 (BIA 2008)(noting that the prosecuting jurisdiction characterized the proceedings as "criminal"). Like the Oregon statute in *Eslamizar*, the statute here defines "crimes" as mutually exclusive and distinct from "disorderly persons" offenses, and a conviction "shall not give rise to any disability or legal disadvantage based on conviction of a crime." N.J. STAT. § 2C:1-4(b); *Eslamizar*, 23 I&N Dec. at 687. Thus, the consequences of a guilty finding in a disorderly persons offense prosecution support Respondent's contention that her conviction falls outside the ambit of the INA definition.

Second, even though at the time of her convictions the state had to prove each element of the case beyond a reasonable doubt, the "reasonable doubt" standard, while a "necessary condition," is not necessarily sufficient for an offense to constitute a criminal conviction. *Castillo*, 729 F.3d at 307; *see also* N.J. STAT. § 2C:1-13(a).

Third, considering the factors articulated in *Castillo*, Respondent was able to show that removability has not been established. *See* INA §§ 240(c)(2), (3). *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). At the time of Respondent's conviction, a theft offense constituted a disorderly persons offense if the "amount involved was less than $200.00." N.J. STAT. § 2C:20-2(b)(3). The State of New Jersey characterized the violation of N.J. STAT. § 2C:20-3a as a disorderly persons offense which is considered to be a petty offense and not a crime. N.J. STAT. § 2C:20-2(b)(3). Furthermore, the disorderly persons definition provides that "there shall be no right to indictment by a grand jury nor any right to trial by jury on such offenses," thus indicating that it may not be a true criminal proceeding, even though it may not be constitutionally infirm.

Fourth, the penalty imposed for the instant theft offenses was in the form of fines. The imposition of fines for the disorderly persons offenses does not fall within the criminal context, for the reasons outlined above – such as the lack of constitutional safeguards and the characterization of the violation as an offense – and may not be a crime under New Jersey law. In the present case, Respondent paid fines for her two disorderly persons offenses. For the first offense, she paid $356. For the second offense, he paid $80. Subjecting Respondent to a penalty, in the form of a fine rather than a term of imprisonment, would further suggest that Respondent's theft convictions are civil in nature. As stated above, even though Respondent's proceedings involved a finding of guilt beyond a reasonable doubt, the "reasonable doubt" standard is a "necessary condition," but not necessarily sufficient for an offense to constitute a criminal conviction. *Castillo*, 729 F.3d at 307; *see also* N.J. STAT. § 2C:1-13(a).

b. Is Theft by Unlawful Taking or Disposition (N.J. Stat. § 2C:20-3A) a CIMT?

In the absence of a precedential decision from the BIA or the Third Circuit regarding whether a conviction under N.J. STAT. 2C:20-3a categorically constitutes a CIMT,[2] the Court will examine the statute.

1. Categorical Approach

Theft or larceny offenses have been found to involve moral turpitude. *Giammario v. Hurney*, 311 F.2d 285, 286 (3d Cir. 1962)("larceny, whether grand or petit, has always been held to involve moral turpitude regardless of the sentence imposed"); *Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006) (holding that retail theft to be a crime involving moral turpitude). Both the Third Circuit and the BIA are in agreement that theft, whether grand or petit, is a crime involving moral turpitude when permanent deprivation is an element of the conviction. *Jurado-Delgado*, 24 I&N Dec. at 29; *see also Briseno-Flores v. Att'y Gen*, 492 F.3d 226 (3d Cir. 2007); *Giammario v. Hurney*, 311 F.2d 285 (3d Cir. 1962); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In determining whether there was an intent to permanently deprive the owner of his property, it is appropriate to consider the nature and circumstances surrounding the offense. *Jurado-Delgado*, 24 I&N Dec. at 33 (internal citations omitted); *see also Matter of V-Z-S-*, 22 I&N Dec. 1338, 1350 (a specific intent to permanently deprive can be presumed whenever one unlawfully takes, or attempts to take, the property of another). Crimes containing as an element a specific intent to defraud always involve moral turpitude. *Matter of Tejwani*, 24 I&N Dec. 97, 98 (BIA 2007).

Pursuant to N.J. STAT. § 2C:20-3a, "a person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." The statute is indivisible, as it does not reference to disjunctive sets of "elements." *See Descamps*, 133 S. Ct. at 2281-83. The phrase "unlawfully takes, or exercises unlawful control over" indicates the offense can be committed by alternative means, not elements. The New

[2] In an unpublished decision, the BIA did not disturb an IJ's determination that a respondent's conviction under N.J. STAT. § 2C:20-3a was a CIMT. Ricardo Manuel Suarez-Tirado, A088 646 137, 2008 WL 5181761 (BIA Nov. 6, 2008) (remanding for a determination of whether the conviction falls under the petty offense exception). However, the underlying decision indicates the IJ found this was a CIMT because the respondent admitted the factual allegations and conceded the charges of removability in the NTA, including the charge under INA § 212(a)(2)(A)(i) (providing that any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a CIMT is inadmissible).

Jersey criminal jury instructions indicate the following elements are required for a conviction under the statute:

> (1) that [the] defendant knowingly took or unlawfully exercised control over movable property;
> (2) that the movable property was property of another;
> (3) that [the] defendant's purpose was to deprive the other person of the movable property.

N.J. STAT. 2C:20-3a is not divisible vis-à-vis the CIMT concept, as it does not list multiple discrete offenses nor does it define a single offense by reference to disjunctive sets of "elements." *Descamps v. United States*, 133 S. Ct. 2276, 2281-83 (2013). However, the statute on its face does not require a permanent taking. The question, then, is whether the minimum conduct necessary to violate this statute would remove it from the CIMT definition. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693, 1684-85 (2013).

The Court now turns to the meaning of "deprive" to determine whether a permanent taking is required for a conviction under this statute. Under New Jersey law, to "deprive" is defined as:

> (1) to withhold or cause to be withheld property of another permanently or *for so extended a period as to appropriate a substantial portion of its economic value*, or with purpose to restore only upon payment of reward or other compensation; or
> (2) to dispose or cause disposal of the property so as to make it unlikely that the owner will recover it.

N.J. STAT. § 2C:20-1(a) (2000) (emphasis added). This definition shows that the phrase "for so extended a period" includes temporary deprivation and therefore a broader range of conduct than the intention to permanently deprive. The Court follows the BIA's presumption that an offense can constitute a CIMT only if a trier of fact was required to find, as an element of the offense, that the taking was permanent. *Jurado-Delgado*, 24 I&N Dec. 29, 33 (BIA 2006). Since the definition of "deprive" above explicitly includes less than permanent takings, a conviction for theft by unlawful taking is not categorically a CIMT.

In addition, the New Jersey criminal jury instructions do not specify that the jury is required to determine whether the deprivation was permanent or for an extended a period of time. New Jersey Criminal Jury Instructions (2008).

> A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he/she believes or

> hopes that they exist. A person acts purposely if he/she acts with design, with a specific intent, with a particular object or purpose, or if he/she means to do what he/she does. Purpose is a condition of the mind that cannot be seen and that can be determined only by inferences from conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she engaged in a particular act. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference, which may arise from the nature of defendant's acts and conduct, from all that he/she said and did at the particular time and place, and from all surrounding circumstances.
>
> If you find that the State has proven all three elements beyond a reasonable doubt, then you must find defendant guilty. If you find that the State has failed to prove any of the elements beyond a reasonable doubt, then you must find defendant not guilty.
>
> Since the value of the movable property [or specific type of property] determines the degree or severity of the crime, the State must prove its value beyond a reasonable doubt [or the movable property taken beyond a reasonable doubt]. If you find defendant guilty, then you must indicate the value of the property (or whether the movable property is a specifically enumerated item). [Read to the jury the gradation theft offenses charge, N.J.S.A. 2C:20-2b].

Id.

Thus, given that the minimum criminal conduct under N.J. STAT. 2C:20-3a encompasses categories of offenses that may not involve moral turpitude, N.J. STAT. 2C:20-3a is not categorically a CIMT. *See Matter of R-*, 2 I&N Dec. 819, 828 (BIA 1947) ("It is settled law that the offense of taking property temporarily does not involve moral turpitude"); *see also Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended").

2. Modified Categorical Approach

Alternatively, even if N.J. STAT. § 2C:20-3a is divisible and the Court applies the modified categorical approach, the record of conviction does not establish that Respondent's conviction constitutes a CIMT. Here, the record of conviction consists of Respondent's Certificates of Disposition and several computer generated complaint summaries, none of which indicate that Respondent was charged with, or that she was convicted of, a permanent taking. *See* (Certificates of Disposition, Tabs A-B). While a factfinder may reasonably assume that respondent intended permanently to keep the cash she pled guilty to taking, the modified categorical approach's focus on "elements" rather than "facts" does not permit inferences of this kind. *See Descamps*, 133 S. Ct. at 2285; *United States v. Brown*, 765 F.3d 185, 190-91 (3d Cir.

2014); *see also Matter of Chairez I*, 26 I&N Dec. 349 (BIA 2014). Accordingly, because Respondent was not required to plead to facts establishing that she intended to commit a permanent taking, and there is no evidence in the record admitting such intent, the record does not establish that both of her convictions constitute CIMTs.

IV. Conclusion

Therefore, based upon the foregoing analysis, the Court finds that (a) A violation of N.J.S.A. 2C:20-3A when categorized as a disorderly persons offense is not a crime within the meaning of the INA; and (b) A violation of N.J.S.A. 2C:20-3A does not constitute a CIMT.

ORDER

IT IS ORDERED that Respondent's motion to terminate is **GRANTED.**

_____
Date

_____
Shifra Rubin
Immigration Judge