U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Rivas, Martin J., Esq.
Attorney At Law
801 Madrid Street, Suite 205
Coral Gables, FL 33134-0000

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: LUCIANO, KENIA MORILLO

A 060-183-622

Date of this notice: 6/8/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Kelly, Edward F.
Pauley, Roger

Userteam: Docket

File: A060 183 622 – Miami, FL

Date: JUN - 8 2017

In re: KENIA MORILLO LUCIANO a.k.a. Kenia Morillo a.k.a. Kenia M. Luciano a.ka. Kenia Raymond

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Martin J. Rivas, Esquire

ON BEHALF OF DHS: Richard Jurgens
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's November 25, 2013, decision terminating these removal proceedings against the respondent. The respondent has filed a brief in opposition of the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion and judgment. 8 C.F.R. § 1003.1(d)(3)(ii).

The determinative issue on appeal is whether the respondent's conviction for grand theft in the third degree in violation of Florida Statutes § 812.014 qualifies as a crime involving moral turpitude, so as to support the DHS's charge of removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i).[1] The Immigration Judge concluded that it does not, and terminated these proceedings. For the following reasons, we will affirm the Immigration Judge's decision.

As an initial matter, we are unpersuaded by the DHS's argument that the categorical and modified categorical approaches, as established by *Taylor v. United States*, 495 U.S. 575 (1990), are inapplicable when determining whether a conviction falls within the confines of a crime involving moral turpitude (DHS's Br. at 7-15). This argument is foreclosed by precedent of the

[1] The Record of Proceeding contains a group of documents, marked pages 1 through 7, relating to the respondent's conviction, which will be collectively cited to hereinafter as "Conviction Documents."

United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, which holds that these approaches are fully applicable in this context. *See Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

The Board recently concluded in *Matter of Silva-Trevino*, 26 I&N Dec. 826, 830 (BIA 2016), that the categorical and modified categorical approaches provide the proper framework for determining whether an offense constitutes a crime involving moral turpitude. To this end, when determining whether a conviction for a State or Federal offense involves moral turpitude, we held that unless controlling case law of the governing Federal court of appeals expressly 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, should be applied in determining whether an offense is a categorical crime involving moral turpitude. In evaluating what is a "realistic probability" in a given case, it is appropriate to consider how the controlling Federal circuit applies that test. *See Matter of Chairez*, 26 I&N Dec. 819, 820 (BIA 2016). While the Eleventh Circuit Court of Appeals has adopted the categorical approach based on Supreme Court precedent, it has not expressly addressed the realistic probability test. *See e.g., Walker v. U.S. Att'y Gen.* 783 F.3d 1226, 1229 (11th Cir. 2015).

In cases where the statute of conviction includes some crimes that involve moral turpitude and some that do not, adjudicators must determine if the statute is divisible and thus susceptible to a modified categorical analysis. A criminal statute is divisible so as to warrant a modified categorical inquiry only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *Matter of Chairez*, 26 I&N Dec. 822 (citing *Descamps v. United States*, 133 S. Ct. 2276, at 2281, 2283 (2013)).

The statute under which the respondent was convicted requires proof of the following three elements: (1) knowingly obtaining or using, or endeavoring to obtain or use, the property of another (2) with the intent to permanently or temporarily (3) either (a) deprive the other person of a right or benefit of the property or (b) appropriate the property to one's own use or to the use of any person not entitled to the use of the property. Fla. Stat. § 812.014(1) (2008); *see also* Fla. Stat. § 812.014(2)(c) (providing that a violation is punished as a third-degree felony where the property stolen is valued between $300 and $5,000 and pursuant to Fla. Stat § 812.014(3)(a), is punished as a misdemeanor where the property stolen is valued under $300).

The Board recently held in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), that a theft offense is a crime involving moral turpitude if it involves a taking or exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded.[2]

[2] We are not persuaded by the DHS's argument that all theft offenses involve moral turpitude. There is no question, as the DHS properly points out, that a number of states, and even some provisions of Federal law, punish the act of taking or appropriating property where the intent to

Although any bright-line distinction between intent to deprive permanently versus temporarily has been clarified by *Matter of Diaz-Lizarraga, supra*, we conclude that the respondent's statute of conviction applies to conduct in which moral turpitude does not necessarily inhere. Section 812.014(1) of the Florida Statutes, by its very terms, applies even if a temporary taking or appropriation of property is intended. *See generally Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1353-54 (11th Cir. 2005) (per curiam) (discussing the requirements of Florida Statutes § 812.014(1)). There is no required element that the "theft" occur under circumstances where the owner's property rights are substantially eroded. Thus, the offense of grand or petit theft under Florida law is categorically broader than a generic crime involving moral turpitude.

The next issue we must address, then, is whether the statute of conviction is divisible. *See Descamps v. United States*, *supra*, at 2281 (explaining that resort to the modified categorical approach is appropriate only where the statute of conviction is "divisible," meaning "one or more of the elements of the offense [are set out] in the alternative"). The Eleventh Circuit's approach to divisibility focuses on whether jury unanimity is required with respect to the alternative, overbroad portion(s) of the statute of conviction. *See United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) ("[W]e should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?"). The DHS, the party bearing the burden of proof on the issue of removability, has identified no authority for concluding that jury unanimity is required with respect to any alternative, overbroad portion(s) of the statute of conviction. *See Matter of Chairez, supra.*

Even if we assume arguendo that Florida Statutes § 812.014(1) is divisible with respect to the intent to deprive requirement, we conclude that the DHS has nevertheless failed to establish, under the modified categorical approach, that the respondent's conviction involved a permanent taking or a taking under circumstances where the owner's property rights are substantially eroded. The record of conviction in this case includes a judgment entry, disposition order, and criminal information (Conviction Documents at 1, 3-6). Notably, while the judgment entry reflects that the respondent pled no contest to the charge contained in the information, the charge in the information merely alleges that she committed the offense "with the intent to either temporarily or permanently deprive . . . [or] appropriate" the property (I.J. at 3-4; Conviction Documents at 1, 5). As the Immigration Judge properly found, such evidence does not establish, by clear and convincing evidence, that the respondent committed the type of theft in which moral turpitude necessarily inheres (I.J. at 3-4). *See Matter of Diaz-Lizarraga, supra*

Finally, we are not persuaded by the DHS's argument that we can infer, based on the facts underlying the respondent's conviction, that this offense involved a crime involving moral

---

deprive is less than total or permanent. "That only explains, however, why we choose to criminalize [theft] in the first place. It says nothing about whether [taking of property under circumstances where the owner's property rights are substantially eroded] is worse than any other crime" or whether such conduct is morally turpitudinous in in nature. *Robles-Urrea v. Holder*, 678 F.3d 702, 710 (9th Cir. 2012).

turpitude because the conviction documents purport to reflect that the respondent stole from a retail store. Inasmuch as the DHS relies on our decision in *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006), that case involved a Pennsylvania statute where theft from a retail store was an element of the offense. *See* 18 Pa. Const. Stat. § 3929(a)(1) (1991); (DHS's Br. at 15-20). The respondent's statute of conviction here contains no such requirement. In fact, grand theft under Florida law is a distinct offense from retail theft, each requiring proof of *different* elements. *See* Fla. Stat. § 812.015; *Rimondi v. State*, 89 So. 3d 1059, 1062 & n.3 (Fla. Dist. Ct. App. 2012) (explaining that retail theft requires the property to be that of "a merchant," whereas grand theft can be committed against the property of "any person"). The modified categorical approach is not a vehicle by which we can examine the conduct underlying the respondent's grand theft conviction to determine that she, in fact, committed a different crime. *See Descamps v. United States*, *supra*, at 2285 ("The modified approach . . . retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.").

In sum, the DHS has not established, by clear and convincing evidence, that the respondent has been convicted of a crime involving moral turpitude and is thus removable under section 237(a)(2)(A)(i) of the Act. As there are no other charges pending against the respondent at this time, the removal proceedings will be terminated. In reaching this conclusion we note that the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction is not a crime involving moral turpitude and the respondent is thus not removable under sections 237(a)(2)(A)(i) or (ii) of the Act. *See Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). Accordingly, the following order shall be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
MIAMI, FLORIDA

In the Matter of:	)	
	)	
LUCIANO, Kenia Morillo	)	
A# 060-183-622	)	**IN REMOVAL PROCEEDINGS**
	)	
RESPONDENT	)	
	)	

CHARGE: Section 237(a)(2)(A)(i) of the Immigration and Nationality Act ("INA") as an alien who, within five years of admission, has been convicted of a crime involving moral turpitude for which a sentence of one year or longer may be imposed.

ON BEHALF OF RESPONDENT:
Martin J. Rivas, Esq.
801 Madrid Street, Suite 205
Coral Gables, FL 33134

ON BEHALF OF DEPARTMENT
Richard Jurgens, Esq.
Assistant Chief Counsel
Department of Homeland Security
333 S. Miami Avenue, Suite 200
Miami, FL 33130

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent, Kenia Morillo Luciano, is a thirty-nine-year-old female. She is a citizen and native of the Dominican Republic. See Notice to Appear ("NTA")(Apr. 5, 2013). Respondent was admitted to the United States on August 17, 2008, as a Conditional Resident. See id. On September 27, 2010, Respondent adjusted her status to that of a Lawful Permanent Resident ("LPR"). Id.

On November 14, 2012, Respondent was convicted of one count of grand theft in violation of sections 812.014(1)(a), 812.014(1)(b), and 812.014(2)(c)(1) of the Florida statutes. See Respondent's Judgment (Nov. 14, 2012). Respondent received an eighteen-month probation sentence. Id.

On April 5, 2013, the Department of Homeland Security ("DHS") served Respondent with an NTA, charging her with removability under section 237(a)(2)(A)(i) of the INA, as an alien who, within five years of admission, has been convicted of a crime involving moral turpitude for which a sentence of one year or longer may be imposed. See NTA (Apr. 5, 2013).

During a master calendar hearing on July 30, 2013, Respondent admitted all factual allegations in the NTA. Specifically, Respondent admitted that: she is not a citizen or national of the United States; she entered the United States on August 17, 2008, as a Conditional Resident; she adjusted her status to that of an LPR on September 27, 2010; she was convicted on November 14, 2012, of one count of grand theft in violation of section 812.014(2)(C) of the Florida statutes for which a sentence of eighteen months of probation was imposed and restitution ordered.

Respondent contests removability under section 237(a)(2)(A)(i) of the INA. On September 30, 2013, Respondent filed a motion to terminate removal proceedings, arguing that DHS has failed to establish by clear and convincing evidence that Respondent has been convicted of a crime involving moral turpitude. See Respondent's Motion to Terminate (Sept. 30, 2013). On October 18, 2013, DHS filed an opposition to Respondent's motion to terminate. See DHS Opposition to Respondent's Motion to Terminate (Oct. 18, 2013).

II. Removability under section 237(a)(2)(A)(i) of the INA

An alien is removable under section 237(a)(2)(A)(i) of the INA if she is convicted, within five years of admission, of a crime involving moral turpitude ("CIMT") for which a sentence of one year or longer may be imposed. DHS alleges that Respondent's 2012 conviction for grand theft is a conviction for a CIMT for which a sentence of one year or longer may be imposed. See NTA (Apr. 5, 2013). In the case of an alien who has been admitted to the United States, DHS bears the burden of establishing by clear and convincing evidence that the alien is deportable. See INA § 240(c)(3); 8 C.F.R. § 1240.8(a). Therefore, in this case, DHS must establish by clear and convincing evidence that Respondent has been convicted of a CIMT for which a sentence of one year or longer may be imposed.

The BIA has described a CIMT as a "nebulous concept, which refers generally to 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." Matter of Perez-Contreras, 20 I&N Dec. 615, 617-18 (BIA 1992). A finding that a crime is a CIMT under the INA requires that the crime involve both a culpable mental state and reprehensible conduct. Matter of Silva-Trevino, 24 I&N Dec. 687, 689 n.1 (A.G. 2008).

To determine whether a particular conviction is a CIMT, the Court must first engage in a "categorical" inquiry and look to "the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct." Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1305 (11th Cir. 2011). If the statute of conviction punishes only conduct that involves moral turpitude, then the conviction is for a crime that is categorically a CIMT. Matter of Ortega-Lopez, 26 I&N Dec. 99, 100 (BIA 2013)(internal citations omitted).

If the statute is overbroad, in that it punishes conduct that involves moral turpitude as well as conduct that does not, the Court applies the "modified categorical approach." See Fajardo, 659 F.3d at 1305; Jaggernaugth v. U.S. Att'y Gen., 432 F.3d 1346, 1354 (11th Cir. 2005). Under the modified categorical approach, the Court may examine the record of conviction, which includes the charging document, plea, verdict or judgment, and sentence, but

does not include the police report. Jaggernaugth, 432 F.3d at 1355.

Generally, theft crimes are considered to be CIMTs. A theft offense involves moral turpitude if the taking is committed with the intent to keep the property permanently. 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."); See also 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."). Retail theft, in particular, is often deemed to be a CIMT. See Matter of Jurado-Delgado, 24 I&N Dec. 29, 33 (BIA 2006) (explaining that the BIA has previously held that "offenses involving theft of goods from a retail establishment are crimes involving moral turpitude.")

On November 14, 2012, Respondent was convicted of one count of grand theft in violation of sections 812.014(1)(a), 812.014(1)(b), and 812.014(2)(c)(1) of the Florida statutes. See Respondent's Judgment (Nov. 14, 2012). Those sections provide:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> (2)(c) It is grand theft of the third degree and a felony of the third degree, punishable as provided in s. 775.082, 775.083, or s. 775.084, if the property stolen is:
>
> (1) Valued at $300 or more, but less than $5,000.

Fla. Stat. §§ 812.014(1)(a); 812.014(1)(b); 812.014(2)(c)(1). By the statute's plain language, a defendant can be convicted under section 812.014 of the Florida statutes for either temporarily or permanently depriving a victim of property. As discussed above, only takings that are committed with an intent to permanently deprive the victim of property involve moral turpitude. See Grazley, 14 I&N Dec. at 333; R-, 2 I&N Dec. at 828. Thus, Respondent's statute of conviction is overbroad in that it punishes conduct that involves moral turpitude as well as conduct that does not. Therefore, the Court finds that section 812.014 of the Florida statutes is divisible and the Court proceeds to the modified categorical approach. Jaggernaugth, 432 F.3d at 1354.

Under the modified categorical approach, the Court looks to Respondent's Criminal Information and Judgment. With respect to the grand theft charge, Respondent's Criminal Information states that Respondent:

> did then and there unlawfully and knowingly obtain or endeavor to obtain the property of Macy's, to wit: store merchandise, of the value of three hundred

dollars (300.00) or more, but less than five thousand dollars ($5,000.00) with the intent to either temporarily or permanently deprive Macy's of the right to the property or a benefit from the property, or to appropriate the property to her own use or the use of any person not entitled to the use of the property.

See Respondent's Criminal Information. The language in Respondent's Criminal Information mimics the statutory language and does not specify whether Respondent was convicted of a temporary or permanent taking. The Court is unable to determine from the record of conviction whether Respondent was convicted under the part of the Florida statute that punishes conduct that involves moral turpitude. Therefore, the Court finds that DHS has failed to meet its burden to demonstrate that Respondent's grand theft conviction is a conviction for a CIMT.

Respondent's Criminal Information states that Respondent's crime involved theft from a Macy's store. See Respondent's Criminal Information. Accordingly, DHS argues that Respondent committed retail theft, which is presumptively a CIMT. See Jurado-Delgado, 24 I&N Dec. at 34. However, the Court does not find this argument persuasive. Unlike the statute of conviction in this case, the statute analyzed by the BIA in Jurado-Delgado required a general intent to deprive rather than a temporary or permanent intent to deprive, as the Florida statute in this case does. Jurado-Delgado, 24 I&N Dec. at 34. Florida has a retail theft statute similar to the one in Jurado-Delgado, but Respondent was not convicted under that statute. See Fla. Stat. § 812.015 (2013). Therefore, the retail theft presumption in Jurado-Delgado does not apply to this case.

Based on the foregoing, the Court finds that DHS has failed to establish by clear and convincing evidence that Respondent has been convicted of a CIMT for which a sentence of one year or longer may be imposed. Therefore, the Court will not sustain removability under section 237(a)(2)(A)(i) of the INA. Accordingly, the Court will grant Respondent's motion and terminate these removal proceedings.

ORDER

IT IS HEREBY ORDERED that the charge of removability under section 237(a)(2)(A)(i) of the INA **IS NOT SUSTAINED.**

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

IT IS FURTHER ORDERED that Respondent's removal proceedings be **TERMINATED.**

DATED this 25th day of November, 2013.

H. Kevin Mart
Immigration Judge

Appeal Due Date: 12/26/2013

cc: Assistant Chief Counsel
Counsel for Respondent
Respondent