U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - DEN
12445 East Caley Avenue
Centennial, CO 80111-5663

Name: A[redacted]-V[redacted], N[redacted]

A[redacted]545

Date of this notice: 1/18/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger
Adkins-Blanch, Charles K.
Grant, Edward R.

ShariefM
Userteam: Docket

File: [redacted] 545 - Denver, Colorado Date: JAN 18 2018

In re: N[redacted] A[redacted]-V[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

APPLICATION: Cancellation of removal, voluntary departure

The respondent, a native and citizen of Mexico, timely appeals from the Immigration Judge's August 20, 2013, decision finding her inadmissible and subject to removal, as charged; denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), for failure to meet her burden of proof; but granting her request for post-hearing voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), as a matter of discretion. The record will be remanded to the Immigration Court for further proceedings consistent with this opinion and the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The record reflects that on October 11, 2010, the respondent was convicted, upon a plea of guilty, in the Municipal Court of Aurora, Colorado, for the offense of False Statement-City Personnel, in violation of the Aurora Municipal Code § 94-381, and sentenced to 15 days in jail (Exh. 12). The Immigration Judge found the respondent's conviction constitutes a crime involving moral turpitude, rendering her statutorily ineligible for cancellation of removal pursuant to section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C). On appeal, the respondent challenges that determination.

The phrase "crime involving moral turpitude" describes a class of offenses involving fraud, deception, or reprehensible conduct—*i.e.*, conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in

[1] At the time the respondent filed her appeal, she was represented by attorney Stephen C. Baca. However, Mr. Baca was suspended from practice before the Board and the Immigration Judges in a March 1, 2016, decision. Although Mr. Baca was later reinstated and permitted to practice before the Board and the Immigration Judges, he has yet to submit a new Notice of Entry of Appearance as Attorney before the Board (Form EOIR-27), to indicate that he represents the respondent on appeal. The respondent is therefore considered to be acting pro se. The Board's decision will be sent directly to the respondent, and a courtesy copy will be provided to Mr. Baca.

general," and committed with a culpable mental state. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 833-34 (BIA 2016). To determine whether the respondent's offense is a crime involving moral turpitude, we employ the "categorical approach," and unless circuit case law dictates otherwise, we apply the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction. *Id.* at 831; *see also Rodriguez-Heredia v. Holder*, 639 F.3d 1264, 1267 (10th Cir. 2011) (adopting the reasonable probability test, noting that an offense is broader than the generic crime if there is a "realistic probability" that the statute would be applied to acts not covered by the generic crime). We first compare the elements in the statutory definition of the offense to the elements of the generic crime involving moral turpitude to determine if there is a categorical match. *See Flores-Molina v. Sessions*, 850 F.3d 1150, 1158 (10th Cir. 2017) (citing *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013)). Thus, "[t]he 'categorical approach' ... requires ignoring a petitioner's actual conduct and examining only the minimum conduct needed for a conviction under the relevant state [or local] law." *Ibarra v. Holder,* 736 F.3d 903, 907 (10th Cir. 2013); *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016) (stating that the "categorical approach . . . requires us to focus on the elements of the crime, rather than the conduct of the respondent"); *Matter of Chairez*, 26 I&N Dec. at 821.

At the time of the respondent's 2010 conviction for a violation of the Aurora Municipal Code § 94-381, the municipal ordinance provided as follows,

> Section 94-381 - False Statement to City Personnel.
>
> > It shall be unlawful for any person to knowingly make any false statement to any police officer, firefighter, or other city employee conducting any criminal or traffic violation investigation or to display any false identification with intent to mislead the individual conducting the investigation.

The Immigration Judge, relying on the Board's decision in *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006), determined that section 94-381 of the Aurora Municipal Code categorically qualified as a crime involving moral turpitude. She concluded that the ordinance covers inherently deceptive conduct because it punishes knowingly and willfully giving false information to a police officer as the officer is conducting an investigation, and that this results in an impairment of governmental functions (IJ at 5-6). The Immigration Judge also cited *Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007), as support for the proposition that "moral turpitude adheres in crimes that involve inherently deceptive conduct and result in the impairment of government functions whether or not the specific intent to defraud is an element of the crime" (IJ at 5-6).

However, we are not persuaded that moral turpitude necessarily inheres in the minimum conduct that has a realistic probability of being prosecuted under the Aurora ordinance. Addressing a similar provision of the Denver Municipal Code, DMC § 38-40, prohibiting giving false information to a city official during investigation, the United States Court of Appeals for the Tenth Circuit, determined that it was not a crime involving moral turpitude. *See Flores-Molina v. Sessions*, 850 F.3d at 1164-65. The court determined that for a false statement to violate the Denver Code, it need not involve fraud, cause harm to the government or anyone else, obtain a benefit for the speaker, or be given with intent to achieve any of these acts and thus offense did not contain an explicit or inherent element of intent to defraud. *See id.*

Although similar to the Denver Municipal Code provision addressed by the *Flores-Molina* court, the Aurora Municipal Code provision at issue here also includes language indicating that the false statement be knowingly made with the intent to mislead the city official. *See* section 94-381 of the Aurora Municipal Code. However, as similarly considered by the Tenth Circuit, this would not be sufficient to establish morally turpitudinous conduct, because '[e]ven assuming a false statement covered by [the city ordinance] is 'deceptive,' there is no requirement that the information be believable or have any effect on the official's investigation."[2] *See Flores-Molina v. Sessions*, 850 F.3d at 1168; *see also Arias v. Lynch*, 834 F.3d 823, 829 (7th Cir. 2016) ("A rule that all crimes that involve any element of deception categorically involve moral turpitude would produce results at odds with the accepted definition of moral turpitude as conduct that is 'inherently base, vile or depraved.' ").

In addition, *Flores-Molina* considered that "*Matter of Pinzon* and *Matter of Jurado-Delgado*, and the category of CIMT cases they exemplify, involve offenses that require proof of a specific intent, and DMC § 38-40 does not require such proof." *See id.* at 1166; *Cf. Marmolejo-Campos v. Holder*, 558 F.3d 903, 924 (9th Cir. 2009) (en banc) (criticizing a BIA decision for "misleadingly conflat[ing] 'evil intent' with 'specific intent' "). The court also noted that "[a]lthough the Denver Municipal Code does not define 'knowingly' or 'willfully,' or specify which crimes are general intent and which are specific, the Colorado criminal code's joint definition of those terms provides that '[a]ll offenses defined in this code in which the mental culpability requirement is expressed as 'knowingly' or 'willfully' are declared to be general intent crimes." *Id.* (citing Colo. Rev. Stat. § 18-1-501(6)). Furthermore, the Colorado Supreme Court has applied this statute in interpreting a municipal-code provision with a "knowingly" mental state, when the code did not itself define "knowingly." *See City of Englewood v. Hammes*, 671 P.2d 947, 952–53 (Colo. 1983). This would apply with equal force to the "knowingly" mental state in the Aurora Municipal Code provision at issue here.

As similarly found by the *Flores- Molina* court with respect DMC § 38-40, the minimum conduct required to obtain a conviction under section 94-381 of the Aurora Municipal Code "falls outside the 'impair or obstruct the government by deceit' articulation of 'crime involving moral turpitude' that has been applied to fraud and fraud-like statutes" and that "it need not involve fraud, cause harm to the government or anyone else, obtain a benefit for the speaker, or be given with the intent to achieve any of these ends." *Flores-Molina v. Sessions*, 850 F.3d at 1066. We note that neither offense contained an explicit or inherent element of intent to defraud.

Therefore, pursuant to the court's controlling precedent decision in *Flores-Molina v. Sessions*, we conclude that the respondent's 2010 conviction under section 94-381 of the Aurora Municipal Code does not entail the minimum conduct necessary to constitute a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, so as to preclude the respondent's eligibility for cancellation of removal by section 240A(b)(1)(C) of the Act.

[2] Notably, neither the Denver nor the Aurora Municipal Code provisions include materiality as a statutory element. *See Matter of Pinzon*, 26 I&N Dec.189 (BIA 2013) (making a material false statement to government officials to obtain a benefit is a crime involving moral turpitude).

Consequently, even though the respondent remains inadmissible and subject to removal under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), by virtue of her unlawful presence in the United States, we find that she is not precluded by her 2010 conviction from pursuing an application for cancellation of removal for non-lawful permanent residents of the United States. As such, we find it appropriate under the circumstances to remand the record to the Immigration Judge to allow the respondent the opportunity to establish her eligibility for cancellation of removal under section 240A(b) of the Act, and any other relief or protection from removal to which he may be entitled.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with this opinion and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DENVER, COLORADO

File: [redacted]545 August 20, 2013

In the Matter of

N[redacted] A[redacted]-V[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or "Act"), as amended -- the alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: Cancellation of removal pursuant to Section 240A(b) of the Immigration and Nationality Act.
Post-conclusion voluntary departure pursuant to Section 240B(b)(1) of the Act.

ON BEHALF OF RESPONDENT: DWIGHT MANN
200 South Sheridan Boulevard, Suite 150
Denver, Colorado 80226

ON BEHALF OF DHS: P. MICHAEL TRUMAN
DHS-ICE Office of the Chief Counsel
12445 East Kaley Avenue
Centennial, Colorado 80111

ORAL DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The respondent is a 24-year-old female native and citizen of Mexico, who last arrived in the United States without being admitted or inspected at or near El Paso, Texas in August 2000. The United States Department of Homeland Security (DHS) brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filing of a Notice to Appear dated October 18, 2010 filed with the Immigration Court on October 25, 2010. See Exhibit 1. At a master calendar hearing on July 13, 2011, the respondent, through her counsel, did admit the allegations and concede removability as alleged in the Notice to Appear. On the basis of the respondent's admissions and concessions, removability has been established by clear and convincing evidence. Furthermore, respondent designated Mexico as the country of removal should removal become necessary. The issue before the Court concerns the respondent's eligibility for her applications for relief from removal.

Respondent has applied for relief from removal in the form of cancellation of removal for certain non-permanent residents under Section 240A(b)(1) of the Act. See Exhibit 2. And in the alternative, voluntary departure under Section 240B(b)(1) of the Act. The respondent bears the burdens of proof and persuasion on her request for relief.

II. EVIDENCE PRESENTED

The documentary record of proceeding consists of Exhibits 1 through 12. All of those exhibits have been identified and marked and been entered into the record. They have been considered regardless of whether specifically mentioned in the test of this decision.

III. STATEMENTS OF LAW

A. STATUTORY ELIGIBILITY

To be eligible for cancellation of removal under Section 240A(b)(1) of the Act an applicant must prove that she, the applicant:

(i) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding service of the charging document and up to the time of her application;

(ii) has been a person of good moral character for the 10 years prior to the final administrative order (Matter of Ortega, 23 I&N Dec. 793 (BIA 2005));

(iii) has not been convicted of an offense under certain specified sections of the Act (Sections 212(a)(2), 237(a)(2) or 237(a)(3) of the Act);

(iv) establishes that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent or child who is a United States citizen or lawful permanent resident.

B. SUSTAINING BURDEN OF CREDIBILITY

The provisions of the "REAL ID Act of 2005" apply to the respondent's application as it was filed on or after May 11, 2005. See Sections 240(c)(4)(B) and (C) of the Act.

IV. ANALYSIS AND FINDINGS

A. STATUTORY ELIGIBILITY DETERMINATION

As a preliminary matter, this Court must consider whether the respondent's conviction for providing a false statement to city personnel under Aurora Municipal Code Section 94-381 renders her statutorily ineligible for cancellation of removal pursuant to Section 240A(b)(1) of the Act. In this matter, the respondent does not dispute that she pled guilty to that offense on October 11, 2010. See Exhibit 11. And also see respondent's Exhibits 9 and 10. With regard to the respondent's offense of false statement to city personnel, the respondent under the general penalty

provisions of the Aurora Municipal Code Section 1-113, see Exhibit 12, could have received imprisonment not to exceed one year and/or could have been fined in a sum not to exceed $1,000. In this matter, the respondent according to the criminal documents provided by the respondent at Exhibit 11 received a sentence of 15 days jail with credit for three days of jail time already served.

In assessing whether respondent is statutorily eligible for cancellation of removal, the Court must first determine whether respondent's conviction is a crime involving moral turpitude. The decision in Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008) provides a framework for determining whether a particular offense constitutes a crime involving moral turpitude. See id. at pages 688-89, 696. Under Matter of Silva-Trevino, first a categorical approach is to be employed under which the criminal statute at issue is to be examined to ascertain whether moral turpitude is intrinsic to all offenses that have a "realistic probability" of being prosecuted under that statute. Id. at 689-90, 696-97.

In this matter, respondent was convicted under Aurora Municipal Code Section 94-381 entitled "false statement to city personnel," which provides:

> It shall be unlawful for any person to knowingly make any false statement to any police officer, firefighter or other city employment conducting any criminal or traffic violation investigation or to display any false identification with intent to mislead the individual conducting the investigation.

As the Court stated earlier, to determine whether a conviction is a crime involving moral turpitude, the Court first must undertake a categorical approach where the Court is "initially limited to considering the statutory definition of the crime not the underlying factual circumstances of the crime." See Rodriguez Heredia v. Holder, 639 F.3d 1264 (10th Cir. 2011). Specifically, such a crime must be "inherently base, vile or depraved and contrary to the accepted rules of morality and the duties owed a person

or to society in general." Matter of Hashmi, 32 I&N Dec. 949, 950 (BIA 1999). In this matter, the Department of Homeland Security counsel has argued that under the Silva-Trevino analysis, this offense that was suffered by the respondent is categorically a crime involving moral turpitude. In other words, there is not a realistic probability that this criminal statute in question would be applied to reach conduct that does not involve moral turpitude. DHS counsel cites Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006). In Matter of Jurado-Delgado, the Board of Immigration Appeals had analyzed a similar statute that was contained in the Pennsylvania Consolidated Statutes in which it held that unsworn falsification to authorities in violation of Title 8, Section 4904(a) of the Pennsylvania Consolidated Statutes was categorically a crime involving moral turpitude. That statute set forth that "in general a person commits the misdemeanor in the second degree if with intent to mislead a public servant in performing his official function, he: (1) makes any written false statements which he does not believe to be true; (2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity. See 18 Pennsylvania Consolidated Statute, Section 4094(a) (1992); Id., at page 34. The Court does agree with the Department's position and finds that the Pennsylvania Statute is functionally similar and nearly identical to the relevant statute at issue in this case. The Court finds that under the Aurora Municipal Code section in this matter the *mens rea* required is knowingly, and the Court does that the Aurora Municipal Code statute demonstrates the requisite level of intent to lead to a finding that the statute is one for a crime involving turpitude. In looking at the plain language of the statute at issue in this case, the Court cannot envision a circumstance in which a respondent could knowingly give a false statement to an officer or employee of the city when such officer or employee is acting in their official capacity and that that would not be a crime involving moral turpitude. The Court also notes that moral

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turpitude also inheres in crimes that involve inherently deceptive conduct and results in the impairment of governmental functions or other significant societal harm whether or not the specific intent to defraud is an element of the crime. See Matter of Kochlani, 24 I&N Dec. 128 (BIA 2007).

In this case, respondent's counsel has argued that even if the respondent's offense is a crime involving moral turpitude, her offense would fall under the petty offense exception in that she was only sentenced to a sentence of 15 days in jail. However, the Board of Immigration Appeals in Matter of Cortez, 25 I&N Dec. 301 (BIA 2010), has addressed this very issue and has found that for purposes of establishing statutory eligibility that the petty offense exception does not apply if a respondent has been convicted of an offense under Section 237(a)(2) of the Act. See Section 240A(b)(1)(C) and also Matter of Cortez, 25 I&N Dec. 301 (BIA 2010). Therefore, since the Court has found that respondent's conviction is categorically a crime involving moral turpitude for which the petty offense exception does not apply for purposes of statutory eligibility for cancellation of removal the Court will pretermit the respondent's application for cancellation of removal for certain non-permanent residents.

B. SECTION 240B(b)(1) OF THE ACT

VOLUNTARY DEPARTURE AT THE END OF REMOVAL PROCEEDINGS

Respondent's offense for false statement to city personnel which this Court has determined is a crime involving moral turpitude does fall within the five year period immediately preceding her application for voluntary departure. However, for purposes of post-conclusion voluntary departure, the petty offense exception would apply under 212(a)(2) and she would be eligible for post-conclusion voluntary departure. The Department of Homeland Security has stated that it has no opposition to a grant of

post-conclusion voluntary departure and in view of all of the respondent's equities in this case, as evidenced by the documentary exhibits in this matter, the fact that the respondent has three United States citizen children, and has been residing in the United States for at least 13 years, the Court will grant the respondent post-conclusion voluntary departure as a matter of discretion. Therefore, the Court will issue the following orders:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal pursuant to Section 240A(b)(1) be and hereby is pretermitted and denied.

IT IS FURTHER ORDERED that the respondent's request for post-conclusion voluntary departure be granted in lieu of removal and without expense to the United States Government on or before 60 calendar days from today's date. Respondent would have to depart the United States on or before October 19, 2013.

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the amount of $500 with the Department of Homeland Security on or before five business days from today's date.

IT IS FURTHER ORDERED that if required by DHS, the respondent shall present to DHS all necessary travel documents for voluntary departure within 60 days.

IT IS FURTHER ORDERED that if the respondent fails to comply with any of the above orders the voluntary departure order shall without further notice or proceedings vacate the next day and the respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear.

WARNING TO RESPONDENT: Failure to depart as required means you could be removed. You may have to civil penalty of $1,000 to $5,000. The Court has

the set the amount at $3,000. Also you would become ineligible for voluntary departure, cancellation of removal and any change or adjustment of status for 10 years to come.

APPEAL RIGHTS: Both parties have the right to appeal the decision in this case. Any appeal is due in the hands of the Board of Immigration Appeals on or before 30 calendar days from the date of service of this decision. If the respondent does appeal the decision, she must provide proof of payment of the voluntary departure bond to the Board of Immigration Appeals within 30 days of filing her appeal. This is required by regulations that went into effect on January 20, 2009. See 8 C.F.R. 1240.26(c)(3)(ii).

If respondent does not appeal and instead files a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled or extended. The grant of voluntary departure will be terminated automatically. The alternative order of removal will take effect immediately and the penalties for failure to depart voluntarily under Section 240B(d) of the Act will not apply.

August 20, 2013

Please see the next page for electronic signature

EILEEN R. TRUJILLO
Immigration Judge

//s//

Immigration Judge EILEEN R. TRUJILLO

trujille on January 8, 2015 at 5:21 PM GMT