U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RIVERA-CARRILLO, MARCO ANTONIO **A200-607-697**

Date of this notice: 4/22/2011

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:
Adkins-Blanch, Charles K.

U.S. Department of Justice

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RIVERA-CARRILLO, MARCO ANTONIO
2060 N CENTER ST LOT#281
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DHS/ICE Office of Chief Counsel - FLO
P.O. Box 25158
Phoenix, AZ 85002

Name: RIVERA-CARRILLO, MARCO ANTONIO **A200-607-697**

Date of this notice: 4/22/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.

File: A200 607 697 - Florence, AZ

Date: APR 22 2011

In re: MARCO ANTONIO RIVERA CARRILLO

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose A. Bracamonte, Esquire

ON BEHALF OF DHS: Dion A. Morwood
Assistant Chief Counsel

APPLICATION: Change in custody status

The Department of Homeland Security ("DHS") has appealed from the Immigration Judge's July 15, 2010, bond order granting the respondent's request for a change in custody status. The Immigration Judge's decision is supported by a bond memorandum dated August 31, 2010. The appeal will be dismissed.

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); *Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002) (stating that the Board must defer to the factual determinations of an Immigration Judge in the absence of clear error). The Board reviews questions of law, discretion, and judgement and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS argues that the Immigration Judge erred in concluding that the respondent had established that the government was substantially unlikely to prove that the respondent had been convicted of a crime involving moral turpitude that subjects him to the mandatory detention provisions of section 236(c)(1)(A) of the Immigration and Nationality Act.[1]

We affirm the Immigration Judge's decision. The Act prescribes mandatory detention for certain aliens, including those who, like the respondent, have been charged with removability for commission of a crime involving moral turpitude. The regulations generally do not confer jurisdiction on an Immigration Judge over custody or bond determinations governing those aliens who are subject to mandatory detention. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). However, an alien may seek a determination by an Immigration Judge that the alien is "not properly included within" certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue in this matter.

[1] Section 236(c)(1)(A) of the Act provides for mandatory detention of "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of" "a crime involving moral turpitude." *See* section 212(a)(2)(A)(I) of the Act.

See 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph*, 22 I&N Dec. 799, 802 (BIA 1999). An alien will not be considered "properly included" within a mandatory detention category only when an Immigration Judge determines that the Department of Homeland Security is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention. *See Id.*

We find no clear error in the Immigration Judge's conclusion that the record of conviction does not establish which subsection of Arizona Revised Statutes section 13-2006 the respondent was convicted under. While subsections (A)(1) and (A)(2) contain the language of "intent to defraud," subsection (A)(3) does not contain such language. Therefore, the statute is not categorically a crime involving moral turpitude. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 n. 1 (A.G. 2008) (if a conviction is not categorically an crime involving moral turpitude the record must be analyzed under a modified categorical approach that involves an examination of the record of conviction). The Immigration Judge analyzed the record of conviction under the modified categorical approach and determined that the record of conviction also did not establish the specific subsection under which the respondent was convicted. Similarly, the Immigration Judge considered the third basis described in *Matter of Silva-Trevino, supra*, and concluded that none of the evidence outside the formal record of conviction established that the respondent had been convicted of a crime involving moral turpitude as described in subsections (A)(1) or (A)(2) of A.R.S. 13-2006.

The DHS argues on appeal that the Immigration Judge erred in concluding that the respondent's conviction was not a crime involving moral turpitude because even subsection (A)(3) contains the language "intent to induce," which establishes the requisite scienter under *Matter of Silva-Trevino, supra*. A basic tenet of statutory interpretation holds that a legislative body uses specific language for a reason. The Arizona legislature specifically included the language "intent to defraud" in subsections (A)(1) and (A)(2) of A.R.S. 13-2006. We conclude that the absence of that specific intent language is subsection (A)(3) was by commission and not omission. The legislature's decision not to include language that requires specific intent supports the Immigration Judge's conclusion. Therefore, we find that the language in subsection (A)(3) is insufficient to establish the requisite scienter to conclude that the respondent committed a crime involving moral turpitude.

For the reasons stated above, we find no error in the Immigration Judge's determination that the DHS did not establish that the government was substantially unlikely to establish that the respondent was properly included within the mandatory detention provisions of section 236 of the Act. As the DHS has not presented any argument that the amount of bond set by the Immigration Judge was inappropriate, the Immigration Judge's decision is also affirmed on that basis. *See e.g., Matter of Patel*, 15 I&N Dec. 666 (1976) (factors unique to each alien must be evaluated in determining suitability for release from custody).

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3260 N. PINAL PARKWAY
FLORENCE, ARIZONA 85132

FILE: **A200-607-697**

IN THE MATTER OF:
RIVERA-CARRILLO, MARCO

RESPONDENT

IN REMOVAL PROCEEDINGS

2010 AUG 13 P 12:10

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of respondent pursuant to 8 CFR 236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

____ ORDERED that the request for a change in custody status be denied.

X ORDERED that the request be granted and that respondent be:

____ released from custody on his own recognizance

X released from custody under bond of $ 5000.00

____ OTHER _____

Copy of this decision has been served on the respondent and the Department of Homeland Security

APPEAL: ~~waived~~ - (reserved) by DHS appeal due 7-16-2010

FLORENCE -- FLORENCE, ARIZONA

Date: July 15, 2010

BRUCE A. TAYLOR
Immigration Judge

XS

ATTACHMENT TO NOTICE OF APPEAL
Marco Antonio RIVERA-CARRILLO
A200-607-697

The Department of Homeland Security ("Department" or "DHS") appeals the immigration court's July 15, 2010 decision to grant the respondent bond in the amount of $5,000.

I.

ISSUE PRESENTED

Did the immigration court err as a matter of law when it exercised jurisdiction over the respondent's custody conditions and ordered him released on bond in the amount of $5,000, where the respondent's criminal history includes a class 6 felony conviction for Criminal Impersonation; where this offense includes the intent to induce by deception by "assuming a false identity" and "pretending to be" an employee or a representative of some person or organization; where this offense subjects the respondent to mandatory detention under INA section 236(c)(1)(A), as an alien convicted of a crime of moral turpitude; and, where the Department need not charge an alien with the ground of removability that provides the basis for mandatory detention under INA section 236(c)(1)?

II.

STATEMENT OF THE CASE AND THE FACTS

The respondent is a thirty-two-year-old male, native and citizen of Mexico who allegedly first entered the United States without admission or parole in approximately 1993. (Bond Exh. 1.)

On (February 8, 2009), the former Immigration and Naturalization Service ("Service" or "INS") voluntarily returned the respondent to Mexico.

On February 28, 2009, the respondent reentered the United States without admission or parole. (Exh. 1.)

On April 2, 2010, the Superior Court, State of Arizona, County of Maricopa, convicted the respondent of two felony counts of Criminal Impersonation, in violation of sections 13-2001, 13-2006, 13-701, 13-702, and 13-801 of the Arizona Revised Statutes ("A.R.S."). (Bond Exh. 5.) As a result, the court sentenced him to four months' imprisonment on one count; it sentenced him to 1.75 years' probation on the other count. (*Id.*)

On April 8, 2010, the Department placed the respondent in removal proceedings through the issuance of a Notice to Appear ("NTA") and charged him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act" or "INA"), alien present in the United States without admission or parole.

On June 2, 2010, the respondent appeared with counsel before the immigration court in Florence, Arizona for a scheduled bond redetermination hearing. At that time, he requested that the court take "no action" and indicated that he would seek bond at a later date.

On June 23, 2010, the respondent appeared with counsel before the court for another custody redetermination hearing. At that time, he claimed that his April 2, 2010 Criminal Impersonation conviction is not a crime involving moral turpitude, and argued that he is not subject to mandatory detention under INA section 236(c). The respondent added that he is not a danger to the community or a flight risk, and noted that his only criminal offense is non-violent. In addition, the respondent stated that he is the father of three United States citizen children ranging in age from seven to sixteen years and claimed that his eldest child suffers from seizures. He added that his spouse does not reside in the United States legally and explained that, prior to his detention, he worked as a manager for a business in Phoenix. Last, the respondent stated that he owns a vehicle and has a bank account and noted that, if released, he will reside with his family.

In support, the respondent submitted a bond worksheet (Bond Exh.1); a copy of a September 13, 1993 Certificate of Live Birth from the State of Arizona bearing the name "Gari Morfi-Montanez Amador" (*id.*); a copy of an August 15, 1997 Certification of Vital Record from the State of Arizona bearing the name "Yhaneth Rivera-Montanez" (*id.*); a copy of a September 13, 2003 Certificate of Live Birth from the State of Arizona bearing the name "Gissell Rivera-Montanez" (*id.*); copies of medical records from Arizona Children's Neurology bearing the name "Gari Amador," dated April 9, 2010 (*id.*); and, a copy of an Arizona Certificate of Title for a 1999 Ford Mustang registered to "Marco Antonio Rivera-Carrillo" (*id.*).

The respondent also argued that A.R.S. section 13-2006, the Arizona criminal impersonation statute, is not categorically a crime involving moral turpitude. In doing so, he disputed that A.R.S. section 13-2006(A)(3) requires fraud. The respondent added that, as the criminal court did not convict him of a particular subsection under A.R.S. section 13-2006, the immigration court could not apply the modified categorical approach to determine whether he committed a crime involving moral turpitude.

In response, the Department argued that the respondent's 2010 Criminal Impersonation conviction is *categorically* a crime involving moral turpitude, and cited to the Attorney General's opinion in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). In support, the Department noted that the Presentence Investigation report ("PSI") associated with his offense, as well as police reports, indicate that the respondent used another person's social security number to obtain employment, and during contacts with police, over the past twelve years. The documents add that the victim, now eighteen,

discovered the respondent's deceit when she experienced difficulty obtaining student loans for college. She then had to have her credit fixed, as well as clear the police record associated with her social security card. As a result, the Department argued that the respondent is subject to mandatory detention pursuant to INA section 236(c)(1).

In support, the Department submitted a copy of a Form I-213, "Record of Inadmissible/Deportable Alien," bearing the name "Marco Antonio Rivera-Carrillo" (Bond Exh. 2). It also submitted conviction records and related documents associated with the respondent's April 2, 2010 Criminal Impersonation conviction. These included a copy of a Direct Complaint filed in the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco A. Rivera-Carrillo" (Bond Exh. 3); a copy of a Probable Cause Statement, bearing the name "Marco Antonio Rivera-Carrillo" (*Id.*); a copy of an Information filed in the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" (*Id.*); a copy of an Incident/Investigation Report prepared by the Mesa, Arizona, Police Department, bearing the name "Marco Antonio Rivera-Carrillo" (*Id.*); a copy of an April 2, 2010 Sentence of Imprisonment document from the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" (relating to count one) (Bond Exh. 5); a copy of an April 2, 2010 Suspension of Sentence – Unsupervised Probation document from the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" (relating to count two) (*id.*); a copy of an Order of Confinement document from the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" (*id.*); a copy of an Restitution Ledger Request in behalf of victim Ashley Zollinger ("Zollinger"), bearing the name "Marco Antonio Rivera-Carrillo" (*id.*); a copy of a Presentence Report from the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" and associated with the respondent's April 2, 2010 Criminal Impersonation conviction (*id.*); and, a copy of a Plea Agreement from the Superior Court, State of Arizona, County of Maricopa, bearing the name "Marco Antonio Rivera-Carrillo" (*id.*).

At the conclusion of the hearing, the court continued the matter to July 15, 2010 in order to provide the Department with an opportunity to obtain transcripts of the plea colloquy.

At the continued July 15, 2010 hearing, the Department notified the court that it was unable to obtain transcripts of the plea colloquy associated with the respondent's Criminal Impersonation conviction. As a result, the court determined that the respondent is not subject to mandatory detention and ordered him released on bond in the amount of $5,000. In doing so, the court provided the parties with a Bond Memorandum bearing the name "Douglas Alberto Chavez," (Bond Exh. 6), and indicated that it adequately stated its position in this case. The court added that A.R.S. section 13-2006 is a divisible statute and stated that it believed that A.R.S. sections 13-2006(A)(1) and (2) define offenses that constitute crimes involving moral turpitude. However, it explained that A.R.S. section 13-2006(A)(3) does not do so. According to the court, the Department's documentary evidence failed to identify the subsection that the respondent pled guilty to. Further, it concluded that *Matter of Silva Trevino* does not allow it to rely on conduct described in

the PSI and police reports as part of its analysis because it could not be certain that it was the conduct that the criminal court based the respondent's conviction on. The Department reserved appeal, and hereby submits its timely Notice of Appeal.

III.

LAW AND ANALYSIS

The Board of Immigration Appeals ("Board" or "BIA") reviews factual determinations of the immigration court under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2005); *Matter of R-S-H-*, 23 I&N Dec. 625, 637 (BIA 2003) (discussing the "clearly erroneous" standard of review).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395(1948.) "A fact finding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,899 (Aug. 26, 2002) (Supplementary Information) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985))

The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of the immigration court *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

INA section 236(c) provides in pertinent part as follows:

> (1) CUSTODY. – The Attorney General shall take into custody any alien who –
>
> (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2) (emphasis added),
>
> (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D);
>
> (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised released, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

Id.

INA section 236(c) requires mandatory detention of a criminal alien if he is released from custody after October 8, 1998, the last day that the Transition Rules were in effect.[1] *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999); *see also* 8 C.F.R. § 1003.19(h)(2)(D) (2007). This requirement applies to an alien who is not immediately taken into custody by immigration officials when released from incarceration. *Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007); *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000).

The Department need not charge an alien with the ground that provides the basis for mandatory detention under INA section 236(c)(1). *Matter of Kotliar*, 24 I&N Dec. at 127 (BIA 2007). However, the Department must give the alien notice of the circumstances or convictions that provide the basis for mandatory detention and an opportunity to challenge the mandatory detention before the immigration court during a bond redetermination hearing. *Id.*

For purposes of determining custody conditions under INA section 236, an alien will not be considered "properly included" in a mandatory detention category when the court or Board of Immigration Appeals ("Board" or "BIA") finds, on the basis of the bond record as a whole, that it is substantially unlikely that the Department will prevail on a charge of removability specified in INA section 236(c)(1). *See Matter of Joseph*, 22 I. & N. Dec. 799, 802, 808 (BIA 1999) 8 C.F.R. § 1003.19(h)(2)(ii).

According to INA section 212(a)(2)(A)(i)(I),

> 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 is inadmissible.

Id.

Moral turpitude is a nebulous concept, which refers generally to 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 general. *See Jordan v. De George*, 341 U.S. 223, 229 (1951); *see also Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006) (moral turpitude refers generally to 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 general); *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001)(moral turpitude has long been the subject of interpretation, and its precise meaning has never been fully settled); *Matter of Tran*, 21 I&N Dec. 291, 292 (BIA 1996) (citing *Matter of Franklin*, 20 I & N Dec. 867 (BIA 1994)); *Matter of L-V-C-*, 22 I&N Dec. 594, 600 (BIA

[1] *See also* Section 303(b)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division "C" of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-586 ("IIRAIRA"), which provides that the provisions of INA § 236(c) "shall not apply to individuals released after: October 8, 1998, the date on which the Transition Rules expired.

1999) (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); *Grageda v. INS*, 12 F.3d 919, 921 (9th Cir. 1993) (noting that courts have described moral turpitude in general terms as "an act of baseness or depravity contrary to accepted moral standards" (quoting *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969)), and as "basically offensive to American ethics and accepted moral standards" (quoting *Castle v. INS*, 541 F.2d 1064, 1066 (4th Cir. 1976))).

In order to determine whether a conviction is for a crime involving moral turpitude, the courts have applied the categorical and modified categorical approaches established by the United States Supreme Court. *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067 (9th Cir.2007)(citing *Taylor v. United States*, 495 U.S. 575 (1990) (directing courts to first make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed is broader than, and so does not categorically fall within, this generic definition); *Shepard v. United States*, 544 U.S. 13, 26 (2005)(limiting evidentiary inquiry under modified categorical approach to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record)).

Employing these approaches in *Cuevas-Gaspar*, the Ninth Circuit Court of Appeals concluded that the act of entering a structure "is not itself 'base, vile or depraved,' and that it is the particular crime that accompanies the act of entry that determines whether the offense is one involving moral turpitude." *Cuevas-Gaspar v. Gonzales*, 430 F.3d at 1019 (9th Cir. 2005). Significantly, the Ninth Circuit decided *Cuevas-Gaspar* prior to the Attorney's General clarification of the term "crime involving moral turpitude" in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

In *Matter of Silva-Trevino*, the Attorney General rejected the application of the *Taylor/Shepard* analytical framework in the context of moral turpitude determinations in favor of the "realistic probability test" adopted by the Supreme Court in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007).[2] *Silva-Trevino*, 24 I&N Dec. at 687. The Attorney General explained,

> [I]n evaluating whether an alien's prior offense is categorically one that involved moral turpitude, immigration judges should determine whether there is a "realistic probability, not a theoretical possibility," that a State or Federal criminal statute would be applied to reach conduct that does not involve moral turpitude.[3]

---

[2] Under INA section 103(a)(1) and 8 C.F.R. § 1003.3(d)(1) (2008), a determination and ruling by the Attorney General with respect to all questions of law shall be controlling.

[3] In proceedings under INA section 212, the burden is on the alien to demonstrate that his conviction is not categorically a crime involving moral turpitude.

Id. (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. at 193 (2007)).

The Attorney General added,

> To qualify as a crime involving moral turpitude for purposes of the Immigration and Nationality Act, a crime must involve both reprehensible conduct and *some degree of scienter*, whether specific intent, deliberateness, willfulness, or recklessness.

Id. (emphasis added).

Last, the Attorney General instructed,

> To determine whether a conviction is for a crime involving moral turpitude, immigration judges and the Board of Immigration Appeals should: (1) look to the statute of conviction under the categorical inquiry and determine whether there is a "realistic probability" that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.

Id.

In this case, the Superior Court, State of Arizona, County of Maricopa, convicted the respondent of Criminal Impersonation, a class six felony, in violation of A.R.S. sections 13-2001, 13-2006, 13-701, 13-702, and 13-801. As a result, the court sentenced him to four months' imprisonment on one count; it sentenced him to 1.75 years' probation on the other count.

According to A.R.S. section 13-2006,

> A. A person commits criminal impersonation by:
>
> 1. Assuming false identity with *intent to defraud*[4] another; or
> 2. Pretending to be a representative of some person or organization with *intent to defraud*; or

[4] A crime that has as an element *the intent to defraud* involves moral turpitude. *McNaughton v. INS*, 612 F. 2d 234, 235 (9th Cir. 1978) (citing *Jordan v. DeGeorge*, 341 U.S. 223, 227-32 (1951).

3. Pretending to be, or assuming a false identity of, employee or a representative of some person or organization with *intent to induce* another person to provide or to allow access to property. This paragraph does not apply to peace officers in the performance of their duties.

Id. (emphasis added).

Subsection (B) adds that criminal impersonation is a class 6 felony. *Id.*

Subsections (A)(1), (A)(2), and (A)(3) all include a specific intent, namely the *intent to defraud* (subsections (A)(1) and (A)(2)) and the *intent to induce* (subsection (A)(3)). Thus, the statute, *in its entirety*, satisfies the scienter requirement discussed in *Silva-Trevino*. Although subsection (A)(3) does not include the words, "intent to defraud," one may, nonetheless, argue that it describes such a purpose through its language. Indeed, the Ninth Circuit has held that a crime can involve "fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is . . . '*implicit in the nature*' of the crime." *Blanco v. Mukasey*, 518 F.3d 714, 718, 719 (9th Cir. 2008) (emphasis added) (quoting *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir. 1993)). "[I]ntent to defraud is implicit in the nature of the crime when the individual *makes false statements* in order to procure something of value, either monetary or non-monetary." *Id.* (emphasis added); *see also Matter of Kochlani*, 24 I&N Dec. 128, 130-31 (BIA 2007) (explaining that, although "crimes that have a specific intent to defraud as an element have always been found to involve moral turpitude, [the Board has] also found that certain crimes are inherently fraudulent and involve moral turpitude even though they can be committed without a specific intent to defraud," where a conviction requires proof that the defendant willfully or knowingly committed an act that causes "significant societal harm").

Here, the intent to deceive, which necessarily involves an intent to defraud, appears to be an indispensable element of subsection (A)(3). Specifically, subsection (A)(3) reiterates acts described in subsections (A)(1) and (A)(2) that involve deceit or trickery (i.e., "assuming a false identity" and "pretending to be"). Further, and as a corollary, like subsections (A)(1) and (A)(2), subsection (A)(3) involves reprehensible conduct. Indeed, in order to fall within the ambit of this subsection, the perpetrator pretends to be, or assumes a false identity, in order to *induce* another person to provide or to allow access to property. These actions, as noted, involve the intent to deceive, which necessarily involves the intent to defraud. Therefore, because subsection (A)(3) "contains an inherent intent to deceive or mislead and because moral turpitude inheres in the criminal intent," the respondent's conduct is "inherently wrong and morally reprehensible, not merely prohibited by statute of recent origin." *Matter of P-*, 6 I&N Dec. 795, 798 (BIA 1955).

These facts establish that A.R.S. section 13-2006(A)(3) describes acts that constitute a categorical crime involve moral turpitude. *See Jordan v. De George*, 341 U.S. 223, 232 (1951) ("The phrase 'crime involving moral turpitude' has without

exception been construed to embrace fraudulent conduct."); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1018 (9th Cir. 2005) (same); *Blanco* 518 F.3d at 718 ("The Supreme Court has held that crimes that involve fraud categorically fall into the definition of crimes involving moral turpitude."); *Matter of L-V-C-*, 22 I&N Dec. 594 (BIA 1999) (noting that crimes involving fraud are "generally considered crimes involving moral turpitude"); *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) ("[W]here fraud is so inextricably woven into the statute as to clearly be an ingredient of the crime, it necessarily involves moral turpitude."). *Cf. Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (holding that *mere possession* of illegal documents, *without intent* to use such documents fraudulently or unlawfully, is not a crime involving moral turpitude).

The respondent's conviction is also a crime involving moral turpitude under the modified categorical approach. The available documents comprising the respondent's record of conviction do not recite any facts to establish the specific conduct that he pled guilty to on April 2, 2010. Where the record of conviction does not resolve the moral turpitude inquiry, courts may look to documents outside the formal record of conviction to determine whether the alien's crime actually involved moral turpitude. *See Silva-Trevino*, 24 I&N Dec. at 698-99. Here, both the PSI and the police reports associated with the respondent's 2010 felony Criminal Impersonation conviction indicate that the respondent used another person's social security number to obtain employment, and during contacts with police, over the past twelve years. The documents add that the victim, now eighteen, discovered the respondent's deceit when she experienced difficulty obtaining student loans for college. The respondent's actions forced her to fix her credit and to clean the record associated with her social security card. Significantly, the report establishes that the respondent's offense involved an identifiable victim.

Using another person's personal identifying information in order to illegally obtain employment (a tangible benefit of value) is deceptive and is, therefore, inherently fraudulent. *See* Black's Law Dictionary (8th ed., 2004) (defining fraud as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"). The respondent's conduct induced an employer to act to its own detriment, because it exposed the employer to possible liability for hiring an individual who, in fact, has no legal authorization to work in the United States. *See, e.g.*, 8 U.S.C. § 1324a (prohibiting employers from hiring unauthorized aliens). The respondent's crime is also harmful to society, in that he took a job that would have otherwise been available for a United States citizen, lawful permanent resident, or other individual with legal authorization to work in the United States. *See, e.g.*, *Matter of Hall*, 18 I&N Dec. 203, 206-07 (BIA 1982) (noting that unauthorized employment can negatively impact the American work force); 8 U.S.C. § 1182(a)(5)(A) (requiring that aliens entering the United States to work must obtain labor certification establishing that "there are not sufficient workers who are able, willing, qualified . . . and available at the time of application . . . and at the place where the alien is to perform such skilled or unskilled labor," and that "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed").

Significantly, the Ninth Circuit's decision in *Beltran-Tirado v. INS*, 213 F.3d 1179 (9th Cir. 2000), is clearly distinguishable from the respondent's case. In that case, a court convicted the alien of "falsely representing a social security number" in violation of 42 U.S.C. § 408(g)(2), now recodified at 42 U.S.C. § 408(a)(7)(B). *See id.* at 1182. When the former Immigration and Naturalization Service ("Service" or "INS") moved to deport Beltran in 1993, she applied for permanent resident status under the "registry" statute, 8 U.S.C. § 1259. The immigration court, however, denied her application because it found that her conviction was a crime involving moral turpitude that precluded her from meeting the statutory requirement of good moral character. *See id.* at 1183. The Ninth Circuit, however, disagreed. *See id.* at 1184-85.

In reaching its decision, the court examined a 1990 statutory amendment to 42 U.S.C. § 408, which provided that aliens who had been granted permanent resident status under the amnesty or registry statutes were exempted from prosecution for certain past uses of false social security numbers, including using a false social security number to obtain employment which results in eligibility for social security benefits. *See id.* at 1183-84, n.8. Relying on a congressional conference report accompanying the statutory amendment, in which Congress indicated that "*individuals provided exemption from prosecution under this proposal* should not be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the [INS]," the Ninth Circuit concluded that Beltran's use of a false social security number did not involve moral turpitude. *Id.* at 1184 (emphasis added). The Ninth Circuit noted that "Beltran was not exempted from prosecution under § 408(d)," but the only reason for this was "that her crimes were committed a few weeks too late and she had already been convicted of them." *Id.*

In a dissenting opinion, Circuit Judge John T. Noonan wrote,

> The court reaches very far to perform a kindly deed. It reads meaning into two statutes that Congress has not inscribed there, and it goes on to attribute to the Board a motive that the Board does not articulate. Beltran needed a social security number to live in the United States. But when she caused tax trouble for the number's owner and was asked to stop, she did not. Not to mention that the Board's interpretation of a statutory term should control, it was not an unreasonable exercise of discretion for the Board to deny her relief.

Id. at 1186.

The statutory amendment and legislative history that the Ninth Circuit relied upon in *Beltran-Tirado* applies only to aliens who were granted lawful permanent resident status under the amnesty or registry statutes. *See* 42 U.S.C. § 408(e). The fact that Congress chose to grant one class of aliens exemption from prosecution for certain acts and to deem such acts not morally turpitudinous for *that* class of aliens does not necessarily mean that such acts do not inherently involve moral turpitude. Indeed, that Congress felt a need to create an exemption for certain aliens suggests that aliens who fall

outside the exemption category, who have used a false social security number, *would* be considered to have committed moral turpitude. As discussed above, use of another person's social security number is morally turpitudinous due to the deception and fraud that are inherent in the offense.

Notably, the respondent is not within the class of aliens described in 42 U.S.C. § 408(e). He is not a permanent resident; rather, he is charged as an alien who entered the United States without inspection. Moreover, unlike Beltran, the respondent has not applied for registry. Thus, the reasoning of *Beltran-Tirado* is inapplicable to this case.

The Ninth Circuit's recent published decision in *Tijani v. Holder*, 598 F.3d 647 (9th Cir. 2010) further dilutes the *Beltran-Tirado* holding. In that case, the court held that an alien's convictions for obtaining credit through false means, including submission of fictitious social security numbers, constitute crimes involving moral turpitude. The court explained,

> Credit is today the most widespread means of acquiring wealth in this country. To suppose that it is not fraud to try to tap into this wealth by lies is to ignore the economic elements of the modern world. Credit card not fraud? No, in the modern United States it is the paradigm of fraud.

Id. at 648

The Ninth Circuit added that intent to repay back the fraudulently obtained credit is no defense; rather, the "intent of the fraudster is evil: to get what he has no right to get." *Id.* at 651. Last, it stated, "the creditor who is induced through misrepresentations to give credit suffers measurable and foreseeable harm the moment the creditor enters into the transaction with the fraudster." *Id.* at 652.

While the respondent in this case has not been convicted of credit card fraud, much of the rationale that the Ninth Circuit used in *Tijani* is relevant and applicable.

Based on these facts, the court erred as a matter of law when it determined that the respondent's offense is not a crime involving moral turpitude, exercised jurisdiction over his custody conditions, and ordered him released on bond in the amount of $5,000.

IV.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Board sustain its appeal, vacate the immigration court's July 15, 2010 decision, and order the respondent held in the Department's custody without bond pending resolution of his removal proceedings.