U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: WANG, YUNLEI

A 099-882-279

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:
Wendtland, Linda S.
O'Connor, Blair
Pauley, Roger

Userteam: Docket

File: A099 882 279 – Adelanto, CA Date: JUN - 8 2017

In re: YUNLEI WANG

IN REMOVAL PROCEEDINGS

CERTIFICATION[1]

ON BEHALF OF RESPONDENT: Antonio M. Zaldana, Esquire

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 (sustained)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (withdrawn)

APPLICATION: Termination

The respondent, a native and citizen of China and a lawful permanent resident of the United States, appeals from the Immigration Judge's July 5, 2016, decision that found him removable as charged. The Department of Homeland Security ("DHS") has not filed a response to the appeal. The appeal will be sustained and proceedings terminated.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent does not dispute that he was convicted of conspiracy to commit access device fraud in violation of 18 U.S.C. § 1029(a) (Respondent's Brief at 6; *see* I.J. at 1-2; Exhs. 1, 2). It is well-settled that a conviction for conspiracy to commit a crime is a conviction for a crime involving moral turpitude ("CIMT") if the underlying crime is a CIMT. *See McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980). Hence, the central question at issue here is whether the respondent's underlying crime was for a CIMT, thereby rendering the respondent removable pursuant to section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i).

[1] The Board previously remanded the case to the Immigration Judge on June 3, 2016, for the issuance of a new decision and the case has been returned to the Board upon certification (I.J. at 2).

The statutory phrase "crime involving moral turpitude" is broadly descriptive of a class of offenses involving reprehensible conduct committed with a culpable mental state. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 834 (BIA 2016); *see also Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007) (noting that crimes committed intentionally or knowingly have historically been found to involve moral turpitude). Conduct is "reprehensible" in the pertinent sense if it 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." *Silva-Trevino III*, *supra*, at 833 (citation omitted). To determine whether the respondent's offense qualifies as a CIMT, we employ the "categorical approach," which requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statutes of conviction rather than on the actual conduct which led to the respondent's particular convictions. *Id.* at 831-33.

It is undisputed that 18 U.S.C. § 1029(a) contains 10 subsections – and all of those subsections except subsection (9) require that an individual knowingly act with an intent to defraud. *See* 18 U.S.C. § 1029(a). Therefore, a violation of each of those nine subsections (i.e., all other than subsection (9)) is a categorical CIMT. *Planes v. Holder*, 652 F.3d 991, 997-98 (9th Cir. 2011) (stating that crimes that have fraud as an element are categorically crimes involving moral turpitude); *McNaughton v. INS*, *supra*, at 459 (stating that a crime having as an element the intent to defraud clearly is one involving moral turpitude); *see also Blanco v. Mukasey*, 518 F.3d 714, 718-19 (9th Cir. 2008) (noting that a crime involves fraudulent conduct, and thus is a crime involving moral turpitude, "if intent to defraud is either 'explicit in the statutory definition' of the crime or 'implicit in the nature' of the crime") (citation omitted).

In contrast, subsection (9) of 18 U.S.C. § 1029(a) provides for punishment, if the offense affects interstate or foreign commerce, of:

> [w]hoever . . . knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization.

The respondent argues (as he did before the Immigration Judge) that because subsection (9) does not contain intent to defraud as an explicit element, and does not require proof of an intent to use the configured device unlawfully, a violation may not be considered a CIMT (Respondent's Brief at 6-9, 11-13). As such, he contends that because his record of conviction does not specify which subsection of 18 U.S.C. § 1029(a) he was convicted under, he is not removable as charged and his removal proceedings must be terminated (Respondent's Brief at 13; Exhs. 1, 2). We agree.

The Immigration Judge determined that fraud is implicit in the nature of a violation of subsection (9) of 18 U.S.C. § 1029(a), and therefore, a violation of this subsection is also a CIMT (I.J. at 3-5). However, similar to the distinction we made in *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), we observe that, although 18 U.S.C. § 1029(a)(9) requires the possession of hardware or software with knowledge that it has been configured to modify telecommunication identifying information associated with a telecommunications instrument so that it *may* be used to obtain telecommunications service without authorization, it does not require actual use of or an

intent to actually use that instrument. Because the statute does not require that the instrument be used to knowingly obtain something of value, a violation of the statute is not a CIMT. *See Blanco v. Mukasey*, *supra*. Therefore, we reverse the Immigration Judge's determination that the respondent's conviction for a violation of 18 U.S.C. § 1029(a) is a conviction for a CIMT. Consequently, the respondent is not removable as charged and his removal proceedings shall be terminated.[2]

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the proceedings are terminated.

FOR THE BOARD

[2] In light of this determination, we need not address the respondent's appellate arguments that the Immigration Judge did not comply with the Board's remand order when she declined to conduct another evidentiary hearing (Respondent's Brief at 4-6); or that the omission of the word "conspiracy" from the text of section 237(a)(2)(A)(i) of the Act, means that Congress did not intend an alien to be removable for a conviction involving a conspiracy (Respondent's Brief at 10-11).

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In re: YUNLEI WANG

DISSENTING OPINION: Blair O'Connor, Board Member

Although the respondent was convicted of the only subsection of 18 U.S.C. § 1029(a) that does not explicitly require an intent to defraud, I believe that such an intent is nevertheless implicit in the nature of the crime that this subsection criminalizes, which includes the possession of hardware or software that is configured so that it "may be used to obtain telecommunications service without authorization." 18 U.S.C. § 1029(a)(9). Unlike the statutes addressed in the cases cited in the majority opinion, the *only* possible reason one would possess the items prohibited by the statute here is to obtain something of value, namely satellite, cable, or other telecommunications services, without having to pay for them. As such, because the offense in question, at a minimum, involves deceitful conduct by which the defendant intends to obtain something of value, I would find that it categorically involves moral turpitude. *See Goldeshtein v. INS*, 8 F.3d 645, 649 (9th Cir. 1993). Accordingly, I respectfully dissent.

In *Blanco v. Mukasey*, 518 F.3d 714, 719-20 (9th Cir. 2008), the court held that a California conviction for providing false identification to a police officer in order to impede the enforcement of law did not categorically involve moral turpitude because, in order to obtain a conviction, the state did "not need to show that the individual had [the] specific intent to obtain a benefit or cause another to be liable on his behalf." Similarly, in *Matter of Serna*, 20 I&N Dec. 579, 585-86 (BIA 1992), we held that a conviction under 18 U.S.C. § 1546 for possession of an altered immigration document did not categorically involve moral turpitude because one could possess such a document "without its use or proof of any intent to use it unlawfully." These cases are distinguishable because the *only* reason one would possess hardware or software that has been configured so that it "may be used to obtain telecommunications service without authorization," 18 U.S.C. § 1029(a)(9), is to actually obtain that service. It's not like such hardware or software is possessed as a collector's item. One possesses it in order to use it to obtain something of value without having to pay for it. Because I would find fraud inherent in such an offense, I would dismiss the appeal.

Blair O'Connor
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
ADELANTO, CALIFORNIA

File Number: **A099 882 279**	)	
	)	
In the Matter of	)	**DETAINED**
	)	
WANG, Yunlei	)	**IN REMOVAL PROCEEDINGS**
	)	
Respondent.	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act – aggravated felony (withdrawn by the department)

Section 237(a)(2)(A)(i) of the Immigration and Nationality Act – crime of moral turpitude committed within five years of entry

APPLICATION: None

ON BEHALF OF APPLICANT:
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ON BEHALF OF DHS:
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ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Removal proceedings commenced and jurisdiction vested in the Immigration Court ("Court") when the U.S. Department of Homeland Security ("Department") filed a Notice to Appear ("NTA") with the Court on October 20, 2015. 8 C.F.R. § 1003.14(a). *See* Exhibit 1. The NTA alleged that Yunlei Wang ("Respondent") is a native and citizen of China who is a lawful permanent resident convicted of a crime involving moral turpitude committed within five years of admission and an aggravated felony. *See* Id.

Respondent appeared with counsel at a master calendar proceeding on November 10, 2015 and requested time to prepare his case. The Court granted the request and the matter was continued to November 25, 2016. On November 25, 2016, Respondent appeared with counsel and admitted allegations one through four. He denied allegations five and six. The Department submitted the conviction record they believed supported allegations five and six. *See* Exhibit 2. The Court found allegation five to be true, but

did not find allegation six to be true as there was no information in the conviction document that showed the loss to the victim. The Department then withdrew the first charge of removability – the aggravated felony charge. The Court sustained the second charge of removability based on the conviction documents.

Respondent indicated he would be seeking relief from removal in the form of Cancellation of Removal for Permanent Residents under Section 240A(a) of the Immigration and Nationality Act as well as asylum and related protections. The matter was continued to January 6, 2016 for filing of the applications. Respondent appeared with counsel on that date and indicated that all avenues of relief had been explored and there was no basis on which to file the applications. The Court therefore found the applications abandoned and entered a removal order.

Respondent appealed the decision to the Board of Immigration Appeals ("Board"). On June 3, 2016, the Board issued an order remanding the matter to this Court because the oral decision did not contact enough information for them to render a decision. The Court hereby issues a detailed decision for its findings, conclusions and orders on January 6, 2016 and will recertify the matter to the Board.

II. Law and Analysis

A. Crime Involving Moral Turpitude

Respondent argues that his conviction is not for a crime involving moral turpitude (CIMT) because he was only convicted of *conspiracy* to commit such a crime. However, it is well-settled that conspiracy to commit a crime is a CIMT if the underlying crime is a CIMT. The Ninth Circuit Court of Appeals (The Ninth Circuit) clearly held in 1980 that "[w]here the underlying, substantive offense is a crime involving moral turpitude [...], conspiracy to commit such an offense is also a crime involving moral turpitude." *See McNaughton v. INS*, 612 F.2d 457, 458 (9th Cir. 1980).

More recently, in *Mancilla-Delafuente v. Lynch*, the Court cited to *McNaughton* in affirming that Respondent's conviction for conspiracy to "possess a credit card or debit card without the consent of the cardholder and with the intent to circulate, use, sell or transfer the credit card or debit card with the intent to defraud" under a Nevada statute is a CIMT because the underlying crime is a CIMT. 804 F.3d 1262 (9th Cir. 2015). The underlying crime is clearly a CIMT because it contains the element "intent to defraud." *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *see also Blanco v. Mukasey*, 518 F.3d 714, 719 (9th. Cir. 2008) (quoting *Goldeshtein v. INS*, 8 F.3d 645, 650 (9th Cir.1993)); *McNaughton*, 612 F.2d at 459. Thus, in the instant matter, the Court must first determine whether the underlying crime in Respondent's case is a CIMT.

"The determination whether a conviction under a criminal statute is categorically a crime of moral turpitude involves two steps...." *See Castrijon–Garcia v. Holder*, 704 F.3d 1205, 1208 (9th Cir. 2013) (internal quotation marks and brackets omitted). The Supreme Court announced in 1990 the now-commonplace "categorical approach" to

determining whether a conviction meets a federal definition. *See Taylor v. United States,* 495 U.S. 575 (1990); *see also Nunez v. Holder,* 594 F.3d 1124, 1129 (9th Cir. 2010) ("To determine if a crime involves moral turpitude, we first apply the categorical approach."). In making this determination, the Court should "compare the elements of the statute of conviction to the generic definition of a [CIMT to] decide whether the conviction meets that definition." *See Castrijon–Garcia,* 704 F.3d at 1208. In applying the categorical approach, the Court "do[es] not look to the facts of the underlying conviction, but rather to the state statute defining the conviction." *See United States v. Laurico–Yeno,* 590 F.3d 818, 821 (9th Cir. 2010). "In order for a violation of the state statute to qualify [under the federal definition], the full range of conduct covered by the state statute must fall within the scope of the federal statutory provision." *Id.* (internal quotation marks and brackets omitted). The Ninth Circuit has held that "[t]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *See Gonzales v. Duenas-Alvarez,* 549 U.S. 183, 193 (9th Cir. 2007).

In Respondent's case, the federal statue at issue is 18 U.S.C. § 1029(a), "Fraud and related activity in connection with access devices." In The Ninth Circuit, CIMTs are generally "of two types: those involving fraud and those involving grave acts of baseness or depravity." *See Castrijon–Garcia,* 704 F.3d at 1212. That a conviction for a fraud offense is categorically a CIMT "has been the clearly established rule with respect to fraud since at least 1951." *See Navarro–Lopez v. Gonzales,* 503 F.3d1063, 1074 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring for a majority), *overruled on other grounds by United States v. Aguila–Montes de Oca,* 655 F.3d 915 (9th Cir. 2011).

The Ninth Circuit has long held that "[a] crime involves fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is either 'explicit in the statutory definition' of the crime or 'implicit in the nature' of the crime." *See Blanco v. Mukasey,* 518 F.3d 714, 719 (9th. Cir. 2008) (quoting *Goldeshtein v. INS,* 8 F.3d 645, 650 (9th Cir.1993)); *see also Matter of Cortez,* 25 I&N Dec. 301 (BIA 2010); *McNaughton v. INS,* 612 F.2d 457, 459 (9th Cir. 1980) (stating that "[a] crime having as an element the intent to defraud clearly is one involving moral turpitude."); *see also, e.g., Mancilla-Delafuente v. Lynch,* 804 F.3d 1262, 1265 (9th Cir. 2015) (Nevada statute criminalizing "possess[ion of] a credit card or debit card without the consent of the cardholder and with the intent to circulate, use, sell or transfer the credit card or debit card with the intent to defraud" is a CIMT); *De Martinez v. Holder,* 770 F.3d 823, 825 (9th Cir. 2014) (Arizona statute committed by "assuming a false identity with the intent to defraud another" is categorically a CIMT). These cases offer support that there is a not a realistic probability that the statute could be applied to conduct that does not involve moral turpitude. *See Gonzales,* 549 U.S. at 193.

"Intent to defraud" is explicitly mentioned throughout 18 U.S.C. § 1029(a). While there is one subsection that does mention "intent to defraud" explicitly, the crime committed in violation of this section is remains categorically a CIMT because, as stated

above, "[a] crime involves fraudulent conduct, and thus is a crime involving moral turpitude, if intent to defraud is [...] 'implicit in the nature' of the crime." *See Blanco*, 518 F.3d at 719; *see, e.g.*, *Hung Lin Wu v. Mukasey*, 288 F. Appx. 428, 429 (9th Cir. 2008) ("knowingly traffic[king] in a counterfeit label affixed or designed to be affixed to" a specified set of materials is a CIMT); *Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008) (California offense of "willfully manufacturing, intentionally selling, or knowingly possessing for sale a counterfeit trademark" is CIMT because it "is an inherently fraudulent crime" since "[t]he commission of the crime necessarily defrauds the owner of the mark, or an innocent purchaser of the counterfeit items, or both[.]")). *Tijani v. Holder* also notes that "to be inherently fraudulent, a crime must involve knowingly false representation to gain something of value." 628 F.3d 1071, 1076 (9th Cir. 2010).

Section 1029 of 18 U.S.C. related to access device crimes reads:

> (a) Whoever—
> (1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
> (3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices;
> (4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;
> (5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or persons, to receive payment or any other thing of value during any 1-year period the aggregate value of which is equal to or greater than $1,000;
> (6) without the authorization of the issuer of the access device, knowingly and with intent to defraud solicits a person for the purpose of—
> (A) offering an access device; or
> (B) selling information regarding or an application to obtain an access device;
> (7) knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services;
> (8) knowingly and with intent to defraud uses, produces, traffics in, has control or custody of, or possesses a scanning receiver;
> (9) knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization; or

(10) without the authorization of the credit card system member or its agent, knowingly and with intent to defraud causes or arranges for another person to present to the member or its agent, for payment, 1 or more evidences or records of transactions made by an access device;

shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

Knowingly using hardware or software, knowing that it was modified (false representation) so that it could be used to obtain services without authorization (fraudulently gain something of value) is, then, a CIMT. *See Tijani*, 628 F.3d at 1076. Given the abovementioned Ninth Circuit rulings and that the statute at issue includes "intent to defraud" in nine of its ten sections, there is an *a fortiori* argument to be made that a crime under those nine sections of 18 U.S.C. § 1029(a) is a CIMT, and a clear argument that Respondent's conviction under 18 U.S.C. § 1029(a)(9) is also a CIMT.

Moreover, the Ninth Circuit has already held that one section of 18 U.S.C. § 1029(a) is a CIMT. In *Planes v. Holder*, the Ninth Circuit affirmed the Board's decision where Respondent's federal conviction for "possession of 15 or more access devices with intent to defraud" under 18 U.S.C. § 1029(a)(3) was categorically a CIMT because it was "defined by reference to the intent to defraud." 652 F.3d 991 (9th Cir. 2011). Such a conviction thus supported Respondent's removal under INA § 237(a)(2)(A)(ii), since the crime included fraud as an element of offense. *See id.*

Therefore, the Court could reasonably conclude that crimes committed under all ten subsections of 18 U.S.C. § 1029(a) are CIMTs. Furthermore, the Board has repeatedly found that fraud and trafficking counterfeit items are CIMTs, with and without specific intent to defraud. *See, e.g., Matter of Cortez*, 25 I&N Dec. at 306; *Matter of Kochlani*, 24 I&N Dec. 128, 130–31 (BIA 2007) (trafficking in counterfeit goods or services is a crime involving moral turpitude); *Matter of Flores*, 17 I&N Dec. 225, 230 (BIA 1980) (uttering and selling false or counterfeit paper related to the registry of aliens was a crime involving moral turpitude, even though intent to defraud was not an explicit statutory element).

Based upon the foregoing, the Court concludes that Respondent has been convicted of a CIMT because he was convicted of conspiracy to commit a CIMT.

B. Crime Committed Within Five Years of Admission

The conviction records at Exhibit 2 indicate the offense *ended* on "12/10/2013" or December 10, 2013. While the documents do not indicate how long the conspiracy was in effect, it unequivocally states that it ended in December 2013. Respondent admitted allegation three in the NTA which asserts that he was granted admission to the United States as the child of an asylee on March 8, 2010. Regardless of when the conspiracy formed and regardless of how long it was in operation, it ended on December 10, 2013, clearly within five years of Respondent's admission to the United States. The Court therefore finds that the crime was committed within five years of admission.

C. Sentence of One Year or More Could be Imposed.

Respondent was sentenced by the Federal District Court judge to nine months of incarceration. The penalties for violation of 18 U.S.C. § 1029 are listed at § 1029(c):

> (c) Penalties.--
> (1) Generally.--The punishment for an offense under subsection (a) of this section is.--
> (A) in the case of an offense that does not occur after a conviction for another offense under this section.--
> (i) if the offense is under paragraph (1), (2), (3), (6), (7), or (10) of subsection (a), a fine under this title or imprisonment for not more than 10 years, or both; and
> (ii) if the offense is under paragraph (4), (5), (8), or (9), of subsection (a), a fine under this title or imprisonment for not more than 15 years, or both;
> (B) in the case of an offense that occurs after a conviction for another offense under this section, a fine under this title or imprisonment for not more than 20 years, or both; and
> (C) in either case, forfeiture to the United States of any personal property used or intended to be used to commit the offense.
> (2) Forfeiture procedure.--The forfeiture of property under this section, including any seizure and disposition of the property and any related administrative and judicial proceeding, shall be governed by section 413 of the Controlled Substances Act, except for subsection (d) of that section.

Thus, in every instance of a conviction under this section of the United States Code, a sentence of one year or more may have been imposed, up to the statutory maximums shown above.

Based upon the foregoing, the Court found Respondent removable as charged and entered the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for Cancellation of Removal pursuant to Section 240A(a) be deemed **ABANDONED**.

IT IS FURTHER ORDERED that Respondent's applications for asylum, withholding of removal and protection under the Convention Against Torture be deemed **ABANDONED**.

IT IS FURTHER ORDERED that Respondent be **REMOVED** to China based upon the sustained charge in the NTA.

IT IS FURTHER ORDERED the record be certified and returned to the Board.

DATED: July 5, 2016

Amy T. Lee
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL [M] PERSONAL SERVICE [P]
TO: [ ] Alien [ ] Alien c/o Custodial Officer [ ] Alien's Attorney/Rep [ ] DHS
DATE: 07/05/16 BY: COURT STAFF