



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

*5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041*

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525 E. Big Beaver Road, Suite 206
Troy, MI 48083-0000**

**DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207**

Name: NYKHOLAT, MYKOLA

A087-261-881

Date of this notice: 6/3/2011

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:
Pauley, Roger

Immigrant & Refugee Appellate Center | www.irac.net



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**NYKHOLAT, MYKOLA
A# 087-261-881
100 EAST SECOND
MONROE, MI 48161**

**DHS/ICE Office of Chief Counsel - DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207**

Name: NYKHOLAT, MYKOLA

A087-261-881

Date of this notice: 6/3/2011

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:
Pauley, Roger**

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A087 261 881 - Detroit, MI

Date: JUN - 3 2011

In re: MYKOLA NYKHOLAT

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Caridad Pastor Cardinale, Esquire

ON BEHALF OF DHS: Brian C. Burgtorf
Assistant Chief Counsel

CHARGE:

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

The respondent, a native and citizen of Ukraine, has appealed from the Immigration Judge's decision dated February 24, 2011. On appeal, the respondent moves to terminate proceedings or, alternatively, to remand the record for further proceedings. The Department of Homeland Security does not oppose termination. The motion to terminate will be granted.

As found by the Immigration Judge, the respondent was admitted to the United States as a student on August 10, 2005, and his status was subsequently adjusted to that of a conditional resident on March 6, 2009. On June 16, 2010, the respondent was convicted of two counts of "larceny \$200.00 or more" in violation of Michigan Compiled Laws section 750.356(4)(a). The Immigration Judge determined that the respondent's convictions were for two distinct crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, and thus found that the respondent was subject to removal as charged. The respondent has now submitted evidence to show that he was allowed to withdraw his guilty plea to the violations of M.C.L. § 750.356(4)(a) and enter a guilty plea to two counts of misdemeanor entering without permission in violation of M.C.L. § 750.115(1). The two counts under M.C.L. § 750.356(4)(a) were dismissed, effectively vacating his convictions for larceny. The respondent argues that his convictions for entering cannot be considered convictions for crimes involving moral turpitude because M.C.L. § 750.115(1) does not require the offense to be accompanied by an intent to commit a morally turpitudinous crime. We agree. See *Matter of M*, 2 I&N Dec. 721, 723 (BIA 1946) (an offense involving breaking and entering or trespass may be deemed to involve moral turpitude only if accompanied by the intent to commit a morally turpitudinous act after entry); *Matter of G*, 1 I&N Dec. 403, 404-406 (BIA 1943); see also *Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009) (distinguishing morally turpitudinous Florida residential burglary statute from New York burglary statute in *Matter of M*).

As the moral turpitude charge is the sole ground for removal in this case, there now exists no basis for continuing these proceedings. Therefore, the motion to terminate proceedings will be granted.

Accordingly, the following orders will be entered.

ORDER: The motion is granted.

FURTHER ORDER: The proceedings are terminated.


FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

Detroit, Michigan

File A 87 261 881

Date: February 24, 2011

In the Matter of

MYKOLA NYKHOLAT

)
)
)
)

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(2)(A)(ii) of the Immigration
and Nationality Act as amended -- after
admission convicted of two or more crimes
involving moral turpitude not including
political offenses

APPLICATION:

None

APPEARANCES:

ON BEHALF OF RESPONDENT:

Carrie Pastor-Cardinale, Esquire
525 E. Big Beaver Road, Suite 206
Troy, MI 48083

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

Brian C. Burgtorf, Esquire
Assistant Chief Counsel
333 Mount Eliot
Detroit, MI 48207

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a male who is a native and citizen of
the Ukraine. The Department of Homeland Security (DHS) initiated
proceedings against Respondent pursuant to authority contained in

Section 240 of the Immigration and Nationality Act (hereinafter "Act"). The instant proceedings were commenced with the Court by the filing of the Notice to Appear. See Exhibit 1; 8 C.F.R. 1003.14(a).

At a hearing before the Court, the Respondent has admitted receipt of the Notice to Appear from the Department of Homeland Security, and that has been admitted as noted as Exhibit #1.

The Respondent, through counsel, has admitted as alleged in the Notice to Appear that he is not a citizen or national of the United States, but rather a native and citizen of the Ukraine. The Respondent admitted as alleged on the Notice to Appear that he came to the United States at New York on or about August 10 of 2005, as a nonimmigrant student who was admitted for the duration of his status in the United States. Respondent further admitted that on March 6, 2009, his status was adjusted to that of a conditional permanent resident under Section 245 of the Immigration and Nationality Act.

The Respondent denied conviction on June 16, 2010, in the 16th Circuit Court in Mount Clemens, Michigan, for the offense of larceny under \$200 but more than \$1,000 in violation of Michigan bylaws (MCL) 750.3564A. The Respondent further denied that the victim in that case was a Frank DiMercurio. The Respondent further denied that on that same date, in that same court, he was convicted of a second offense of larceny of \$200 or

more but less than \$1,000, again in violation of MCL 750.3564A, in that case, involving a victim, Alexander Posios. The Respondent denied removability under Section 237(a)(2)(A)(ii) of the Act.

The Department of Homeland Security has the burden of establishing removability under Section 237 charges by clear and convincing evidence. See Section 240(c)(3). In the instant case, the Department of Homeland Security has submitted, in support of both the factual allegations and the charges of removal, certain documentation to establish the charges. See Exhibit 2. The Department has submitted a Certified Record of the Macomb County Circuit Court which establishes that by virtue of the documentation that the Respondent was sentenced following a plea of nolo contendere of two counts under MCL 750.3564A, and for that offense was sentenced to a term of imprisonment of one day with a year of probation as well as the requirement of costs and fees. See Exhibit 2, circuit court sentence disposition. The record reflects that the Respondent, on July 1 of 2008, did commit the offense of larceny against a Frank DiMercurio. See Exhibit 2, felony information. The information binding the Respondent over further establishes that a second offense was committed against an Alexander Posios and added Counts II with a reduction of charge from the more serious charges of larceny of 1,000 or more but less than 20,000 and attempted larceny against the two named individuals were reduced pursuant to agreement. See Exhibit 2, sentence disposition.

The Government has the burden of proving that the two separate crimes were not part of a single scheme. See Matter of C-, 9 I&N Dec. 524 (BIA 1962). The Government further has to establish that both crimes were in fact crimes involving moral turpitude. Hamdin v. INS, 98 F.3d 183 (5th Cir. 1996). The normal inference to be drawn from different crimes committed at different crimes against different persons is that they were separate and distinct offenses and not part of a common scheme or plan unless there is evidence to the contrary. Matter of S-, 9 I&N Dec. 613 (BIA 1962). In the instant case, the Respondent is charged with larceny against two different individuals, and while it appears that they involve similar items, each of the crimes is a separate and distinct crime. Even though the fact that they are similar in character and followed closely in time makes no difference in consideration where there are two separate and distinct crimes involving as it does here separate items of separate persons. Matter of D-, 5 I&N Dec. 728 (BIA 1954). Because an alien commits a crime and repeats the offense does not follow that the offenses were indeed part of a single scheme, even though the crimes are similar. Repetition of a particular crime would not generally constitute a single scheme. Matter of J-, 6 I&N Dec. 382 (BIA 1954).

Moral turpitude does not have a clear definition, and individual cases must be considered on their merits in light of Board precedent as well as the appropriate circuit courts. The

Board has held that a crime involves moral turpitude when it is an act of "baseness, vileness or depravity in the private social duties which man owes to his fellow man or to society" . . . "a crime involves moral turpitude when its nature is such that it manifests upon the part of the perpetrator personal depravity or baseness." Matter of E-, 2 I&N Dec. 134 (BIA, A.G. 1944); Matter of Sloan, 12 I&N Dec. 840 (BIA 1966; A.G. 1968); Matter of Awaijane, 14 I&N Dec. 117 (BIA 1972). The Board has held that in determining whether a crime involves moral turpitude, the Court must consider whether the act is accompanied by a "vicious motive" or "corrupt mind." A crime by its very nature as defined by the statute involve an evil intent before a crime if moral turpitude is justified. In other words, the crime must be a crime which is malum en se as opposed to malum prohibitum. Matter of E-, 2 I&N Dec. 134, supra. Matter of P-, 3 I&N Dec. 56 (BIA 1948); Matter of Awaijane, supra.

The Respondent has been charged with a crime involving moral turpitude which involves theft offenses which have been traditionally found to constitute moral turpitude. See Okoro v. INS, 125 F.3d 920 (5th Cir. 1997); Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992); Matter of Kim, 17 I&N Dec. 144 (BIA 1977) (Larceny is a crime involving moral turpitude); Matter of Grazley, 14 I&N Dec. 330 (BIA 1973).

The elements of the offense involved under MCL 750.3564A do involve that the Respondent committed the offense of larceny by

stealing items within the range of the values expressed in the statute. The Court therefore finds that both crimes here involve moral turpitude and further finds that the charge of removability under Section 237(a)(2)(A)(ii) of the Act is sustained by clear and convincing evidence.

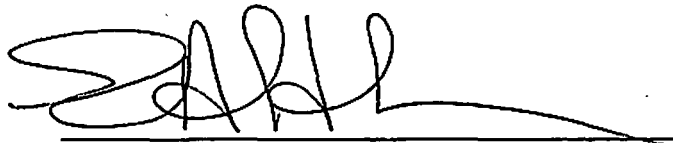
The Respondent has designated the Ukraine as the country to which removal would be directed. The Respondent, through counsel, has indicated that there is no fear of return to that country. The sole request for relief in this case is for a continuance to pursue a collateral attack on the underlying convictions. The DHS opposes a continuance for a collateral attack on convictions. While a continuance may be granted for good cause and in the Court's discretion, the Respondent in this case has at this point no underlying relief available to him. He has expressed no request for relief having withdrawn his request for voluntary departure. The Court is cognizant of the fact that the Respondent has a United States citizen wife upon which his conditional residency was granted as well as a child born of the marriage. Nevertheless, despite these equities, Respondent has two very recent convictions for theft offenses, and the Court will decline to exercise its discretion to grant a continuance for the sole purpose of a collateral attack on underlying convictions when there is no evidence of a likelihood of a potential success on the merits. The request for continuance is therefore denied.

For the foregoing reasons, based upon all the evidence

of record whether specifically enumerated in this decision or not,
the following order will be entered.

ORDER

IT IS HEREBY ORDERED that the Respondent shall be
removed and deported from the United States to the Ukraine on the
charge contained in the Notice to Appear.

A handwritten signature in black ink, appearing to read 'E. A. Hacker', with a long horizontal line extending to the right.

ELIZABETH A. HACKER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before
ELIZABETH A. HACKER, in the matter of:

MYKOLA NYKHOLAT

A 87 261 881

Detroit, Michigan

was held as herein appears, and that this is the original
transcript thereof for the file of the Executive Office for
Immigration Review.



Janine M. Giambalvo, Transcriber

YORK STENOGRAPHIC SERVICES, INC.
34 North George Street
York, Pennsylvania 17401-1266
(717) 854-0077

March 28, 2011

Completion Date

jmg/mab