



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

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**Name: C [REDACTED]-S [REDACTED], E [REDACTED]**

**A [REDACTED]-502**

**Date of this notice: 5/30/2018**

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

Userteam: Docket

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Falls Church, Virginia 22041

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File: [REDACTED] 502 – Chicago, IL

Date: **MAY 30 2018**

In re: E [REDACTED] C [REDACTED] -S [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Justin R. Burton, Esquire

ON BEHALF OF DHS: Geoffrey P. Gilpin  
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b) of the Act

This case was last before us on September 11, 2012, when we disagreed with the Immigration Judge's determination that the respondent's conviction for identity deception under section 35-43-5-3.5 of the Indiana Code was for a categorical crime involving moral turpitude (CIMT). We remanded the case to the Immigration Judge to consider whether the conviction was for a CIMT under the remainder of the then-existing framework set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). On remand, the Immigration Judge concluded in a decision dated October 24, 2013, that the respondent's conviction for identity deception was for a CIMT based on the third step of the *Silva-Trevino* framework, which permitted the adjudicator to consider evidence beyond the record of conviction to determine whether the relevant offense constituted a CIMT. Because the Immigration Judge determined that the respondent's conviction was for a CIMT, he denied his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) and ordered the respondent's removal from the United States. The respondent appeals from the Immigration Judge's October 24, 2013, decision. The appeal will be sustained and the record will be remanded.

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

The issue before us on appeal is whether the respondent's two convictions for identity deception under Indiana law are for crimes involving moral turpitude. While this appeal was pending, the Attorney General vacated the three-step framework set forth in the prior *Silva-Trevino* decision, see *Matter of Silva-Trevino*, 25 I&N Dec. 550, 554 (A.G. 2015), and the Board thereafter issued a precedent decision clarifying that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a CIMT. *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). In the controlling federal jurisdiction of the Seventh Circuit, the realistic probability test, which focuses on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, is applied in determining whether an offense is a categorical crime involving moral turpitude. See *Cano-Oyarzabal v. Holder*, 774 F.3d 914, 917 (7th Cir. 2014) (adopting the realistic probability

Cite as: E-C-S-, AXXX XXX 502 (BIA May 30, 2018)

standard in deciding whether a crime categorically involves moral turpitude). Under the new framework for determining whether an offense is a CIMT, if a statute of conviction is not categorically a CIMT, the next step is to determine whether the statute is divisible such that the modified categorical approach may be applied. *See Matter of Silva-Trevino*, 26 I&N Dec. at 833; *see also Matter of Chairez*, 26 I&N Dec. 819, 822 (2016).

The respondent, a native and citizen of Mexico, was convicted of identity deception under section 35-43-5-3.5 of the Indiana Code. That statute provided, at the time of the respondent's 2009 conviction:

A person who knowingly or intentionally obtains, possesses, transfers, or uses the identifying information of another person, including the identifying information of a person who is deceased: (1) without the other person's consent; and (2) with intent to: (A) harm or defraud another person; (B) assume another person's identity; or (C) profess to be another person; commits identity deception, Class D felony.

In our September 11, 2012, order, we concluded that identity deception under section 35-43-5-3.5 of the Indiana Code is not categorically a CIMT because there is a realistic probability that the statute would be applied to non-turpitudinous conduct (BIA Dec. at 2). On appeal, the parties do not dispute this determination. Because identity deception under Indiana law is not categorically a CIMT, we must then consider whether the statute is divisible such that the modified categorical approach may be applied.

A criminal statute is divisible so as to warrant a modified categorical inquiry only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. *See Matter of Chairez*, 26 I&N Dec. at 822 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013); *see also Matter of Silva-Trevino*, 26 I&N Dec. at 833). The Supreme Court clarified in *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), that "disjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent 'element' of the offense." *See also Matter of Chairez*, 26 I&N Dec. at 819-20 (clarifying that the understanding of statutory divisibility embodied in *Descamps* and *Mathis* applies in immigration proceedings).

We conclude that section 35-43-5-3.5 of the Indiana Code is not divisible. The statute includes three separate intent alternatives. Specifically, a perpetrator must have the "intent to: (A) harm or defraud another person; (B) assume another person's identity; or (C) profess to be another person." Even assuming that the particular nature of the intent is an "element" of the offense of identity deception, none of the three intent alternatives constitutes a categorical CIMT. With respect to subsections (B) and (C), we previously concluded in our September 11, 2012, order, that neither violation necessarily involves the "reprehensible conduct" sufficient to entail moral turpitude (BIA Dec. at 2). *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013) (noting that to involve moral turpitude, a crime requires both a culpable mental state and reprehensible conduct). Subsection (A) requires an intent to "harm or defraud another person" (emphasis added). While an intent to defraud would entail moral turpitude, *see Marin-Rodriguez v. Holder*, 710 F.3d 734,

738 (7th Cir. 2013) (crimes entailing an intent to deceive or defraud are morally turpitudinous), we conclude that an intent to harm would not, because "harm", as defined under Indiana law, does not necessarily involve the "reprehensible conduct" sufficient to entail moral turpitude. See section 35-31.5-2-149 of the Indiana Code (defining "harm" as loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any other person in whose welfare the person is interested"). Thus, we conclude that section 35-43-5-3.5 of the Indiana Code is not divisible.

Because we conclude that section 35-43-5-3.5 of the Indiana Code is neither a categorical CIMT nor divisible so as to warrant a modified categorical inquiry, the respondent has carried his burden of proving the absence of a disqualifying CIMT conviction for purposes of cancellation of removal. See *Matter of Chairez*, 26 I&N Dec. at 825. We will therefore sustain the appeal and remand the record for further consideration of the respondent's eligibility for cancellation of removal and any other relief for which he may be eligible. The following orders will be entered.

ORDER: The appeal is sustained and the Immigration Judge's October 24, 2013, decision is vacated.

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

  
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FOR THE BOARD