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

Ortega, Hector R., Esq
Ortega, Canossa & Associates, PLC
315 W. 9th St., Suite 613
Los Angeles, CA 90015

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: HERNANDEZ AVILA, NOE CESAR **A 079-531-484**

Date of this notice: 8/30/2012

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:
Cole, Patricia A.

lucasd
Userteam: Docket

File: A079 531 484 - Los Angeles, CA Date: AUG 30 2012

In re: NOE CESAR HERNANDEZ AVILA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hector R. Ortega, Esquire

ON BEHALF OF DHS: Elena Kusky
Assistant Chief Counsel

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

APPLICATION: Termination

The respondent is a native and citizen of El Salvador and a lawful permanent resident of the United States. The Department of Homeland Security ("DHS") appeals from the Immigration Judge's May 27, 2011, decision terminating removal proceedings. The appeal will be dismissed.

At issue is whether the respondent's November 20, 2007, conviction under California Penal Code § 653w(a) (failure to disclose origin of a recording or audiovisual work) constitutes a crime involving moral turpitude ("CIMT"), thereby rendering the respondent removable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a CIMT within 5 years after admission for which a sentence of 1 year or longer may be imposed.

CPC § 653w(a)(1) provides:

> A person is guilty of failure to disclose the origin of a recording or audiovisual work if, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale, or resale of, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the outside cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group thereon. This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers.

The record reflects that the respondent pled *nolo contendere* to Count 1 of the Felony Complaint, which provides that he "did unlawfully fail to disclose the origin of a recording and audiovisual work" (Exh. 4).

Pursuant to our de novo review and contrary to the DHS's arguments on appeal, we agree with the Immigration Judge that CPC § 653w(a) is not categorically a CIMT (I.J. at 3-4). *See* 8 C.F.R. § 1003.1(d)(3)(ii). We also agree with the Immigration Judge that the respondent's conviction is not a CIMT under the modified categorical approach because apart from the Felony Complaint, there is no further information regarding the factual basis of his plea (I.J. at 4-5). Moreover, we agree with the Immigration Judge that without other indicia of reliability, the police reports submitted by the DHS do not support a finding that the respondent's conviction is a CIMT under the third step of *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (I.J. at 5-6). As noted by the Immigration Judge, the arrest reports were not incorporated into the respondent's plea and are not substantiated by separate witness statements or direct admissions by the respondent (I.J. at 6). In the absence of such evidence or a plea colloquy, we agree that the DHS did not meet its burden to establish removability as charged. Accordingly, the following order is entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

ORTEGA, CANOSSA AND ASSOCIATES, PLC
HECTOR E. ORTEGA, ESQ.
315 W. 9TH STREET, STE. 613
LOS ANGELES, CA 90015

IN THE MATTER OF FILE A 079-531-484 DATE: May 31, 2011
HERNANDEZ AVILA, NOE CESAR

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
606 SOUTH OLIVE ST., 15TH FL.
LOS ANGELES, CA 90014

X OTHER: See attached Termination decision

Travis Adam
COURT CLERK
IMMIGRATION COURT FF

CC: ELENA KUSKY, ESQ. (TRIAL ATTORNEY)
606 S. OLIVE ST 8TH FLOOR
LOS ANGELES, CA 90014

SENT BY MAIL ON 05/31/2011

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

File No.: **A 79 531 484**	)
	)
In the Matter of:	)
	) **IN REMOVAL PROCEEDINGS**
HERNANDEZ AVILA,	)
Noe Cesar	)
	)
Respondent	)
	)

CHARGE: Immigration and Nationality Act (INA) § 237(a)(2)(A)(i)
-alien convicted of a crime involving moral turpitude committed within five years after the date of admission for which a sentence of one year or longer may be imposed.

APPLICATION: Motion to Terminate

ON BEHALF OF RESPONDENT:
Hector R. Ortega, Esquire
Ortega, Canossa and Associates, PLC
315 West Ninth Street, Suite 613
Los Angeles, California 90015

ON BEHALF OF THE GOVERNMENT:
Elena Kusky, Assistant Chief Counsel
Department of Homeland Security
606 South Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a native and citizen of El Salvador who was admitted to the United States as a lawful permanent resident on January 4, 2005. On November 20, 2007, Respondent was convicted of violating California Penal Code (CPC) section 653w(a) (failure to disclose origin of a recording or audiovisual work). On April 1, 2008, the Government instituted removal proceedings against Respondent by filing a Notice to Appear (NTA) with the Court. See 8 C.F.R. § 1003.14. In the NTA, the Government charges Respondent with removability under INA § 237(a)(2)(A)(i). Exh. 1.

Although Respondent failed to appear for his initial hearing on June 5, 2008, the Court reset the matter to allow the Government time to file a brief and further evidence in support of the removability charge. On July 15, 2008, Respondent again failed to appear. However, because the Government did not have Respondent's file, the proceedings were administratively closed. The Court subsequently granted the Government's Motion to Recalendar, filed September 24, 2010.

On December 2, 2010, Respondent failed to appear. Nevertheless, based upon the Government's failure to file a sufficient brief, proceedings were reset.[1] On March 3, 2011, Respondent appeared before the Court with counsel. Proceedings were continued after the Court informed the Government that its brief, filed on January 4, 2010, was insufficient to meet its burden.[2]

On April 15, 2011, the Government filed a supplemental brief. On April 22, 2011, Respondent filed a Motion to Terminate (Motion).

For the following reasons, the Court will GRANT Respondent's Motion.

II. Law and Analysis

The Government bears the burden of proving by clear and convincing evidence that Respondent is removable. INA § 240(c)(3)(A). Pursuant to INA § 237(a)(2)(A)(i), an alien, who within five years of admission, has been convicted of a crime involving moral turpitude for which a sentence of one year of more may be imposed is removable.

Here, Respondent was admitted to the United States as a lawful permanent resident on January 4, 2005. The Government has submitted conviction records establishing that on November 20, 2007, Respondent pleaded *nolo contendere* to violating CPC § 653w(a). Exh. 5.

CPC § 653w(a) provides in pertinent part that:

> A person is guilty of failure to disclose the origin of a recording or audiovisual work if, for commercial advantage or private financial gain, he or she knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale or resale, or rents, or manufactures, or possesses for these purposes, any recording or audiovisual work, the cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group thereon. This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers.

In the Ninth Circuit, crimes are deemed to involve moral turpitude if they fall into one of two categories: (1) offenses involving grave acts of baseness and depravity that offend the most fundamental values of society and (2) offenses involving fraud. Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1074-75 (9th Cir. 2007). To fall within the first category, the crime must involve "some level of depravity or baseness so far contrary to the moral law that it gives rise to moral outrage." Id. at 1071. Such crimes must also be done willfully or with evil intent. Quintero-Salazar v. Keisler, 506 F.3d 688, 693 (9th Cir. 2007). To fall within the second category, the

[1] The Government's brief, filed December 2, 2010, discussed the legislative history of CPC § 653w(a) but failed to address how the statute's elements constitute a crime involving moral turpitude under the categorical or modified categorical approaches.

[2] The Government's brief focused on policy rather than the elements of CPC § 653w(a).

intent to defraud need not be evident on the face of the statute, but "may also be implicit in the nature of the crime." Winestock v. INS, 576 F.2d 234, 237 (9th Cir. 1978).

A precedential decision issued by the Attorney General attempted to established a uniform administrative framework for determining whether an alien has been convicted of a crime involving moral turpitude. See Matter of Silva-Trevino, 24 I&N Dec. 687 (AG 2008). To determine whether an alien's prior conviction constitutes a crime involving moral turpitude, the Court should: (1) look to the statute of conviction to determine whether, categorically, there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude; (2) if that "categorical" inquiry does not resolve the question, conduct a modified categorical analysis by looking to the alien's 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 does not resolve the inquiry, consider any additional evidence the adjudicator determines is "necessary or appropriate" to resolve accurately the moral turpitude question. Id. at 704. Absent controlling precedent, the Court is bound to follow Silva-Trevino. Matter of Guevara Alfaro, 25 I&N Dec. 417, 424 (BIA 2011).

A. Categorical Approach

In the present case, the Government contends that CPC § 653w(a) is a crime involving moral turpitude because it is an offense involving fraud. The Government concedes that intent to defraud is not a specific element of CPC § 653w(a). See CPC § 653w(a). Rather, the Government argues that CPC § 653w(a) requires that the defendant knowingly conceal the true nature of the product's origin, which it argues is tantamount to fraud. See id.

As noted above, a crime may involve moral turpitude even if the intent to defraud is not an explicit element of the offense. In Matter of Kochlani, 24 I&N Dec. 128, 130 (BIA 2007), the Board of Immigration Appeals (the Board) held that even though 18 U.S.C. § 2320, the federal counterfeiting statute, could be violated without proof of a specific intent to deceive the purchaser, it nonetheless involves fraud so as to constitute a crime involving moral turpitude. The Board reasoned that, like the act of selling counterfeit documents or the act of counterfeiting currency, the federal counterfeiting statute requires 1) trafficking in counterfeit or fraudulent items or objects; 2) proof of intent to traffic and knowledge that the items or objects are counterfeit; and 3) the prohibited offense results in significant societal harm. Id. at 131.

Similar to the congressional intent in support of 18 U.S.C. § 2320, CPC § 653w(a) "was enacted as part of a comprehensive statutory scheme designed to prevent and punish the misappropriation of recorded music for commercial advantage or private financial gain." People v. Anderson, 286 Ca. Rptr. 734, 736 (Cal. Dist. Ct. App. 1991). The legislature's interest in enacting CPC § 653w(a) was a "desire to protect the public in general, and the many employees of the vast entertainment industry in particular, from the hundreds of millions of dollars in losses suffered as a result of the piracy and bootlegging of the industry's products." Id. at 590. Based upon the legislative intent behind the statute and other court's interpretations of CPC § 653w(a)'s application, the Court finds that there is a realistic probability that CPC § 653w(a) applies to conduct which involves knowingly distributing counterfeited items.

However, unlike the federal counterfeiting statute which at all times requires a showing of an intent to traffic items or objects which the person knew were counterfeit, CPC § 653w(a) is not limited to knowingly trafficking in counterfeited goods. For example, as noted by Respondent, a person could be convicted under CPC § 653w(a) for selling his own recording or audiovisual work if the item was not in its original packaging. Indeed CPC § 653w(a)'s broad language could realistically allow a conviction if a person knowingly forwarded items for sale which were damaged so that a portion of the manufacturer's label was no longer clearly displayed. In either example, the items would not be counterfeited but the individual who knowingly sold or forwarded the items for sale could be convicted under CPC § 653w(a).[3] See also Anderson v. Nidof, 26 F.3d 100, 102 (9th Cir. 1994) (noting that CPC § 653w(a) prohibits the selling of works without disclosing the manufacturer and author of the recording regardless of its copyright status). Although preventing the "dishonest dealing and deliberate exploitation of the public and the mark owner" may have been the policy behind CPC § 653w(a), the statute as written encompasses broader conduct, including conduct which does not entail an intent to defraud. Accordingly, as there is more than a theoretical possibility that the statute could be applied to conduct which does not involve moral turpitude, the Court finds that CPC § 653w(a) is not categorically a crime involving moral turpitude.

B. Modified Categorical Approach

When the statute is unable to provide a definitive solution, the Court should then conduct a "modified categorical analysis." Under the modified categorical approach, the Court is restricted to examining "a narrow specified set of documents that are part of the record of conviction." Tokalty v. Ashcroft, 371 F.3d 613, 620 (9th Cir. 2004). The Ninth Circuit has formulated a list of documents limited to "the indictment (but only in conjunction with a signed plea agreement), the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea, or the transcript from the plea proceedings." Ruiz-Vidal v. Gonzales, 473 F.3d 1072, 1079 (9th Cir. 2007).

In the present matter, the Government submitted the complaint and the minute order indicating Respondent's plea.[4] The Government did not submit the plea agreement. Although the Government submitted the complaint, there is no evidence that Respondent pleaded "as

[3] The Court notes that because CPC § 653w(a) is a relatively new statute, the Court does not have the benefit of case law interpreting its application and therefore, the Court is restricted to construing its own examples in which individuals might likely be subject to prosecution under the statute.

[4] The Government has also submitted police reports pertaining to Respondent's conviction. Police reports may only be considered in a modified categorical approach if they have been "specifically incorporated into the guilty plea by the defendant." Matter of Santos Enrique Milian-Dubon, 25 I&N Dec. 197 (BIA 2010) (internal quotations omitted). In Matter of Santos, the Board considered police reports pertaining to the respondent's conviction in its modified categorical analysis because the respondent's plea form included the phrase, "'stip to police report as factual basis,'" and was accompanied by the respondent's initials. Id. Consequently, the Board held that the police reports constituted findings of fact adopted by the defendant upon entering into the plea, and thereby became a part of the judicial record on which courts may rely. Id. In the present case, none of the other documents in the record indicates that Respondent adopted the findings in the police report such that this Court could rely on the reports in its analysis. As a result, the Court may not consider the police reports in conducting its modified categorical analysis.

charged in the information." Thus, even if the complaint provided a factual basis for his conviction, the Court would not be able to rely upon it. United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007). The minute order establishes that on November 20, 2007, Respondent pleaded *nolo contendere* to violating CPC § 653w(a). However, the minute order does not recite the factual basis for his conviction. The Government has not submitted any other judicial document establishing that Respondent was convicted of knowingly intending to defraud, knowingly distributing counterfeited items, or any other morally turpitudinous act. Accordingly, it is inconclusive under the modified categorical approach whether his conviction is a crime involving moral turpitude.

C. Third Step

When the Court cannot make a determination under either a categorical inquiry or a modified categorical analysis, the Court may consider evidence beyond the formal record of conviction. Silva-Trevino, 24 I&N Dec. at 688. This inquiry allows the Court to look beyond the statutory language and the record of conviction, "to the extent [the Court] deem[s] it necessary and appropriate." Id. The goal of this inquiry, however, is to discern the nature of the underlying conviction, but "not an occasion to relitigate facts or determinations made in the earlier criminal proceeding." Id. According the Board, the Court should not consider evidence outside the record of conviction when such evidence was excluded from the underlying plea. See Matter of Ahortalejo-Guzman, 25 I&N Dec. 465, 467 (BIA 2011) (stating that "[w]here the record of conviction conclusively shows that a conviction does not involve family violence, the fact that other evidence outside of the record of conviction may indicate that the victim was part of the offender's family does not establish that the offender was convicted on that basis"). The Ninth Circuit has emphasized the "reliability" of documents and attributed little or no weight to a respondent's own admissions during the judicial proceeding. See S-Yong v. Holder, 600 F.3d 1028, 1035 (9th Cir. 2010) (rejecting court's reliance solely upon an alien's judicial admissions and an unidentified "conviction document" to determine that whether his conviction was a controlled substance offense).

Furthermore, a respondent is expressly guaranteed "a reasonable opportunity to examine the evidence against [him], to present evidence on the [respondent's] own behalf, and to cross-examine witnesses presented by the [Department]..." Hernandez-Gadarrama v. Ashcroft, 394 F.3d 674, 681; INA §240(b)(4)(B); see also 8 C.F.R. § 1240.10(a)(4). Although the rules of evidence are not applicable to immigration hearings, the constitution and statutory guarantees of due process require the Government's decision regarding whether to produce a witness or rely on hearsay statements to not be wholly unfettered. Hernandez-Gadarrama, 394 F.3d at 681; Saidane v. INS, 129 F.3d 1063, 1065 (9th Cir.1997) (citing Baliza v. INS, 709 F.2d 1231, 1233-34 (9th Cir. 1983)).

In support of its assertion that Respondent's conviction is a crime involving moral turpitude, the Government has offered the arrest reports underlying Respondent's conviction. These reports relate the amount of recording and audiovisual materials in Respondent's possession, their location, their content, and their descriptions. Respondent's alleged conduct and profit is also reported. While the Government has argued for the consideration of the arrest

reports underlying Respondent's subsequent indictment and conviction, the Court finds that the arrest reports are legally insufficient to meet the Government's burden in this instance.

As the Board has explained in Matter of Teixeira:

> [R]eliable police reports can be very useful in determining the circumstances surrounding an arrest. But, a particular criminal incident can often result in the violation of multiple criminal provisions of law. The arrest report typically will not tell us what charges the prosecution chose to pursue, nor which of those charges actually resulted in a "conviction." There may be a wide gulf between the most serious offense an individual may have committed and what he ultimately is convicted of having done.

21 I&N Dec. 316, 326 (BIA 1996).

The contents of the arrest reports are entirely hearsay, and the Government has made no indication that it is willing or able to produce the drafter. There is no indication that Respondent admitted to facts in the arrest reports or that their contents were incorporated in his plea. Moreover, arrest reports are one-sided recitations of events aimed at establishing probable cause or reasonable suspicion in criminal proceedings. The reports are not substantiated by separate witness statements or Respondent's direct admissions. As cautioned by the Attorney General in Silva-Trevino, the goal of the Court's "inquiry is to discern the nature of the underlying conviction where a mere examination of the statute itself does not yield the necessary information; it is not an occasion to relitigate facts or determinations made in the earlier criminal proceeding." Silva-Trevino, 24 I&N Dec. at 690. Without more indication of their reliability, the Court concludes that the arrest report is insufficient to meet the Government's burden. In this case, the Government has failed to provide any other evidence concerning the nature of Respondent's conviction.

Based on the foregoing, the Court cannot conclude that Respondent's CPC § 653w(a) conviction is a crime involving moral turpitude. Therefore, the Court finds that the Government has not met its burden to establish removability as charged.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Terminate be **GRANTED**.

DATE: 5/27/2011

A. Ashley Tabaddor
Immigration Judge