U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: NOLASCO-SANTIAGO, ADELA **A 205-497-497**

Date of this notice: 5/3/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

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

Userteam: Docket

File: A205 497 497 – Hartford, CT Date: MAY - 3 2017

In re: ADELA NOLASCO SANTIAGO a.k.a. Adelina Nolasco a.k.a. Adela Nolasco

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mary D. Foden, Esquire

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

The respondent has appealed the Immigration Judge's June 11, 2015, decision that pretermitted the respondent's application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The record will be remanded.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

On January 10, 2013, the respondent was convicted of Fraud, and Misuse of Visas, Permits, and other Documents in violation of 18 U.S.C. §1546(a). The Immigration Judge determined that this offense constitutes a crime involving moral turpitude (CIMT) under 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), which renders the respondent statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. The respondent challenges this determination on appeal.

There is no dispute that the respondent was convicted under the first paragraph of 18 U.S.C. § 1546(a), which "revolve[s] around a defendant's individual procurement, possession, or use of various fraudulent immigration documents." *See United States v. Principe*, 203 F.3d 849, 852 (5th Cir. 2000). It provides in relevant part:

> Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or …

We conclude that the crime of immigration document fraud in violation of 18 U.S.C. § 1546(a) is not categorically a CIMT because the statute does not necessarily reach only

offenses involving moral turpitude. Indeed, in *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992), this Board held that a violation of 18 U.S.C. § 1546(a) (1982) does not categorically constitute a CIMT because the possession portion of the statute does not expressly include the element of fraud. Put another way, "the crime of possession of an altered immigration document with the knowledge that it was altered, but without its use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude." *Id.* at 586.

As such, we turn to 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. 819, 822 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013); *see also Matter of Silva-Trevino*, 26 I&N Dec. 826, 833 (BIA 2016)). If the statue is divisible, the record of conviction may be examined to identify the statutory provision that the respondent was convicted of violating. *See Descamps v. United States, supra*, at 2281, 2283 (defining when a statute may be considered "divisible"); *Matter of Chairez*, *supra*, at 819-20; *Matter of Silva-Trevino*, *supra*, at 833.

We conclude that the clause of 18 U.S.C. § 1546(a) at issue is not divisible because it does not list multiple discrete offenses as enumerated alternatives or define a single offense by reference to a disjunctive sent of "elements," more than one combination of which could support a conviction. The first paragraph of 18 U.S.C. § 1546(a) includes two clauses. The first clause proscribes knowingly forging an immigration document, which is a CIMT under *Matter of Flores*, 17 I&N Dec. 225, 226 (BIA 1980). *See Omagah v. Ashcroft*, 288 F.3d 254, 261 (5th Cir. 2002) (acknowledging that although the statute at issue in *Matter of Flores*, *supra*, the predecessor to 18 U.S.C. § 1546(a), "does not require a showing of intent to defraud, a fraudulent intent inheres in the act of counterfeiting documents and violating the statute"). However, the second clause, under which it is apparent that the respondent was convicted, prohibits both simple, knowing possession of illegal documents (not a CIMT), as well as possession of illegal documents with an intent to use them (a CIMT). *See Matter of Serna*, *supra*. We conclude that under the second clause of 18 U.S.C.§ 1546(a), whether the defendant "used" or "possessed" the immigration document are merely different means by which the statute may be violated, not elements of the offense. *See United States v. Ryan-Webster*, 353 F.3d 353, 360 n. 11 (4th Cir. 2003) (affirming a conviction under 18 U.S.C. § 1546(a) where the jury was instructed that the first element of the offense was that the defendant uttered, used, or possessed a document); *see also United States v. Meza-Perez*, 2011 U.S. Dist. LEXIS 67013, at *5-6 (C.D. Ill. June 23, 2011). As such, we are unable to discern whether the respondent was convicted of a CIMT and may not employ the modified categorical approach.[1]

[1] In the Second Circuit, an alien meets his or her burden of proof by showing an inconclusive record of conviction. *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir, 2008).

The record will be remanded for further proceedings to determine whether the respondent is otherwise eligible for cancellation of removal and whether she merits such relief in the exercise of discretion.

Accordingly, the following order shall be entered:

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

FOR THE BOARD

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
HARTFORD, CONNECTICUT

IN THE MATTER OF:	)	
	)	
NOLASCO SANTIAGO, Adela	)	**IN REMOVAL PROCEEDINGS**
AKA NOLASCO, Adelina	)	
A205-497-497	)	
	)	
RESPONDENT	)	

CHARGES: INA § 212(a)(6)(A)(i), as amended: alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General.

INA § 212(a)(7)(A)(i)(I), as amended: alien not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid, required entry document, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issues by the Attorney General under INA § 211(a).

APPLICATIONS: Cancellation of Removal pursuant to INA § 240A(b)(1)
Voluntary Departure
Torture Convention

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL AND FACTUAL HISTORY

Adela Nolasco Santiago (Respondent) is a native and citizen of Mexico who entered the United States without inspection at an unknown time and an unknown location. Respondent has resided in the United States since her initial entry. She is mother to two United States citizen children, born in 2002 and 2004, respectively.

Respondent has a number of criminal convictions. On March 20, 2007, Respondent pled guilty to theft of plates, improper use of marker/license/registration, and operating a motor vehicle without a license, in violation of Conn. Gen. Stat. §§ 14-147a, 14-147(c), and 14-36(a) respectively. On February 9, 2011, she pled guilty to second degree breach of peace in violation

of Conn. Gen. Stat. § 53a-181. On January 10, 2013, she pled guilty to possession of a fraudulent alien registration card in violation of 18 U.S.C. § 1546(a). Finally, on February 22, 2013, Respondent pled guilty to sixth degree larceny in violation of Conn. Gen. Stat. § 53a-125b.

On March 14, 2013, the Department of Homeland Security (DHS) personally served Respondent with a Notice to Appear (NTA) identifying her as an arriving alien and charging her as inadmissible pursuant to INA §§ 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I). In written pleadings submitted by and through counsel on September 10, 2013, Respondent conceded proper service of the NTA, admitted all factual allegations contained therein, conceded the charges of inadmissibility, requested relief in the form of cancellation of removal for certain nonpermanent residents, requested voluntary departure in the alternative, and designated Mexico as the country to which her removal should be directed if so ordered. Respondent submitted and subsequently withdrew an I-589 application for asylum, withholding of removal, and protection under the United Nations Convention Against Torture.

II. TESTIMONIAL AND DOCUMENTARY EVIDENCE

Respondent testified in support of her application at a May 18, 2015 individual merits hearing. She stated she was born in Oaxaca Mexico, came to the United States in 1997, and has not since left the country. Respondent is the mother of two United States citizen children, Rafael and Alexandra, aged 12 and 11, respectively, at the time of the hearing. She lives alone with her children in a small apartment. Both of Respondent's children are insured through the State of Connecticut. Respondent's son Rafael is medicated for learning and attention issues; he receives individual attention in special education classes approximately five hours per week. Respondent does not believe similar services are available in Mexico.

Respondent has been arrested at least five times in the United States. She stated that three arrests related to shoplifting; one arrest stemmed from a fight between Respondent and her sister-in-law; and another arrest related to her use of fraudulent documents to obtain employment at Sikorsky Aircraft Corporation. Respondent minimized her culpability: she cast blame for the shoplifting arrests on various female friends; she identified her sister-in-law as the aggressor in the fight that led to her arrest for breach of peace; and finally, she stated that although she purchased an I-551 and used it to secure employment, she knew nothing about the form other than that it would help her obtain work.

Respondent and DHS submitted a number of documents in this matter including Respondent's conviction records, a plea colloquy related to Respondent's federal conviction, Respondent's tax returns, medical and school records related to Respondent's United States citizen son, and various reports concerning country conditions in Mexico.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Cancellation of Removal

1. Guiding Principles

Section 240A(b) of the INA permits cancellation of removal for a non-permanent resident alien, if the alien can establish she: (1) has been physically present in the United States for ten years immediately preceding the date of the application for cancellation; (2) has been a person of good moral character during that ten-year period; and (3) has not been convicted of an offense that would render her inadmissible under INA § 212(a)(2) or removable under §§237(a)(2) or (a)(3). *See* INA § 240A(b)(1); *see also Matter of Cisneros-Gonzalez*, 23 I&N Dec. 668, 670 (BIA 2004).

Respondent is Statutorily Ineligible for Cancellation of Removal

The Court will pretermit Respondent's application for cancellation of removal. Cancellation of removal is unavailable to aliens who, inter alia, have been convicted of crimes involving moral turpitude within the meaning of INA § 212(a)(2). INA §240A(b)(1) Respondent's conviction for visa fraud in violation of 18 U.S.C. 1546(a) is such a crime. Under 8 CFR 1240.21(c)(1), the Court may deny the application regardless of the annual cap.

A crime involving moral turpitude (CIMT) 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." *Mendez v. Mukasey*, 547 F.3d 345, 347 (2d Cir. 2008) ("Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of the mind.") (citations omitted). Generally, "[c]rimes committed intentionally or knowingly have historically been found to involve moral turpitude," *In re Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007), whereas other crimes, such as the "[v]iolation of statutes which merely license or regulate and impose criminal liability without regard to evil intent[,] do not involve moral turpitude." *Matter of Serna*, 20 I&N Dec. 579, 583 (BIA 1992) (quoting *Matter of G-*, 7 I&N Dec. 114, 118 (BIA 1956)). Accordingly, mere possession of an altered immigration document does not constitute a crime involving moral turpitude because an alien "might not have had the intent to use the altered immigration document in his possession unlawfully." *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992). Crimes involving intent to deceive or defraud, however, are unquestionably morally turpitudinous. *See Jordan v. De George*, 341 U.S. 223, 232 (1951) ("[T]he decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude."); *accord Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980).

The use of false immigration documents involves the kind of deceit or fraud that renders a crime morally turpitudinous. *See Matter of Flores*, 17 I&N Dec. at 230 (determining that notwithstanding lack of fraud as an element, crime of uttering or selling false or counterfeit paper relating to alien registry, with knowledge of their counterfeit nature, inherently involves deliberate deception and fraudulent conduct); *see also Marin-Rodriguez v. Holder*, 710 F.3d 734, 739 (7th Cir. 2013) (concluding BIA did not err in holding alien's "directly deceptive use of a false Social Security card to obtain and maintain unauthorized employment" involved moral turpitude); *Lateef f. Dep't of Homeland Sec.*, 592 F.3d 926, 928, 931 (8th Cir. 2010) (concluding alien's conviction for using "unlawfully obtained social security number" was morally turpitudinous); *Omagah v. Ashcroft*, 288 F.3d 254, 261-62 (5th Cir. 2002) (affirming BIA ruling that "conspiracy to possess [illegal immigration documents] with intent to use does rise to the level of moral turpitude. . . .").

By knowingly presenting a fraudulent and falsely made alien registration card to an employer, Respondent engaged in inherently deceptive and morally turpitudinous conduct. As Respondent correctly asserts, the statute under which she was convicted, 18 U.S.C. § 1546(a), criminalizes mere possession, receipt, and acceptance of fraudulent documents, as well as the utterance, use, or attempted use of such documents. 18 U.S.C. § 1546(a). Accordingly, the statute does not categorically proscribe morally turpitudinous conduct. *See Serna*, 20 I&N Dec. at 586. The statue is, however, divisible, permitting modified categorical review of the record to ascertain the specific elements underlying the conviction. Respondent's record of conviction discloses she pled guilty to count one of an indictment that charged her with "fraud and misuse of alien registration." A plea colloquy reveals that as part of her guilty plea, she admitted she "knowingly possessed and used a fraudulent and falsely made alien registration receipt card, and at the time [she] knew that the card was fraudulent and falsely made." See Exhibit 5, pages 9-22. It is Respondent's burden to establish she is statutorily eligible for the relief she seeks. See INA section 240(c)(4). She has failed to carry her burden. Because there is adequate proof in the record that Respondent intended to use the fraudulent document at issue unlawfully, the Court concludes her conviction under 18 U.S.C. § 1546(a) involved moral turpitude. *See Matter of Serna*, 20 I&N Dec. at 583 ("Were it the case that the conviction included the use of an altered visa, we would agree that it was for a crime involving moral turpitude because of the strong similarity of that offense to the crime discussed in *Matter of Flores* . . . ." Respondent is thus statutorily ineligible for cancellation of removal.

B. Voluntary Departure

An individual may be permitted to voluntarily depart the United States if, at the conclusion of proceedings, the Court is satisfied the individual established she: (1) has been physically present in the United States for at least one year immediately preceding the service of the NTA; (2) has been of good moral character, as defined by INA § 101(f)(1)-(8), during at least five years immediately preceding the application for voluntary departure; (3) is not deportable as an aggravated felon or a terrorist under INA § 237(a)(2)(A)(iii) and/or INA § 237(a)(4); and (4) intends to depart the United States and has the means to so depart. INA § 240B(b)(1)(A)-(D); 8 C.F.R. § 1240.26(c)(1). The individual also must possess a valid travel document. 8 C.F.R. § 1240.26(c)(2).

Voluntary departure is a discretionary benefit; a statutorily eligible applicant bears the burden of establishing she merits relief. *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980), *overruled on other grounds by Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988) (superseded in part by statute INA § 322(a)). To determine whether a favorable exercise of discretion is warranted, the Court weighs all relevant adverse and positive factors, including the individual's prior immigration history; criminal history, if any; length of residence in the United States; and extent of his family, business, and societal ties to the United States. *Matter of Thomas,* 21 I&N Dec. 20, 22 (BIA 1995). Discretion may be favorably exercised in the face of adverse factors where there are countervailing equities such as long residence and/or close family ties in the United States, or humanitarian needs. *Id.* at 23.

Respondent is statutorily eligible for voluntary departure: she was physically present in the United States for well over a year immediately preceding the service of the NTA, and she

neither been convicted of, nor admitted to having committed, an act described in INA § 101(f)(1)-(8) immediately preceding her application for voluntary departure. Although she admitted to having committed several crimes involving moral turpitude, those acts were committed outside the relevant period. The Court considered Respondent's positive factors, including her lengthy residence in the United States, her family ties (two United States citizen children), and her employment history. The Court finds, however, that these factors do not outweigh Respondent's adverse factors, including her numerous arrests and convictions and her professed lack of responsibility therefor.

IV. ORDERS

Based on the foregoing, the following orders are entered:

IT IS HEREBY ORDERED that Respondent's application for cancellation of removal is **PRETERMITTED** and her request for voluntary departure is **DENIED**;

IT IS FURTHER ORDERED that Respondent be removed to **MEXICO**.

June 11, 2015
Date

Michael W. Straus
Immigration Judge