U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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3535 Lawton Road, Suite 100
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Name: C[redacted]-D[redacted], D[redacted]

A [redacted]575

Date of this notice: 10/30/2017

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:
Kelly, Edward F.
Mann, Ana
Pauley, Roger

Userteam: Docket

File: [redacted] 575 – Orlando, FL

Date: OCT 30 2017

In re: D[redacted] C[redacted]-D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ifeoma A. Uche, Esquire

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

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's August 26, 2015, decision denying 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 Department of Homeland Security has not responded to the appeal, which will be sustained.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard, and review all other issues, including whether the parties have met their relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

In 2013, the respondent was convicted of trespass of an occupied structure or conveyance in violation of Florida Statutes section 810.08(2)(b). The statute provides:

> (1) Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.
>
> (2)(b) If there is a human being in the structure or conveyance at the time the offender trespassed, attempted to trespass, or was in the structure or conveyance, the trespass in a structure or conveyance is a misdemeanor of the first degree.

The Board has held that the categorical and modified categorical approaches provide the proper framework for determining whether a conviction is for a crime involving moral turpitude. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 827 (BIA 2016). Unless circuit law dictates otherwise, 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 id*; *see also Moncrieffe v. Holder,* 133 S. Ct. 1678, 1684 (2013); *Walker v. U.S. Atty. Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015). If a statute of conviction is not categorically a crime involving moral turpitude, 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 Eleventh Circuit has stated that the term "moral turpitude" involves: "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Itani v. Ashcroft*, 289 F.3d 1213, 1215 (11th Cir. 2003) (internal citations omitted); *see also Matter of Sejas*, 24 I&N Dec. 236, 237 (BIA 2007). Further, to involve moral turpitude, a crime requires both a culpable mental state and reprehensible conduct. *See Matter of Louissant*, 24 I&N Dec. 756-57 (BIA 2009).

We conclude that the respondent's statute of conviction is not categorically a crime involving moral turpitude because (1) the trespass must take place in a structure or conveyance rather than a dwelling, and (2) the trespass offense requires no attendant intent to commit a crime. Although based on the language of the statute of conviction, there was a "human being in the structure or conveyance" at the time of the respondent's trespass, such factual scenario is distinguishable from a trespass of a "dwelling", which, by definition, "is designed to be occupied by people lodging therein at night." *See* Florida Statutes § 810.011. Neither a "structure" nor a "conveyance," as defined under Florida law, "is designed to be occupied by people lodging therein at night." *See id.* (defining "structure" as "a building of any kind, either temporary or permanent, which has a roof over it," and "conveyance" as "any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car."). *Cf. Matter of J-G-D-F-*, 27 I&N Dec. 82, 87-88 (BIA 2017) (holding that first degree burglary of a dwelling under Oregon law is a crime involving moral turpitude, regardless of whether a person was actually present at the time of the offense, because a dwelling contemplates a "justifiable expectation of privacy and personal security") (internal citations omitted); *Matter of Louissant*, 24 I&N Dec. 754 (BIA 2009) (holding that second degree burglary of an occupied dwelling under Florida law was a crime involving moral turpitude because "[b]y breaking into a dwelling of another for an illicit purpose, the burglar tears away the resident's justifiable expectation of privacy and personal security"). The fact that a human being was in the structure or conveyance at the time of the trespass does not render the conduct sufficiently reprehensible as to inhere moral turpitude.

In addition, trespass under Florida Statutes section 810.08(2)(b) requires no attendant intent to commit a crime. The Board has held that a burglary of a building or room is not a crime involving moral turpitude where "the crime intended to be committed at the time of entry ... [does not involve] moral turpitude." *See Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946). If an unlawful entry into a building with an intent to commit a non-turpitudinous crime is not a crime involving moral turpitude, we conclude that an unlawful entry of a structure or conveyance with *no* intent to commit a crime therein is also not a crime involving moral turpitude.

Because trespass under Florida Statutes section 810.08(2)(b) is not categorically a crime involving moral turpitude, we next determine 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. We conclude that Florida Statutes section 810.08(2)(b) is not divisible because none of the listed offenses reaches conduct that involves moral turpitude. Because the statute of conviction is neither a categorical crime involving moral turpitude nor divisible, pursuant to *Descamps v. U.S.*, 133 S. Ct. at 2286, "the inquiry is over."

The Immigration Judge explicitly found that the respondent satisfied the remaining statutory requirements for cancellation of removal under section 240A(b)(1) of the Act, including that the respondent's qualifying relatives will suffer exceptional and extremely unusual hardship in the event of the respondent's removal. Furthermore, we conclude that the respondent merits relief in the exercise of discretion. Accordingly, we will sustain the respondent's appeal and hold that he is eligible for and warrants a grant of cancellation of removal. We will remand the record for updating of the required background and security checks.

ORDER: The appeal is sustained.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ORLANDO, FLORIDA

File: [redacted]575

In the Matter of:

D[redacted] C[redacted]-D[redacted],	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: 212(a)(6)(A)(i) of the Immigration and Nationality Act.

APPLICATION: Cancellation of removal for non-permanent residents.

ON BEHALF OF RESPONDENT: Ifeoma Uche

ON BEHALF OF DHS: Kevin Stanley
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Mexico. The United States Department of Homeland Security brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act. Proceedings were commenced with the filling of the notice to appear with the immigration court. The respondent admits as alleged in his notice to appear that he entered the United States on or about 1998. He further concedes that he is inadmissible as charged under section 212(a)(6)(A) of the Act as an alien present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than

as designated by the Attorney General. On the basis of the respondent's admissions, I find that the respondent's removed or has been established and that the respondent has not shown that he is clearly and beyond doubt entitled to be admitted and is not inadmissible or in that the respondent has not shown by clear and convincing evidence that he is lawfully present in the United States pursuant to a prior admission. The respondent's form 42B application for cancellation is contained in the record at exhibit three. His notice to appear is exhibit 1C. Prior to the admission of the application, the respondent was given an opportunity to make any necessary corrections and then swore or affirmed before this court that the contents of the application as correct were all true and correct to the best of his knowledge. To be eligible for cancellation under section 240A(b)(1), an applicant must prove that he, the applicant, one, has been physically present in the United States for a continuous period of not less than 10 years immediately preceding service of the charging document [indiscernible] time of the application. Two, has been a person of good moral character for the 10 years prior to filing administrative order. Three, has not been convicted of an offense under certain specified sections to the Act. And four, establishes that removal would result in exceptional and extremely unusual hardship to the applicant's spouse, parent, or child who is United States citizen or lawful permanent resident.

At the outset of this oral decision, I just want to make clear on the record the procedural posture of this case versus -- as distinct from other members of the respondent's family. This whole case involves seven respondents. The other six respondents in this case are 556-940 [redacted]. So these are all the other respondents. The court had a hearing in all seven cases on January 21, 2010, at that

hearing I marked for all seven respondents, I marked exhibits one through eight. On June 21, 2010, I did on an oral decision on the record denying all seven respondent's applications for 42B. More than a year later, though, on October 20, 2011, the board remanded all seven of these cases back to this court because the respondent's counsel had submitted new evidence, new material information pertaining to the 42B application. So the board remanded all these cases back to the court on October 20, 2011. So the bottom line is June 21, 2010, exhibits one through eight, denied 42B. October 20, 2011, board remand and all seven cases on those same exhibits one through eight. Since October 20, 2011, though, Ms. Uche has filed 13 different exhibits with the court. Just so we're clear and just so some staff attorney at the board or a board member understands what the evidence is in this case, at tab 30 is pages 455 through 473; tab 31 is page 474 through 516; tab 32, page 517 through 519; tab 33, pages 520 through 521. Those are four exhibits that Ms. Uche submitted after the board remand. Then, again, after the board remand, Ms. Uche filed seven other exhibits as follows; for some inexplicable reason, Ms. Uche re-designated these documents. The fifth filing was tabs A through D, pages 504 through 546; the sixth was tab E through I, page 54 -- page 547 through 559. The seventh exhibit was tab J through L, page 560 through 609. The eighth exhibit was tab M through N, page 610 through 611. The ninth exhibit was tab O through R, page 612 through 622. The tenth exhibit was tab S through Z, page 623 through page 756. Then the eleventh exhibit was A(a) through 757 -- page 757 through 765. So to summarize, again, there were exhibits one through eight marked at the hearing on June 21, 2010, and then after that hearing Ms. Uche filed an 11 additional filings with the court. We then had a master calendar hearing. The government conceded that the respondents had shown that they had the requisite 10 years of physical presence, they had the requisite good moral character, and that they had

established the requisite exceptional and extremely unusual hardship. There's one respondent, though, D[redacted] C[redacted]-D[redacted], [redacted]575, who on May 2013 was convicted of trespass to an occupied conveyance. Ms. Uche filed two documents pertaining to that conviction. These, again, for whatever reason this is another A(a) -- tab A(a) through A(c), page 766 through 774 and then tab A(d), page 775. So these additional two exhibits, number 12 and 13, I'm going to mark as exhibit nine and 10 on today's date, December 11, 2013. These two documents are relevant to David Cedillo's case number 575 -- because -- number 575 because in the court's opinion this is a crime involving moral turpitude that renders the respondent ineligible for cancellation for 42B and I'll explain more about that in a second in the oral decision. So to summarize, the -- there are seven respondents altogether in this case, the court is granting cancellation of removal to six of them. The court is denying, though, the 42B application pertaining to D[redacted] C[redacted]-D[redacted], [redacted]575. The documents in the file show that the respondent was convicted of burglary or trespass to an occupied conveyance. This is in violation of Florida Statute 810.082B. 810.08 paragraph one, states that "whoever without being authorized, licensed, or invited willfully enters or remains in any structure or conveyance, or having been authorized, licensed, or invited is warned by the owner or lessee of the premises or by a person authorized by the owner or lessee to depart and refuses to do so, commits the offense of trespassing in a structure or conveyance." 810.082B which is the applicable statute here says that "if there is a human being in the structure or conveyance at the time, the offender trespassed, attempted to trespass, or was in the structure or conveyance, the trespass in a structure or conveyance is a misdemeanor of the first degree punishable as provided in Florida Statute 775.082." A misdemeanor of the first degree in Florida under 775.082 is punishable by a term not exceeding one year confinement. So the court finds based on the statute and the

board's reasoning in Matter of Louissant, 24 I&N Dec. 754 (BIA 2009), the court finds that this is a crime involving moral turpitude. The respondent is therefore ineligible under 240A(b)(1)(c) because he's been convicted of an offense under INA section 237A(2). The court concludes that this crime involving moral turpitude for the rationale set out in Matter of Louissant. Louissant was a Florida case that dealt with burglary of a dwelling. This case, the instant case, D[redacted] D[redacted], deals with trespass to a structure or conveyance that is occupied by a human being. In Louissant at page 758, the Board of Immigration Appeals said that "we conclude that the conscious and overt act of unlawfully entering or remaining in an occupied dwelling with the intent to commit a crime is inherently reprehensible conduct committed with some form of scienter. By breaking into a dwelling of another for illicit purpose, the burglar tears away the resident's justifiable expectation of privacy and personal security and invites a violent defensive response from the resident. As the United States Supreme Court has found, the main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property but rather from the possibility of a face to face confrontation between the burglar and a third party whether an occupant, police officer, or a bystander who comes to investigate ." In a concurring opinion board member Roger Pauley pointed out that while trespassing alone may not be turpitudinous, that does not mean that the violation of privacy and the sometimes incidental and destruction of property inherent in trespass should be totally disregarded in making a crime involving moral turpitude calculus. So I find on the facts of this case that the respondent is in violation of 810.081 or 2B is a categorically crime involving moral turpitude for the board's -- for the rationale, the board set out in Matter of Louissant. I realize, again, that Louissant was a burglary and this is a trespass but the same rationale appertains in the crime involving moral turpitude calculus. So I've granted -- the bottom line is I've

granted 42B applications for the other six respondents but in this case, I'm denying the respondent's applicant, D[redacted] C[redacted]-D[redacted] [redacted]575, because the court finds that he's been convicted of a crime involving moral turpitude that renders him statutorily ineligible for 42B. If on appeal, though, the Board of Immigration Appeals finds that this is not a crime involving moral turpitude and the respondent is eligible for cancellation, I find as I did in the six other cases that the respondent has shown a continuous physical presence, he's shown the hardship to his qualifying relatives. Accordingly the following orders will be entered:

The respondent's application for cancellation of removal for certain non-lawful permanent residents is denied.

It is further ordered that the respondent be removed to Mexico on the charge contained in the notice to appear.

KEVIN CHAPMAN
Immigration Judge

[redacted]
AUGUST 26, 2015