U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: M[redacted] A[redacted], D[redacted]

A [redacted]210

Date of this notice: 12/4/2017

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:
Pauley, Roger
Mann, Ana
Grant, Edward R.

Userteam: Docket

File: [redacted] 210 – Las Vegas, NV Date: DEC - 4 2017

In re: D[redacted] M[redacted]-A[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Seth L. Reszko, Esquire

ON BEHALF OF DHS: An Mai Nguyen
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b)(1) of the Act; voluntary departure

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated May 16, 2014, which denied his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012), and voluntary departure under section 240B of the Act, 8 U.S.C. § 1229c. The parties have provided arguments on appeal. The appeal will be sustained, and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Department of Homeland Security charged the respondent as inadmissible under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i) (present without being admitted or paroled), which the respondent conceded (Tr. at 4; Exh. 1). The respondent applied for cancellation of removal and voluntary departure in the alternative (Exh. 4). The record shows that on or about October 24, 2012, the respondent was convicted by guilty plea of violating 18 U.S.C. § 1546(a), Possession of False Immigration Document (Exh. 5). In the May 16, 2014, decision on appeal, the Immigration Judge determined that a conviction under 18 U.S.C. § 1546(a) is not categorically for a crime involving moral turpitude (CIMT); that the statute in question is divisible; and that, under the modified categorical approach, the respondent's conviction is for a fraud offense that was a CIMT that barred eligibility for both cancellation of removal and voluntary departure (IJ at 3-4).

There is no dispute that the respondent was convicted under the first paragraph of 18 U.S.C. § 1546(a), which criminalizes a range of conduct mostly tied to immigration-related documents. *See United States v. Wei Lin*, 738 F.3d 1082, 1083 (9th Cir. 2013). 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 a conviction for immigration document fraud in violation of 18 U.S.C. § 1546(a) is not categorically for a CIMT because the statute does not necessarily reach only offenses involving moral turpitude. Indeed, in *Matter of Serna*, 20 I&N Dec. 579, 586 (BIA 1992), the 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.*

Thus, we must ascertain whether the statute is divisible to determine whether the modified categorical approach may be applied. A criminal statute is divisible 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. *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013)); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 833 (BIA 2016). If the statute is divisible, the record of conviction may be examined to identify the statutory provision that the respondent was convicted of violating. *Descamps v. United States*, 133 S. Ct. at 2281, 2283 (defining when a statute may be considered "divisible"); *Matter of Chairez*, 26 I&N Dec. at 819-20; *Matter of Silva-Trevino*, 26 I&N Dec. 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 set 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 Notash v. Gonzales*, 427 F.3d 693, 698 (9th Cir. 2005). 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). *Matter of Serna*, 20 I&N Dec. at 586. 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, e.g., 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). Thus, we may not employ the modified categorical approach to discern whether the respondent was convicted of a CIMT.

In summary, the respondent's conviction under 18 U.S.C. § 1546(a) is not categorically for a CIMT, and the specific clause at issue is not divisible. Therefore, we cannot conclude that the conviction renders the respondent ineligible for cancellation of removal or for voluntary departure. *Compare Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017). A remand is required so that the Immigration Judge may further evaluate the respondent's eligibility for relief from removal. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

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.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3365 Pepper Lane, Suite 200
Las Vegas, Nevada 89120

IN THE MATTER OF:	**In Removal Proceedings**
M[redacted] A[redacted], D[redacted]	**File No.:** [redacted]-[redacted]-210
Respondent	
On Behalf of the Respondent Maya Timis, Esq. Reza Athari & Associates 3365 Pepper Lane, Suite 102 Las Vegas, Nevada 89120	**On Behalf of DHS** An Mai Nguyen Assistant Chief Counsel Immigration and Customs Enforcement

CHARGE: § 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended

APPLICATION: Cancellation of removal for non-permanent residents; voluntary departure

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND

The respondent is a 42-year-old male who is a native and citizen of Mexico. On September 9, 2012, the Department of Homeland Security ("DHS") issued a charging document, the Notice to Appear ("NTA") charging the respondent with inadmissibility pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as amended. (Exh. 1.) DHS alleged in the NTA that the respondent is an alien who is present in the United States without having been admitted or paroled. (*See* Exh. 1.) At a prior hearing the respondent admitted the factual allegations contained in the NTA, conceded removability, and designated Mexico as the country for removal. On December 20, 2012 the respondent submitted an application for cancellation of removal for certain nonpermanent residents (Form EOIR-42B) and supporting documentation.

At a hearing convened on February 3, 2014, DHS made an oral motion to pretermit the respondent's application. During the same hearing DHS submitted a copy of the respondent's conviction records from the District of North Dakota, revealing a felony offense for possession

of a false immigration document in violation of 18 U.S.C. § 1546(a). On February 7, 2014, DHS submitted additional proof that a violation of 18 U.S.C. § 1546(a) is a class D felony with a maximum term of imprisonment of ten years. The respondent has not submitted a response to DHS's motion or supplemental filing.

II. APPLICABLE LAW

To be eligible to receive cancellation of removal for certain nonpermanent residents an alien bears the burden of proving he has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3). INA § 240A(b)(1)(C); *see also* INA § 240(c)(4) ("An alien applying for relief . . . from removal has the burden of proof to establish . . . eligibility . . . and . . . that the alien merits a favorable exercise of discretion.") "Unlike the removal statutes, the cancellation of removal statute does not treat inadmissible and deportable aliens differently. Rather, the requirements for cancellation of removal apply regardless of whether the alien is inadmissible or deportable for removal purposes." *Vasquez-Hernandez v. Holder*, 590 F.3d 1053, 1055 (9th Cir. 2010). "An alien cannot carry the burden of demonstrating eligibility for cancellation of removal by merely establishing that the relevant record of conviction is inconclusive as to whether the conviction" constitutes a bar to relief. *Young v. Holder*, 697 F.3d 976, 988 (9th Cir. 2012) (en banc) *overruling Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-31 (9th Cir. 2007) *and Rosas-Castaneda v. Holder*, 655 F.3d 875, 883-84 (9th Cir. 2011).

The respondent was convicted for violating 18 U.S.C.§ 1546(a) and sentenced to a term of less than one year, therefore his conviction does not constitute an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(P), INA § 101(a)(43)(P). However, to establish his eligibility for cancellation of removal for certain nonpermanent residents, the respondent must show that he has not been convicted of a crime involving moral turpitude. *See* INA §§ 240A(b)(1)(C) and (c)(4).

III. DISCUSSION

To determine whether the respondent's conviction qualifies as an offense precluding eligibility for relief from removal under the Act, the Immigration Court utilizes the two-step analytical framework established by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990). *See Descamps v. United States*, 133 S.Ct. 2276, 2283-84 (2013); *Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013). Under the categorical approach, the Immigration Court may "look only to the fact of conviction and the statutory definition" of the offense. *Taylor*, 495 U.S. at 602; *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) ("[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime."). In applying the categorical approach the Court compares the elements of the criminal statute of conviction to the generic federal definition of the offense at issue to determine whether the conduct proscribed by the statute is broader than the generic federal definition. *Cortez-Guillen v. Holder*, 623 F.3d 933, 935 (9th Cir. 2010); *see Descamps*, 133 S.Ct. at 2281, 83. In identifying the elements of the statute of conviction, the courts consider not only the language of the state statute, but also the interpretation of that language in judicial opinions. *Covarrubias Teposte v. Holder*, 632 F.3d 1049, 1054 (9th Cir. 2010) (internal quotation marks omitted). If there is "a realistic probability, not a theoretical possibility, that the

State would apply its statute to conduct that falls outside the generic definition of a crime," the statute is broader than the generic federal definition. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (U.S. 2007).

When the statute of conviction lists multiple, alternative elements, and so effectively creates "several different . . . crimes," at least one of which matches the generic federal version, a court may apply the modified categorical approach to determine which alternative element was the basis for the respondent's conviction. *Descamps*, 133 S. Ct. at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)). In *Descamps v. United States*, the Supreme Court held that courts may not apply the modified categorical approach when the crime for which the defendant was convicted has a single, indivisible set of elements. *Id.* at 2282. A statute is "indivisible" if it does not have alternate elements, even if it criminalizes a "broader swath of conduct" than the relevant federal law does. *Id.* In *Descamps*, the Supreme Court abrogated the finding of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *United States v. Aguila-Montes de Oca, 655 F. 3d 915 (9th Cir. 2011)*, which held that in any case where the statute of conviction is categorically broader than the generic offense the court may apply the modified categorical approach in order to scrutinize certain documents to determine the factual basis of the conviction. *See Descamps*, 133 S.Ct. at 2289-91. The Supreme Court held that the modified approach does not authorize a court to "substitute [ ] a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* Only in those limited cases where an alien has been convicted of a divisible statute, may the Immigration Court use the modified categorical approach to review "a narrow, specified set of documents that are part of the record of conviction." *See S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004)); *Taylor,* 495 U.S. at 602; *Descamps*, 133 S.Ct. at 2284. The record of conviction must establish the conviction at issue included every element required by the generic federal definition of the offense. *See Shepard v. United States*, 544 U.S. 13, 24 (2005).

Moral turpitude is the only element of the generic "crime involving moral turpitude." *Olivas-Motta*, 716 F.3d at 1204. To satisfy the element of moral turpitude and provide a categorical match, "a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness." *Matter of Silva-Trevino*, 24 I. & N. Dec. at 689 n.1; *see Olivas-Motta*, 716 F.3d at 1203-1204. Generally, a crime of moral turpitude involves "either fraud or 'base, vile and depraved conduct' that 'shock[s] the public conscience." *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010) (quoting *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074-75 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring for the majority)) (alteration in original). The Board of Immigration Appeals ("BIA") has held that a conviction for violating 18 U.S.C. § 1546 does not necessarily involve moral turpitude. *Matter of Serna*, 20 I&N Dec. 579 (1992). Section 1546(a) criminalizes the simple possession of an altered immigration document with knowledge that it was altered, without requiring specific intent or use of the document, and therefore encompasses some conduct that is not morally turpitudinous. *Id.* Additionally, the statute contains several alternative elements and is therefore a divisible statute subject to the modified categorical approach to analysis. See *Descamps*, 133 S. Ct. at 2285.

The record of conviction here includes the respondent's judgment, plea agreement and information for criminal case number 4:12-CR-163 in the United States District Court, District of North Dakota. The second page of the plea agreement indicates that the alien did "voluntarily plead guilty to the sole count of the Information, possession of false immigration document." In turn, the criminal information indicates that:

> "On or about September 9, 2012, in the District of North Dakota, DARIO MARTINEZ-ANGELES, a/k/a JUAN GONZALEZ-HERNANDEZ, knowingly used, attempted to use, and possessed a document prescribed by statute and regulation as evidence of authorized stay and employment in the United States, namely a Social Security card with an account number not assigned to him, knowing the document to be forged, counterfeited, altered falsely made, and otherwise unlawfully obtained; in violation of Title 18, United States Code, Section 1546(a)."

Therefore, the respondent pled guilty to having *used* and *attempting to use* a social security card that was not assigned to him, rather than mere possession.

The Ninth Circuit has ruled a criminal offense characterized by fraud is a crime involving moral turpitude regardless of whether the "intent to defraud is . . . 'explicit in the statutory definition' of the crime or 'implicit in the nature' of the crime." *Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008) (quoting *Goldeshtein v. INS*, 8 F.3d 645, 648 (9th Cir.1993); *see also Tall v. Mukasey*, 517 F.3d 1115, 1119 (9th Cir. 2008) ("A crime whose nature is 'inherently fraudulent' also qualifies as a crime of moral turpitude."); *Matter of Flores*, 17 I&N Dec. 225, 228 (BIA 1980) ("Where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude"). "[T]o be inherently fraudulent, a crime must involve [a] knowingly false representation to gain something of value." *Navarro-Lopez*, 503 F.3d at 1068 (alterations added). Here, although fraud is not explicit in the statute, it is the *use* or *attempted use* of a social security card not assigned to him that makes his conviction one involving fraud. *See Matter of Serna*, 20 I&N Dec. 579 (1992); *Omagah v. Ashcroft*, 288 F.3d 254 (5th Cir. 2002).

Based on the foregoing, the Court finds the respondent has been convicted of a crime involving moral turpitude. The conviction also bars the respondent from receiving post-conclusion voluntary departure, pursuant to sections 101(f)(3) and 240B(b)(1)(B) of the Act. Accordingly, the Court will enter the following orders:

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be **PRETERMITTED**.

IT IS FURTHER ORDERED that the respondent's application for post-conclusion voluntary departure be denied, and he shall be removed from the United States to MEXICO pursuant to the charge contained in the NTA.

DATE: May 16, 2014

Jeffrey L. Romig
Immigration Judge