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 20530

Pritchett, Arundel, Esq.
Alaska Immigration Justice Project
431 West 7th Ave, Suite 208
Anchorage, AK 99501

DHS/ICE Office of Chief Counsel - ANC
1001 SW 5th Avenue, Ste. 505
Portland, OR 97204

Name: CASILLA NUNEZ, EMERITA

A 042-893-719

Date of this notice: 11/20/2013

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.

Lulseges
Userteam: Docket

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CASILLA NUNEZ, EMERITA
P.O. BOX 141783
ANCHORAGE, AK 99514

DHS/ICE Office of Chief Counsel - ANC
1001 SW 5th Avenue, Ste. 505
Portland, OR 97204

Name: CASILLA NUNEZ, EMERITA

A 042-893-719

Date of this notice: 11/20/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.

Lulseges
Userteam: **Docket**

File: A042 893 719 – Portland, OR

Date: NOV 20 2013

In re: EMERITA CASILLA NUNEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arundel Pritchett, Esquire

ON BEHALF OF DHS: Edward L. Dunlay
Deputy Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals the March 15, 2012, decision of the Immigration Judge granting the respondent's motion to terminate removal proceedings. The appeal will be dismissed.

The respondent is a native and citizen of the Dominican Republic and a lawful permanent resident of the United States since 1990. On August 20, 2008, the respondent applied for admission as a returning lawful permanent resident and was charged as an arriving alien[1] based on a 2007 conviction (Notice to Appear). At issue is whether the respondent's 2007 conviction, pursuant to a plea of "no contest," for a violation of ALASKA STATUTES ANNOTATED (ASA) § 11.46.140(a)(1),[2] theft in the third degree, constitutes a crime involving moral turpitude (CIMT), thereby rendering the respondent removable under section 212(a)(2)(A)(i)(I), of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a CIMT. We review 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). In determining whether the respondent's conviction was for a CIMT, we apply the categorical and modified categorical approaches set forth in *Taylor v. United States*, 495 U.S. 575 (1990).

On appeal, the DHS argues that the Immigration Judge erred in determining that the respondent's conviction is not categorically a CIMT. In the alternative, the DHS argues that the

[1] The respondent did not challenge the DHS determination to charge her as an arriving alien.

[2] The respondent was originally charged with violating § 11.46.130(a)(1), theft in the second degree, and § 11.16.110(2)(A) or (B), legal accountability based on the conduct of another (*see* DHS April 26, 2011, Second Supplemental Evidence Submission at 22-23).

Immigration Judge erred in not proceeding to the "third prong" analysis set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), regarding the consideration of evidence beyond the record of conviction. The DHS's alternative argument is foreclosed by *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013) (rejecting the "third prong" analysis set forth in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), regarding the consideration of evidence beyond the record of conviction).

We have long held that in order for a taking to be a theft offense that involves moral turpitude, a permanent taking must be intended. *See e.g., Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973). ASA § 11.46.140(a)(1) provides, in pertinent part that a person commits the crime of theft in the third degree if the person commits theft as defined in ASA§ 11.46.100. In ASA§ 11.46.100, "theft" requires an "intent to deprive another of property or to appropriate property of another." "Deprive" and "appropriate" are defined in ASA§ 11.46.990(8) and ASA§ 11.46.990(2), respectively. ASA§ 11.46.990(8) and ASA§ 11.46.990(2) each contain only one subsection that requires an "intent to permanently deprive." We agree with the Immigration Judge that theft in violation of § 11.46.140(a)(1) is not categorically a CIMT because not every subsection of the divisible statute requires an intent to permanently deprive the owner of the property (I.J. at 4-5). *See Champion v. State*, 908 P.2d 454, 464 (Alaska Ct. App. 1995) (rejecting the contention that all thefts require the intent to permanently deprive in ASA § 11.46.990(8)(A) and holding that theft can be premised on proof of any of the culpable mental states listed in the five subsections of ASA § 11.46.990(8)).

Turning to the modified categorical approach, we agree with the Immigration Judge that the record of conviction does not establish that the respondent's conviction was for a CIMT. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (holding that application of the modified categorical approach is appropriate when the statute of conviction "sets out one or more of the elements in the alternative"); *Shepard v. United States*, 544 U.S. 13 (2005). The modified categorical approach permits the adjudicator to consult a limited class of documents (i.e., "judicially recognizable") to determine which alternative element formed the basis of the defendant's prior conviction. *Id.* As the Immigration Judge observed, the statutes in Count 1 listed in the information are not the same as the statute under which the respondent was convicted (I.J. at 5; *see* DHS April 26, 2011, Second Supplemental Evidence Submission at 22-23). Further, he noted that there is no plea colloquy or statement in support of the plea and that the corrected amended information does not provide sufficient detail to conclude that the respondent was convicted under a subsection of the statute that requires an intent to permanently deprive (I.J. at 6-8; *see* DHS April 26, 2011, Second Supplemental Evidence Submission at 16-17). We agree. Therefore, that is the end of the inquiry. *See Olivas-Motta v. Holder, supra.* Thus, we conclude that the DHS has not met its burden of demonstrating that the respondent is removable as charged for having committed a CIMT. No other charges are pending against the respondent. Accordingly the following order will be entered.

ORDER: The DHS's appeal is dismissed, and proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
PORTLAND, OREGON

File: A042-893-719 March 15, 2012

In the Matter of

ARUNDEL CASILLA NUNEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(2)(A)(i)(I) to wit - inadmissible at the time of request for reentry for having been convicted of a crime involving moral turpitude (application for readmission by returning lawful permanent residence).

APPLICATIONS:

ON BEHALF OF RESPONDENT: ARUNDEL PRITCHETT

ON BEHALF OF DHS: EDWARD DUNLAY

ORAL DECISION OF THE IMMIGRATION JUDGE

This is a decision on a motion to terminate the charge as not constituting a crime involving moral turpitude made by the respondent. The brief background of this matter is that the respondent has admitted that she is not a citizen or national of

the United States as charged, is a native and citizen of the Dominican Republic as charged. She has admitted that she was accorded lawful permanent resident status on August 30, 1990. She has admitted that she was convicted in Anchorage, Alaska, on January 4, 2007, of the offense of theft in the third degree in violation of Alaska Statute 11.46.140(a)(1) and she has admitted that she was sentenced to a term of imprisonment of 360 days with 360 days suspended, three years probation. She has also admitted that on August 20, 2008, she had arrived at Miami International Airport and applied for admission as a returning lawful permanent resident.

Those are the five allegations in the Notice to Appear. She has, however, contested that this is a crime involving moral turpitude. Therefore, she claims that she is admissible or not inadmissible as charged and while ordinarily it is the applicant for admission's burden to show that he or she is not inadmissible, in returning lawful permanent residents, the burden is on the Government to show by clear, convincing unequivocal evidence that the person is inadmissible as charged.

In this particular case the issue then comes down to a determination under Alaska Law whether or not the crime involves categorically a crime involving moral turpitude and, if not, whether or not under the modified categorical approach the crime

can still be determined to have involved, legally as charged and determined, a crime involving moral turpitude.

The Court is not going to do extensive citation in this matter in that the parties have done so and the Court does not find the need to do that. This is not about which law to apply. It is about the facts and circumstances of this case.

The first issue is that the Department of Homeland Security has argued that the Alaska definition of theft does constitute the crime involving moral turpitude. In the citation in its brief, the Chief Counsel accurately cites the Alaska section which is 11.46.140(a)(1), which is a person commits the crime of theft in the third degree if the person commits theft as defined in Alaska Statute 11.46.100 and (1) the value of property of services is $50 or more but less than $500.

The definition of theft is found at that section of 100 where it says theft with intent to deprive another of property or to appropriate property of another to one's self or a third person, the person obtains the property of another. The other Sections 2 through 6 are not applicable here and they were not the section covered.

The Government argues that the intent to deprive another of property is the generic definition of theft. The Court takes that to mean the common law definition of larceny, which has the

intention to permanently deprive and constitutes a crime involving moral turpitude.

However, the Court is convinced that a thorough review of the Alaska law of theft and the citation made by respondent of Champion v. State, cited as 908 P.2d 454 (1996). The Court reviewed the decision, indicates that there is something short of the necessity of the intent to permanently deprive to constitute theft. Although, there is much in the decision where it is the negative implication of what the last Court of Appeals said that indicates such. The Court is satisfied that when the Court of Appeals upheld Mr. Champion's conviction, part of which constituted the theft and the theft had to be an element of crime of burglary, that first, the argument was over the nature of the permanent deprivation. The Court found and that State Court in Alaska found that there was enough deprivation to constitute the crime of Mr. Champion and it was the found facts that intended to take property of an acquaintance and pawn it to obtain money for drugs and alcohol, but that he did not have the intent to permanently deprive. They found that a substantial deprivation of the right of ownership and ruled against him.

His second ground was that the state trial judge actually advised the jury that the state had to prove the intent to permanently deprive the owner of the property. After their long

evaluation of the permanent intent to deprive, the court said, well, he fails on that because even if this was an error, it was an error his favor. However, the Court does not find any equivocation in their decision that it did not have to have that permanent deprivation.

Therefore, the Court finds that the Alaska statute, as presently constituted, does not categorically constitute a crime involving moral turpitude and, therefore, the Court must look to the record itself in order to determine whether or not the conviction for which the respondent suffered, is indeed a crime involving moral turpitude as the Government alleges.

So, therefore, under the modified categorical approach, it then becomes important to evaluate what facts or circumstances of record the Court may look at. In this case, the conviction record shows that there was an information that originally charged the respondent with a crime of theft in the second degree, which involved the loss of the value of property or services of $500 or more, is the definition under Alaska law of theft in the second degree. In that information, which is a one count information, there is a sworn statement attached which gives the body of fact of a fairly large amount of retail theft, what appears to be the J.C. Penney store in Anchorage, Alaska, from June 3 of 2006. And it is charged as a class C felony and

the charging document is dated, apparently, they put the year on the stamp as the printed date is August 28 of 2006.

The Court next finds respondent's conviction record constitutes what is labeled as an amended information dated January 4 of 2007, said filed in open court. And in that amended information, while stating the same date, and the entire charge is as follows, the body of facts are a one sentence paragraph. And they are as follows, that on or about June 3, 2006 at or near Anchorage in the 3rd Judicial District, the State of Alaska, Emerita Casilla committed the crime of theft and the value of property or services was $50 or more. It is under amended information and then there is, following that, the same body of facts filed eight days later called correcting amended information, correcting ATN, the Court's not familiar with that, but the body of facts didn't change.

What is noted to the Court is that there is no language in this amended information, either the corrected or the original amended information, which outlines that this charge was a lesser included of the original information. And I have not been given any information that, as a matter of law, that this is the case. There is no plea colloquy or statement in support of the plea, it is a "rule 11 plea" and so there is no facts in the information that, at least, has been provided to the Court

about the plea, which would incorporate the body of facts in the sworn declaration to the original information.

As the Court has said in the record of proceedings, if there were any kind of incorporation or statement which did incorporate those facts, this Court would unequivocally find that the crime of theft in this case was for a large amount of retail theft and under a modified categorical approach this crime did constitute a crime involving moral turpitude.

There is a restitution judgment to J.C. Penny in the amount of $6,000 in which the respondent, with two other persons, is jointly and severely liable. There is later a satisfaction of this judgment. The Court finds that that is not sufficient since a criminal conviction can also result in civil liability. The Court does not take that that indication alone then does incorporate by reference those other facts. The Court does find that it is not appropriate to look at the original information because the Court does not know that it tracks the same crime. The Court is not naive. It believes that it is likely, but as a matter of proof the Court cannot find that.

Therefore, the Court also finds that this is not a matter of whether Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008) ought to be applied. The reason for that is that when the original information indicated that this was a large amount of

retail theft from J.C. Penney in Anchorage, Alaska, and the amended information was silent as to that, did not incorporate by reference and there is no statement in the plea, that looking at a police report which was about that J.C. Penney theft, would be ~~an opposite~~ inapposite if that information did not follow forward or the charge had a little bit of information about a theft at J.C. Penney's, then maybe a Silva-Trevino would provide the answer. But one has to have a reason to review that (founded) in the records themselves.

Therefore, the Court finds that with the evidence presented, and the Court will note there is no transcript of any plea colloquy or any stipulated facts that were agreed upon that the plea of guilty is based on the original information, et cetera, et cetera. If there were such facts, as the Court has said, it would find the modified categorical approach that the crime did constitute a crime involving moral turpitude.

With the record presented, the Court will indicate that the only pause I have is that the restitution judgment is for $6,000 for J.C. Penney. If that is enough to trigger the rest of the information, then this ruling is in error. If it is not, if it is not to be considered, then as the Court believes that it alone is not enough, that, therefore, the Court finds that as stated, the Government has failed to meet its burden of proof of

showing that this is a crime involving moral turpitude. I repeat, the Court finds the Alaska Statute as charged in this case does not constitute categorically a crime involving moral turpitude.

The conviction as ultimately charged and plead to the Court finds the Court cannot determine moral turpitude from those records.

ORDER

Therefore, these proceedings are terminated.

MICHAEL H. BENNETT
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MICHAEL H. BENNETT, in the matter of:

ARUNDEL CASILLA NUNEZ

A042-893-719

PORTLAND, OREGON

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

CYNDI POITRA (Transcriber)

FREE STATE REPORTING, Inc.

APRIL 21, 2012

(Completion Date)