



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAR 31 2015**

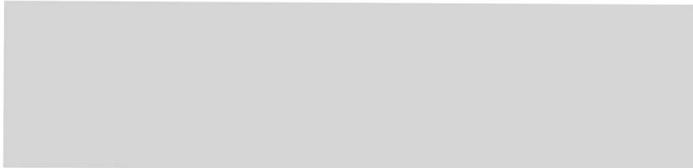
Office: PHOENIX, AZ

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


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Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Phoenix, Arizona, denied the waiver application, and an appeal to the Administrative Appeals Office (AAO) was dismissed. The matter is now before us on a motion to reopen and reconsider. The motion will be granted and the appeal will be dismissed as the waiver application is unnecessary.

The applicant is a native and citizen of Mexico who was found inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with her U.S. lawful permanent resident parents and her U.S. citizen children.

The Field Office Director found that the applicant failed to establish that a qualifying relative would experience extreme hardship as a consequence of her inadmissibility, and the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), was denied accordingly. *See Decision of the Field Office Director*, dated March 24, 2010.

We reviewed the applicant's Form I-601 on appeal and concurred with the Field Office Director that extreme hardship to a qualifying relative had not been established and dismissed the appeal. *See Decision of the AAO*, dated February 26, 2013.

In our decision of February 26, 2013, we concurred with the Field Office Director's finding that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, applying the methodology articulated by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), which held that in determining whether a conviction was for a crime involving moral turpitude, it is permissible to go beyond record of conviction to "consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the moral turpitude issue." On motion, filed on April 1, 2013 and received by the AAO on November 17, 2014, the applicant contends that given the conflict in the U.S. Court of Appeals for the Ninth Circuit over the ruling in *Silva-Trevino*, the "third step" of examining evidence outside the record of conviction should not be applied. We concur.

Section 212(a)(2)(A) of the Act states in pertinent parts:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules

of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

For cases arising in the Ninth Circuit, the determination of whether a crime is a crime involving moral turpitude first requires the categorical inquiry set forth in *Taylor v. United States*, 110 S.Ct. 2143 (1990). See *Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 58 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas-Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005). If the statute “criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied.” *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); see also *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be “a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude.” *Nicanor-Romero*, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). To demonstrate a “realistic probability,” the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probability also exists where the statute expressly punishes conduct not involving moral turpitude. See *U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the “limited, specified set of documents” that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz*, 466 F.3d at 1132-33); see also *Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas-Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. See *Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)).

The record reflects that on [REDACTED] 2004, the applicant pled guilty to and was convicted in Arizona of theft of a credit card or obtaining a credit card by fraudulent means in violation of Ariz. Rev. Stat. Ann. §§ 13-2102, 13-201, 13-1804, 13-701, 13-702, 13-702.01, and 13-801. The judge suspended imposition of the sentence and placed the applicant on probation for 18 months.

At the time of the applicant’s conviction, Ariz. Rev. Stat. Ann. § 13-2102 provided that:

A. A person commits theft of a credit card or obtaining a credit card by fraudulent means if the person:

1. Controls a credit card without the cardholder's or issuer's consent through conduct prescribed in § 13-1802 or 13-1804; or
2. Sells, transfers or conveys a credit card with the intent to defraud; or
3. With intent to defraud, obtains possession, care, custody or control over a credit card as security for debt.

B. Theft of a credit card or obtaining a credit card by fraudulent means is a class 5 felony.

Ariz. Rev. Stat. Ann. § 13-1802 stated that:

A. A person commits theft if, without lawful authority, the person knowingly:

1. Controls property of another with the intent to deprive the other person of such property; or
2. Converts for an unauthorized term or use services or property of another entrusted to the defendant or placed in the defendant's possession for a limited, authorized term or use; or
3. Obtains services or property of another by means of any material misrepresentation with intent to deprive the other person of such property or services; or
4. Comes into control of lost, mislaid or misdelivered property of another under circumstances providing means of inquiry as to the true owner and appropriates such property to the person's own or another's use without reasonable efforts to notify the true owner; or
5. Controls property of another knowing or having reason to know that the property was stolen; or
6. Obtains services known to the defendant to be available only for compensation without paying or an agreement to pay the compensation or diverts another's services to the person's own or another's benefit without authority to do so.

B. A person commits theft if, without lawful authority, the person knowingly takes control, title, use or management of a vulnerable adult's property while acting in a position of trust and confidence and with the intent to deprive the vulnerable adult of the property. Proof that a person took control, title, use or management of a vulnerable adult's property without adequate consideration to the vulnerable adult may give rise to an inference that the person intended to deprive the vulnerable adult of the property.

Ariz. Rev. Stat. Ann. § 13-1804 stated that “[a] person commits theft by extortion by knowingly obtaining or seeking to obtain property or services by means of a threat.”

The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person’s property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) (“Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.”). The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) requires the specific intent to deprive the victim of his or her property permanently, and is therefore a crime categorically

involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). Crimes that include as a requirement an intent to defraud have been held, as a general rule, to involve moral turpitude. *Matter of Adetiba*, 20 I&N Dec. 506, 508 (BIA 1992). In *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007), the Ninth Circuit stated that when intentional fraud is an element of the offense, the offense qualifies as a crime of moral turpitude. As to stolen property, where property is acquired without knowledge that it is stolen or without intent to deprive the rightful owner of his possession, the offense does not involve moral turpitude. *See Matter of K*, 2 I&N Dec. 90 (BIA 1944).

In our previous decision, we found that Ariz. Rev. Stat. Ann. § 13-2102 is a divisible statute. It is clear that the proscribed conduct in § 13-2102(A)(2) and (A)(3) would involve moral turpitude for these acts are committed with the intent to defraud. Section 13-2102(A)(1) prohibits the control of a credit card without the cardholder's or issuer's consent through conduct prescribed in § 13-1802 or 13-1804. The language of § 13-1802 encompasses conduct involving moral turpitude and conduct that does not. A person who knowingly controls property of another with the intent to deprive the other person of such property violates § 13-1802(A)(1). By its terms, § 13-1802(A)(1) does not require a perpetrator to have the intent to permanently deprive the owner of his or her property.

In regard to the modified categorical approach, the record of conviction in the instant case consists of the plea agreement, sentencing documents, the court's information sheet, the minute entry, and the indictment. The indictment stated that the applicant "on or about the 14th day of December, 2003, without the consent of Visa credit card, knowingly controlled the credit card of [REDACTED]." As stated in our previous decision, this does not reflect that the applicant was convicted under Ariz. Rev. Stat. Ann. § 13-2102 for intending to deprive the owner of her property permanently. In that decision, we then looked at a statement made by the applicant that was outside the record of conviction indicating that a permanent taking was intended, and we determined that the offense involved moral turpitude. However, in a decision issued after our prior decision, the Ninth Circuit Court of Appeals rejected *Matter of Silva-Trevino*, which held that an adjudicator may consider "probative evidence beyond the record of conviction" if the record of conviction is inconclusive as to whether an offense involves moral turpitude, and reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder, supra*, at 1203 (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). As the record of conviction in the present case is inconclusive as to whether the applicant was convicted of temporarily or permanently taking the credit card, we are unable to determine that the applicant was convicted of a crime involving moral turpitude.

We note that the BIA addressed the issue of whether Ariz. Rev. Stat. Ann. § 13-2102 constitutes a crime involving moral turpitude in two unpublished decisions. *See Matter of Huerta-Guevara*, 2007 WL 2074556 (BIA June 15, 2007) and *Matter of Lopez-Bustos*, 2010 WL 4213214 (BIA October 13, 2010). In each of these cases, the BIA found conviction documents failed to establish any intent to permanently deprive, and thus the respondent was not inadmissible for committing a crime involving moral turpitude. Although unpublished decisions of the BIA are non-precedential, and we are not bound by such decisions, we find that the reasoning provided in these two decisions support our determination that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

(b)(6)



NON-PRECEDENT DECISION

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Because the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, she does not require a waiver under section 212(h) of the Act. The motion to reconsider is granted, our previous decision will be withdrawn, and the appeal will be dismissed because the applicant is no longer inadmissible and the underlying waiver application is unnecessary.

ORDER: The motion is granted, our previous decision is withdrawn, and the appeal is dismissed as the underlying waiver application is unnecessary.