APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-3377

Clemente Avelino Pereida

Petitioner

v.

William P. Barr, Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Submitted: October 24, 2018
Filed: March 1, 2019

Before ERICKSON, BEAM, and GRASZ, Circuit Judges.

BEAM, Circuit Judge.

Clemente Avelino Pereida, a native and citizen of Mexico, petitions for review of the decision of the Board of Immigration Appeals (Board) affirming the Immigration Judge's (IJ) grant of the Department of Homeland Security's (DHS's) motion to pretermit Pereida's cancellation of removal application. Pereida pleaded no contest to a Nebraska criminal attempt charge (Neb. Rev. Stat. § 28-201(1)(b)) arising from the use of a fraudulent social security card to obtain employment at National Service Company of Iowa, operating in rural Crete, Saline County, in violation of Nebraska Revised Statute § 28-608 (2008).[1] The determinative issue in this matter is whether Pereida's criminal attempt conviction qualifies as a crime involving moral turpitude (CIMT), making him ineligible for cancellation of removal. The criminal impersonation offense underlying Pereida's attempt conviction is a divisible statute with subsections, some of which qualify as CIMTs and one subsection that may not. Applying the modified categorical approach, it is not possible to ascertain which subsection formed the basis for Pereida's conviction. It is Pereida's burden to establish his eligibility for cancellation of removal and he thus bears the adverse consequences of this inconclusive record. Accordingly, because Pereida cannot establish that he was eligible for cancellation of removal, we uphold the Board's

[1] Nebraska Revised Statute § 28-608 was the statute under which Pereida was arrested in July 2009. The statute was revised, effective August 30, 2009, and is currently found at Nebraska Revised Statute § 28-638.

determination that he has not shown such eligibility. Thus, we deny Pereida's petition for review.

I. BACKGROUND

Pereida is a citizen of Mexico who entered the United States without authorization or inspection in, according to his application for cancellation of removal, approximately 1995. He has thus lived in the United States for an extended period of time and, according to the immigration record, has been gainfully employed, paid taxes and with his wife, raised his family (comprised of their three children) here. On August 3, 2009, DHS issued a Notice to Appear (NTA) charging Pereida with removability. Pereida admitted the factual allegations in the NTA and conceded the charge of removability, but in March 2011 filed an application for Cancellation of Removal and Adjustment of Status pursuant to 8 U.S.C. § 1229b(b)(1). In August 2014, DHS filed a Motion to Pretermit Pereida's application asserting that he had been convicted of a CIMT, which is a mandatory bar to his requested relief, given Pereida's no contest plea to a charge of attempted criminal impersonation.

The IJ analyzed the substantive crime of criminal impersonation in Nebraska underlying Pereida's criminal attempt charge and held that the statute is divisible; that Pereida was necessarily convicted under a subsection requiring the specific intent to defraud, deceive or harm; and thus Pereida's conviction under this statute constituted a CIMT. Having found Pereida's attempted criminal impersonation conviction to be a CIMT, the IJ additionally held that because the conviction was

punishable by a maximum term of "not more than one year imprisonment," Neb. Rev. Stat. § 28-106(1), it constituted a conviction "of an offense under subsection 1182(a)(2) [and] 1227(a)(2)," barring Pereida from the relief requested, at least according to the IJ's analysis of 8 U.S.C. § 1229b(b)(1)(C). The IJ's decision was reviewed by the Board, which did not go so far in its analysis.

The Board agreed that only three subsections under Nebraska Revised Statute § 28-608 qualified as CIMTs because each contained as a necessary element the intent to defraud or deceive, thus making the statute divisible. Under a modified categorical approach, the Board found no record as to which particular subsection of the statute Pereida was ultimately convicted of violating. This is where the Board ended its analysis. The Board noted that Pereida bore the burden of proving that his particular conviction did not bar relief. 8 U.S.C. § 1229a(c)(4). Accordingly, the Board found that Pereida failed to carry his burden of proving that his conviction was not a CIMT, and that he was thus statutorily ineligible for cancellation of removal. Pereida petitioned this court for review of the Board's order, claiming that his conviction of attempted criminal impersonation does not fall within the definition of a CIMT. Pereida additionally claims that even if his Nebraska conviction qualifies as a CIMT, it falls within the petty offense exception available under 8 U.S.C. § 1182(a)(2)(A)(ii).

II. DISCUSSION

We have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review "constitutional claims or questions of law raised upon a petition for review." "We review the [Board's] factual determinations under a substantial-evidence standard and its legal conclusions de novo." *Andrade-Zamora v. Lynch*, 814 F.3d 945, 948 (8th Cir. 2016). Where, as here, the Board adopted the reasoning of the IJ, we consider the two decisions together. *Saldana v. Lynch*, 820 F.3d 970, 974 (8th Cir. 2016).

To be eligible for cancellation of removal, Pereida had to meet four requirements. 8 U.S.C. § 1229b(b)(1). At issue here is whether, under 8 U.S.C. § 1229b(b)(1)(C), Pereida's conviction for attempted criminal impersonation is a CIMT as defined by the Immigration and Nationality Act (INA) in 8 U.S.C. § 1182(a)(2) or § 1227(a)(2). If it is, and if no exceptions apply, Pereida is ineligible for cancellation of removal.

We first apply the "categorical approach" to determine whether Pereida's conviction qualifies as a CIMT by comparing the elements of that state offense to see if it fits within the generic definition of a crime involving moral turpitude. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). In doing so, we presume that the conviction rested upon nothing more than the least of the acts criminalized by the state statute. *Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1058 (8th Cir. 2016) (applying the realistic probability test in the context of a CIMT analysis). Deferring to the agency's interpretation of this ambiguous statutory

phrase left undefined by Congress, "[c]rimes involving moral turpitude have been held to require conduct 'that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general.'" *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (quoting *Lateef v. Dep't of Homeland Sec.*, 592 F.3d 926, 929 (8th Cir. 2010)). "Crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude." *Id.* (quoting *Lateef*, 592 F.3d at 929).

The underlying Nebraska offense of criminal impersonation at issue, as it existed at the relevant time, stated:

> (1) A person commits the crime of criminal impersonation if he or she: (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another; (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another; (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or (d) Without the authorization or permission of another and with the intent to deceive or harm another: (i) Obtains or records personal identification documents or personal identifying information; and (ii) Accesses or

> attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2008).

Reviewing this statute as a whole, there appears to be no disagreement among the parties or each of the reviewing courts to-date that the statute defines crimes that are not categorically CIMTs. Both the IJ and the Board concluded that because three of the subsections of § 28-608 contained as a necessary element the intent to deceive, they qualified as a CIMT. However, because a violation of subsection (c) would not, on its face, require the same mens rea requirement, there was a realistic probability that the statute punished non-turpitudinous conduct as well. We agree. Because this statute is divisible, the inquiry does not end here. *Villatoro v. Holder*, 760 F.3d 872, 877 (8th Cir. 2014) (noting that upon application of the categorical approach the inquiry ends if the statute at issue either requires or excludes conduct involving moral turpitude).

Having determined that not all crimes proscribed by the Nebraska statute would qualify as a CIMT, we apply a modified categorical approach to this divisible statute. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (explaining that a divisible statute "list[s] elements in the alternative, and thereby define[s] multiple crimes). It is at this juncture where the IJ and Board's analyses parted ways and where we find

the heart of the matter in this particular case. Applying the modified categorical approach to the record before us, we are unable to discern the subsection of § 28-608 under which Pereida was convicted.

It is a maxim oft repeated that under the INA, the alien bears "the burden of proof to establish that [he] satisfies the applicable eligibility requirements" for cancellation of removal, 8 U.S.C. § 1229a(c)(4)(A)(i), including that he was not "convicted of an offense" that would disqualify him from cancellation of removal, 8 U.S.C. § 1229b(b)(1)(C). *Andrade-Zamora*, 814 F.3d at 948. Here, then, it is Pereida's burden to establish that his conviction for attempted criminal impersonation is not a CIMT. Yet, as Pereida himself acknowledges and argues, there is no indication of the subsection of the statute under which Pereida was convicted, i.e., that the documents filed by DHS, that included the complaint, are insufficient to clarify the matter. This acknowledgment, however, is not in Pereida's favor. There are only a "limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) [that this court can review] to determine what crime, with what elements, [Pereida] was convicted of." *Mathis*, 136 S. Ct. at 2249. On this record, without more, or without any indication that the record is complete, as is, we are unable to make the requisite determination, as the Board itself indicated. Even assuming a complete record is before us, the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief under this circuit's precedent. *Andrade-Zamora*, 814

F.3d at 949 ("While the government bears the burden to prove the alien is deportable or removable, it is the alien's burden under the INA to prove he is eligible for cancellation of removal[;] … [or, stated differently] to prove he did not commit an offense that disqualifies him from cancellation of removal."); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581-82 (10th Cir. 2017) (placing the ultimate burden on the alien where an alien sought discretionary relief and none of the documents in the record indicated under what provision he was convicted), *cert. denied*, 2019 WL 113529 (Jan. 7, 2019); *Syblis v. Att'y Gen. of the U.S.*, 763 F.3d 348, 356 (3d Cir. 2014) (joining the Fourth, Seventh, Ninth and Tenth Circuits in holding that an inconclusive record is insufficient to satisfy a noncitizen's burden of proving eligibility for discretionary relief). We are bound by our precedent absent en banc reconsideration or a superseding contrary decision by the Supreme Court regarding this unique situation.

Our inability to discern the particular crime for which Pereida was convicted forecloses any substantive discussions advanced by Pereida on appeal. For example, Pereida references case law from sister circuits in support of his argument that his particular offense of attempted criminal impersonation is not a CIMT, pointing out various viewpoints on the theoretical boundaries and legal uncertainty in the arena of defining what, exactly, constitutes (or should constitute) moral turpitude in situations such as this. *See, e.g.*, *Beltran-Tirado v. INS*, 213 F.3d 1179, 1184-85 (9th Cir. 2000); *Arias v. Lynch*, 834 F.3d 823, 830-36 (7th Cir. 2016) (Posner, J., concurring). Pereida also alternatively argues that

even *if* this court were to hold that his offense qualifies as a CIMT, the petty offense exception, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), carries the day on these facts. However, the absence of the necessary substantive determination regarding the existence or not of a CIMT in this case precludes any additional discussion and ends the inquiry before us.[2]

III. CONCLUSION

For the foregoing reasons, we deny Pereida's petition for review.

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[2] We do note that whether or not there is a determination regarding the applicability of the petty theft exception under 8 U.S.C. § 1182(a)(2)(A)(ii)(II), Pereida is ultimately foreclosed in seeking cancellation of removal. This court held in *Andrade-Zamora* that the cross-reference in 8 U.S.C. § 1229b(b)(1)(C) only refers to the list of offenses and not the immigration consequences. 814 F.3d at 950-51. Accordingly, Pereida would fail to carry his burden to show that he has not been convicted of an offense under section 1227(a)(2), which includes CIMTs "for which a sentence of one year or longer may be imposed," because Pereida's Nebraska conviction was punishable by a maximum term of "not more than one year imprisonment." 8 U.S.C. §§ 1227(a)(2)(A)(i)(II), 1229b(b)(1)(C); Neb. Rev. Stat. §§ 28-106(1), 28-201(4)(e).

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A093 333 944 – Omaha, NE

Date: OCT 19, 2017

In re: Clemente AVELINO PEREIDA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raul F. Guerra, Esquire

ON BEHALF OF DHS: Matthew E. Morrissey
Assistant Chief Counsel

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

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated September 25, 2014, denying his application for cancellation under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The respondent concedes that he is removable as charged (IJ at 1; Tr. at 2) and, therefore, the issue on appeal is whether he qualifies for cancellation of removal, a form of relief that is available only to an applicant who proves that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)" of the Act. *See* section 240A(b)(1)(C) of the Act. The Immigration Judge determined that the respondent cannot satisfy that requirement because in 2010 he was convicted of attempted Criminal Impersonation, in violation of Nebraska Revised Statutes section 28-201,[1] a crime involving moral turpitude ("CIMT") for which a sentence of 1 year or longer may be imposed under sections 212(a)(2)(i)(I) or 237(a)(2)(A)(i) of the Act, 8 U.S.C. §§ 1182(a)(2)(i)(I), 1227(a)(2)(A)(i) (IJ at 4-5). We affirm the Immigration Judge's decision.

To determine whether the respondent's conviction is a CIMT under the Act, we employ the categorical approach. *Matter of J-G-D-F-*, 27 I&N Dec. 82, 83 (BIA 2017). "This approach requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent's particular violation of that statute." *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016); *see also*

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[1] Although the respondent was convicted of attempted criminal impersonation, it is well-established that "there is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it." *See Matter of Davis*, 20 I&N Dec. 536, 545 (BIA 1992) (quoting *Matter of Awaijane*, 14 I&N Dec. 117, 118-19 (BIA 1972)).

Villatoro v. Holder, 760 F.3d 872, 877-79 (8th Cir. 2014) (adopting the realistic probability standard in deciding whether a crime categorically involves moral turpitude).

The Act does not define offenses constituting crimes involving moral turpitude. However, the phrase moral turpitude refers generally to conduct that 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. *See*, *e.g.*, *Matter of Solon*, 24 I&N Dec. 239, 240 (BIA 2007); *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). It has long been held that crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude. *Jordan v. De George*, 341 U.S. 223, 232 (1951); *Matter of Kochlani*, 24 I&N Dec. 128, 130 (BIA 2007); *Matter of Flores*, 17 I&N Dec. 225, 227-28 (BIA 1980); *Lateef v. Dep't of Homeland Sec.*, 592 F.3d 926, 929 (8th Cir. 2010); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010).

At the time of the respondent's conviction, Nebraska's criminal impersonation statute was located at section 28-608 and provides that:

> (1) A person commits the crime of criminal impersonation if he or she:
>
> > (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another, or to deceive or harm another; or

> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another, and to deceive or harm another; or
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another:
>
> > (i) Obtains or records personal identification documents or personal identifying information; and
> >
> > (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2010).

We agree with the Immigration Judge's determination that only convictions under section 28-608(a), (b), or (d) qualify as CIMTs because each of these subsections contain as a necessary element the

intent to defraud or deceive (IJ at 3-4). *See Lateef v. Dep't of Homeland Sec.*, 592 F.3d at 929; *Guardado-Garcia v. Holder*, 615 F.3d at 902. Thus, the statute is overbroad relative to the definition of a CIMT. However, the moral turpitude inquiry does not end here. Where an offense is not categorically a CIMT, the modified categorical approach allows for consideration of the respondent's conviction record to identify the statutory provision that the respondent was convicted of violating, but only if the statute is divisible. *See Descamps v. United States*, 133 S. Ct. 2276, 2281(2013); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *see also Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (holding that the concept of divisibility as embodied in *Descamps* and *Mathis* "applies in immigration proceedings to the same extent that it applies in criminal sentencing proceedings").

A state statute is divisible if it sets out alternative elements of the offense, as opposed to alternative means of committing the offense, and "at least one (but not all) of the listed offenses or combinations of disjunctive elements is a 'categorical match' to the relevant generic standard." *Matter of Chairez*, 26 I&N Dec. at 822 (*citing Descamps v. United States*, 133 S. Ct. at 2283). The difference between whether something is an "element" as opposed to a "means" is determined by whether it requires jury unanimity. *Id.* at 822-23 (*citing Mathis v. United States*, 136 S. Ct. at 2248).

Upon our examination of the statute, we conclude that section 28-608 is divisible. Section 28-608 is divided into several subsections, each describing separate crimes with different punishments. *See* Neb.

Rev. Stat. § 28-608; *see also Mathis v. United States*, 136 S. Ct. at 2256 (explaining that the statute on its face may resolve the means versus elements issue, noting that if the statutory alternatives carry different punishments, then under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), they must be elements).

As the Nebraska statute is divisible, we apply the modified categorical approach to a limited class of court documents in the record of conviction to determine the respondent's actual crime of conviction. *See Shepard v. United States*, 544 U.S. 13, 27 (2005) (holding that the record of conviction is "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information"). Here, the DHS submitted a certified copy of the Complaint, which charged the respondent with attempt of criminal impersonation under section 28-608 for "use [of] a fraudulent Social Security card to obtain employment at National Service Company of Iowa, located in rural Crete, Saline County, Nebraska, value $500.00 or more but less than $1500," in violation of section 28-201(1)(b)of the Nebraska Revised Statutes (DHS Filing, Conviction Records at 4 (received August 28, 2014)). The DHS also submitted a certified copy of the Journal Entry and Order indicating that the respondent pled no contest to violating section 28-201 of the Nebraska Revised Statutes, for attempt of a class 3A or class 4 felony (DHS Filing, Conviction Records at 1-2 (received August 28, 2014)).

On appeal, the respondent argues that the Complaint is insufficient to conclusively establish the particular offense he was convicted of violating (Respondent's Br. at 5). We agree with the respondent on this point. The complaint charges the respondent of using a fraudulent social security card to obtain employment, which would seem to support a finding that the crime underlying the respondent's attempt offense involved fraud or deceit. *See Guardado-Garcia v. Holder*, 615 F.3d at 901-02 (holding that misuse of a social security number to obtain employment is a CIMT). However, the entry order does not specify the particular subsection of the substantive statute the respondent was ultimately convicted of violating.

In the context of relief for removal, the respondent bears the burden of proving that his particular conviction does not bar relief. *Andrade-Zamora v. Lynch*, 814 F.3d 945, 948-49 (8th Cir. 2016) (explaining that the alien bears burden of showing eligibility for discretionary cancellation of removal). The respondent has not done so and has not carried his burden of proving that his conviction is not CIMT. *See* sections 240(c)(4)(A)-(B) of the Act; 8 C.F.R. § 1240.8(d). Thus, the respondent is statutorily ineligible for cancellation.

Finally, the Immigration Judge granted the respondent a 60-day voluntary departure period, conditioned upon the posting of a voluntary departure bond in the amount of $500.00 to the DHS within five business days from the date of the order. The respondent has submitted timely proof of having paid the voluntary departure bond. Therefore, the period of voluntary departure will be reinstated.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(b) of the Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under

section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/

FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
OMAHA, NEBRASKA

File #: A093-333-944 Date: September 18, 2014

IN THE MATTER OF:	)	
	)	
Clemente AVELINO Pereida,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent.	)	

CHARGES: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act")—Alien present in the United States without being admitted or paroled.

APPLICATION: Motion to Pretermit 42B Application

ON BEHALF OF RESPONDENT:
Raul F. Guerra, Esq.
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ON BEHALF OF THE GOVERNMENT:
Matthew E. Morrissey, Assistant Chief Counsel
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Immigration and Customs Enforcement

1717 Avenue H, Suite 174
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DECISION OF THE IMMIGRATION JUDGE

I. Background and Procedural History

Respondent is a native and citizen of Mexico who arrived in the United States at or near Nogales, Arizona on or about an unknown date and was not then admitted or paroled after inspection by an immigration officer. Exh. 1. On August 3, 2009, the Department of Homeland Security ("DHS" or "the government") served Respondent with a Notice to Appear ("NTA") charging him with removability pursuant to the above-captioned section of the Act. *See id*. Respondent admitted the factual allegations contained in the NTA and conceded the charge of removability. *See id*. On March 25, 2011, Respondent filed an EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents pursuant to section 240A(b)(1) of the Act. Exh. 2.

On August 28, 2014, DHS filed a Motion to Pretermit Respondent's 42B application asserting that he has been convicted of a crime involving moral turpitude ("CIMT") that is a mandatory bar to the requested relief. *See* DHS Motion Brief to Pretermit Respondent's Cancellation of Removal Application (Aug. 28, 2014) ("Motion to Pretermit"); DHS Filing, Conviction Records (Aug. 28, 2014) ("Conviction Records"). On September 9, 2014, Respondent filed a brief opposing the motion to pretermit. *See* Respondent's Brief in Opposition to DHS's Motion to

Pretermit (Sept. 9, 2014). For the following reasons, the Court will grant the government's motion and pretermit Respondent's 42B application.

II. Statement of Law

Cancellation of removal relief is available to a removable nonpermanent resident alien who: (1) has been physically present in the United States for a continuous period of at least ten years immediately preceding the application, (2) has been a person of good moral character during that time, (3) has not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the INA, and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a United States citizen or lawful permanent resident. INA § 240A(b)(1). An alien who has committed a CIMT is ineligible for cancellation of removal relief because he or she cannot be found to have good moral character. *See* INA § 101(f)(3). Furthermore, an alien who has been convicted of a CIMT is ineligible for cancellation of removal relief because he or she has been convicted of an offense under sections 212(a)(2) and 237(a)(2) of the INA. INA §§ 212(a)(2)(A)(i)(I), 237(a)(2)(A)(i), 240A(b)(1)(C).

The term "crime involving moral turpitude" is ambiguous. *See Bobadilla v. Holder*, 679 F.3d 1052, 1054 (8th Cir. 2012). Generally, a crime involves moral turpitude if it involves a reprehensible act accompanied by some degree of scienter. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 (A.G. 2008). In other words, a CIMT involves conduct that 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." *Matter of Torres-Varela*, 23 I&N Dec. 78, 83 (BIA 2001). Neither the seriousness of the offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *See id*. at 84. Instead, the intent required by the statute of conviction is critical to the determination. *See Hernandez-Perez v. Holder*, 569 F.3d 345, 348 (8th Cir. 2009).

To determine whether a respondent's offense qualifies as a CIMT, courts first apply the categorical approach to ascertain whether the statute of conviction necessarily involves moral turpitude. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704. Then, if a "realistic probability" exists that the statute punishes conduct that does not involve moral turpitude, courts apply the modified categorical approach and look to the respondent's record of conviction to determine whether his specific conduct involved moral turpitude. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704. The record of conviction includes documents such as the indictment, information, guilty plea, plea transcript, judgment of conviction, and sentence. *See Chanmouny v. Ashcroft*, 376 F.3d 810, 813 (8th Cir. 2004); *Silva-Trevino*, 24 I&N Dec. at 704. Finally, if the respondent's record of conviction does not resolve the CIMT issue, courts may consider any additional evidence that is "necessary or appropriate." *See Silva-Trevino*, 24 I&N Dec. at 704.

III. Analysis and Findings

Pursuant to 8 C.F.R. section 1240.8(d), "if the evidence indicates that one or more of the grounds for mandatory denial of [an] application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." Here, DHS asserts that Respondent's conviction for attempted criminal impersonation is a CIMT that bars the requested relief. *See* Motion to Pretermit; Conviction Records. Respondent therefore bears the burden to demonstrate by a preponderance of the evidence that his conviction is not a mandatory bar to cancellation of removal under section 240A(b)(1) of the Act. *See* 8 C.F.R. § 1240.8(d).

DHS filed a certified copy of a Journal Entry and Order, indicating that, on June 14, 2010, Respondent pled no contest and was found guilty of violating Nebraska Revised Statute section 28-201, for "attempt of a class 3A or class 4 felony." *See* Conviction Records at 2. Section 28-201, Nebraska's criminal attempt statute, provides that criminal attempt is a "Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony." Neb. Rev. Stat. § 28-201(4)(e) (2010). Although Respondent's conviction is for the inchoate crime of attempt, as opposed to the completed crime, the moral turpitude analysis draws "no distinction between the commission of the substantive crime and the attempt to commit it." *See Matter of Vo*, 25 I&N Dec. 426, 428 (BIA 2011). The Board of Immigration Appeals has held that "[a]n attempt involves the specific intent to commit the substantive crime, and if commission of the substantive crime involves moral turpitude, then

so does the attempt, because moral turpitude inheres in the intent." *Id*.

Accordingly, the Court must determine whether the substantive crime underlying Respondent's attempt conviction involves moral turpitude. Although the Journal Entry and Order does not reflect the underlying offense attempted, DHS submitted the corresponding Complaint, which charges Respondent with attempted criminal impersonation under former Neb. Rev. Stat. section 28-608, a Class IV felony. *See* Conviction Records at 2-4. The Complaint is dated June 8, 2010, and the Journal Entry and Order was entered June 14, 2010, the date of Respondent's hearing in the case. *See id*. at 1-4. All documents bear the same case number—CR 10-197. *See id*. The Court therefore finds the Complaint to be sufficiently reliable evidence that criminal impersonation was the substantive crime underlying Respondent's attempt conviction. In 2010, Nebraska's criminal impersonation statute was located at section 28-608 and provided:

> (1) A person commits the crime of criminal impersonation if he or she:
>
> (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretend capacity with the intent to gain

> a pecuniary benefit for himself, herself, or another and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another: (i) Obtains or records personal identification documents or personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608 (2010).[1] The Court finds that a conviction under subsection (a), (b), or (d) of the statute is a CIMT because each subsection contains as a necessary element the intent to defraud, deceive, or harm. *See id*. Crimes that require proof of a specific intent to defraud or deceive involve moral turpitude. *See Jordan v. De George*, 341 U.S. 223, 232 (1951); *Guardado-Garcia v. Holder*, 615 F.3d 900, 902 (8th Cir. 2010). Additionally, the intent to harm another person by assuming a false identity or representative capacity, or by using personal identifying information to access financial resources, reflects a sufficiently

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[1] Nebraska's criminal impersonation statute is now located at Neb. Rev. Stat. § 28-638 (2014).

depraved state of mind to render a conviction under subsections (a), (b), or (d) morally turpitudinous. Subsection (c), by contrast, contains no *mens rea* requirement and punishes even unknowing licensure violations. Because a violation of subsection (c) does not require a vicious motive or corrupt mind, a realistic probability exists that former Neb. Rev. Stat. section 28-608 punishes non-turpitudinous conduct. *See Bobadilla*, 679 F.3d at 1055-56; *Silva-Trevino*, 24 I&N Dec. at 704.

Accordingly, the Court turns to the modified categorical approach to determine whether Respondent was convicted under subsection (a), (b), or (d), rendering his offense a CIMT, or under subsection (c). The Complaint charges that Respondent intentionally completed a substantial step in a course of conduct intended to culminate in commission of criminal impersonation, when he "did use a fraudulent Social Security card to obtain employment at National Service Company of Iowa, located in rural Crete, Saline County, Nebraska, value $500 or more but less than $1500." *See* Conviction Records at 4. The Complaint demonstrates that Respondent was not convicted of attempting to carry on a business without a license under subsection (c) of the criminal impersonation statute, and he was therefore necessarily convicted under subsection (a), (b), or (d), any of which involves moral turpitude. The Court concludes that the substantive crime underlying Respondent's attempt conviction was a subsection of Neb. Rev. Stat. section 28-608 requiring the specific intent to defraud, deceive, or harm, and therefore finds that the offense is a CIMT.

Having found Respondent's attempted criminal impersonation conviction to be a CIMT, the Court must next determine whether it renders him ineligible for cancellation of removal relief as a conviction "of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3)" of the Act. *See* INA § 240A(b)(1)(C). An alien who has been convicted of a CIMT for which the maximum possible sentence is less than one year, and which qualifies under the "petty offense" exception, is not convicted of an offense "described under" either section 212(a)(2) or 237(a)(2) of the Act and is not barred from cancellation of removal relief if otherwise eligible. *Matter of Cortez*, 25 I&N Dec. 301, 307 (BIA 2010); *see also Matter of Pedroza*, 25 I&N Dec. 312, 314 (BIA 2010). The petty offense exception at INA section 212(a)(2)(A)(ii)(II) exempts from inadmissibility an individual who has committed only one CIMT for which the maximum possible penalty is imprisonment for one year or less, and for which the alien was sentenced to a term of imprisonment of six months or less (regardless of the extent to which the sentence was ultimately executed). *See* INA § 212(a)(2)(A)(ii)(II). Therefore, conviction of a single CIMT offense, which is punishable by a maximum term of imprisonment of *less than one year* and for which the alien was sentenced to six months or less, does not bar 42B relief. *See*, *e.g.*, *Pedroza*, 25 I&N Dec. at 314-15.

However, conviction of a CIMT for which a sentence of *one year or longer* may be imposed is an offense "described under" section 237(a)(2)(A)(i) of the Act that renders an alien ineligible for cancellation of removal pursuant to INA section 240A(b)(1)(C), even if the alien is charged under section 212 grounds of

inadmissibility or is eligible for the petty offense exception. *See Cortez*, 25 I&N Dec. at 307 (clarifying *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009)). The statutory language pertaining only to aspects of immigration law—such as the requirement at section 237(a)(2)(A)(i)(I) that the CIMT in question was "committed within five years … after the date of admission"—is not relevant because only language specifically pertaining to the criminal offense, such as the crime itself and the sentence potentially and actually imposed, should be considered in determining which offenses bar cancellation of removal relief. *Id*.

In the instant case, Respondent's conviction for criminal attempt under Neb. Rev. Stat. section 28-201 is a Class I misdemeanor. *See* Conviction Records at 2; Neb. Rev. Stat. § 28-201(4)(e) (2010). A Class I misdemeanor is punishable in Nebraska by a maximum term of "not more than one year imprisonment." *See* Neb. Rev. Stat. § 28-106(1). In other words, conviction under the statute could result in imprisonment for a term of one year. *See id*. Accordingly, the maximum possible sentence for Respondent's conviction is not *less than one year*, but one year or less, and it is therefore an offense described under section 212(a)(2) that precludes 42B relief. *See Cortez*, 25 I&N Dec. at 307. Furthermore, because a sentence of one year may be imposed, it is an offense described under section 237(a)(2). *See id*. Accordingly, Respondent's attempted criminal impersonation crime is a conviction "of an offense under sections 212(a)(2) [and] 237(a)(2)" of the Act, which constitutes a mandatory bar to 42B relief. *See* INA § 240A(b)(1)(C).

IV. Conclusion

Because Respondent has not demonstrated by a preponderance of the evidence that his conviction for attempted criminal impersonation is not a mandatory bar to the requested relief, the Court will grant DHS's motion to pretermit his 42B application. *See* 8 C.F.R. § 1240.8(d). Accordingly, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that DHS's Motion to Pretermit Respondent's Cancellation of Removal Application is **GRANTED**.

/s/ JACK L. ANDERSON
JACK L. ANDERSON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3377

Clemente Avelino Pereida

Petitioner

v.

William P. Barr, Attorney General of the United States

Respondent

Immigrant Legal Resource Center, et al.

Amici on Behalf of Petitioner

Petition for Review of an Order of the Board of Immigration Appeals
(A093-333-944)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 02, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX E

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1182

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any 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, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a

controlled substance (as defined in section 802 of Title 21),

is inadmissible.

APPENDIX F

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1227

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

APPENDIX G

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229a

§ 1229a. Removal proceedings

***

(c) Decision and burden of proof

***

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

APPENDIX H

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229b

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

APPENDIX I

Code of Federal Regulations
Title 8. Aliens and Nationality

8 C.F.R. § 1240.8

§ 1240.8. Burdens of proof in removal proceedings

(a) *Deportable aliens*. A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens*. In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled*. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal*. The respondent shall have the burden of establishing that he or she is eligible for any

requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

APPENDIX J

Revised Statutes of Nebraska
Chapter 28. Crimes and Punishments

Neb. Rev. Stat. § 28-201 (2008)

§ 28-201. Criminal attempt; conduct; penalties

(1) A person shall be guilty of an attempt to commit a crime if he or she:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

(4) Criminal attempt is:

***

(e) A Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony;

APPENDIX K

Revised Statutes of Nebraska
Chapter 28. Crimes and Punishments

Neb. Rev. Stat. § 28-608 (2008)

§ 28-608. Criminal impersonation; penalty; restitution

(1) A person commits the crime of criminal impersonation if he or she:

(a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;

(b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;

(c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or

(d) Without the authorization or permission of another and with the intent to deceive or harm another:

(i) Obtains or records personal identification documents or personal identifying information; and

(ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.