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##### MEMBER

NJ, NY & FL BARS

April 9, 2013

Re: Mr. Jones

Dear Mr. Attorney:

With regard to our mutual client, Mr. Jones, and with respect to the immigration consequences of his pending New Jersey criminal violations,

In the unpublished BIA decision In re: Juan Pinto-Diaz (2008)[case attached], the Board provides “non-precedential” guidance and instructs us:

We agree with the respondent's argument that intent to defraud is not an element of N.J.S.A. 2C:21-2.1(c), the offense for which he was convicted, and that he was not charged with intent to defraud. We further conclude that the statute covers conduct which both does and does not constitute a crime involving moral turpitude. See Smriko v. Ashcroft, 387 F.3d 279, 283 (3d Cir. 2004). To determine whether the respondent was convicted of a turpitudinous offense, we apply a modified categorical approach, examining the respondent's conviction record including the indictment, the Judgment of Conviction, and the plea agreement. See Alaka v. Att'y Gen., 456 F.3d 88, 106 (3d Cir. 2006).

These documents of conviction do not conclusively establish whether the respondent pled guilty to turpitudinous conduct covered within the statute, or to a non-turpitudinous act under the statute. Consequently, it was error to find that the respondent's conviction under N.J.S.A. 2C:21-2.1c was for a crime involving moral turpitude.

Just like in Pinto-Diaz (non-precedential), which is squarely and exactly on point,

Defendant Jones MUST not pled to any intent to defraud. The statute, N.J.S.A. 2C:21-2.1c, is divisible because a defendant could be charged with turpitudinous conduct and non-turpitudinous conduct. The record of conviction in Mr. Jones’s case MUST not establish that he pled guilty to turpitudinous conduct.

This case arises under the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has adopted the traditional categorical approach to determine whether a crime constitutes a CIMT. See Jean-Louis v. Holder, 582 F.3d 462, 473-82 (3rd Cir. 2009) (declining to follow the “realistic probability approach” put forth by the Attorney General in Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008)). The categorical inquiry in the Third Circuit consists of looking “to the elements of the statutory offense... to ascertain that least culpable conduct necessary to sustain a conviction under the statute.”Id. at 465-66.The “inquiry concludes when we determine whether the least culpable conduct sufficient to sustain conviction under the statute ‘fits' within the requirements of a CIMT.”Id. at 470.However, if the “statute of conviction contains disjunctive elements, some of which are sufficient for conviction of [a CIMT] and other which are not ... [The Immigration Judge] examin[es] the record of conviction for the narrow purpose of determining the specific subpart under which the defendant was convicted.”Id. at 466.This is true even where clear sectional divisions do not delineate the statutory variations. Id. In so doing, the Immigration Judge may only look at the formal record of conviction. Id.Mr. Jones’s record of conviction MUST NOT reveal that he engaged in “evil” or “corrupt mind” conduct.

New Jersey Statute 2C:21-2.1c states:

c. A person who knowingly exhibits, displays or utters a document or other writing which falsely purports to be a driver's license, birth certificate or other document issued by a governmental agency and which could be used as a means of verifying a person's identity or age or any other personal identifying information is guilty of a crime of the third degree. A violation of N.J.S.2C:28-7, constituting a disorderly persons offense, section 1 of P.L.1979, c. 264 (C.2C:33-15), R.S.33:1-81 or section 6 of P.L.1968, c. 313 (C.33:1-81.7) in a case where the person uses the personal identifying information of another to illegally purchase an alcoholic beverage or for using the personal identifying information of another to misrepresent his age for the purpose of obtaining tobacco or other consumer product denied to persons under 18 years of age shall not constitute an offense under this subsection if the actor received only that benefit or service and did not perpetrate or attempt to perpetrate any additional injury or fraud on another.N.J. Stat. Ann. § 2C:21-2.1 (West).

According to the New Jersey Practice Series:

New Jersey Practice Series

Database updated November 2011

Motor Vehicle Law and Practice

Robert Ramsey

Chapter

2. License and Registration

M. Criminal Offenses Related to False Driver's License—N.J.S.A. 2C:21-2.1

**§ 2:62.Exhibit, display or utterance: Crime of the fourth degree, N.J.S.A. 2C:21-2.1(c)**

The knowing exhibition of a false license or false governmental document used for verifying age or identification is a crime of the fourth degree. So, too, is the act of displaying or uttering such a false document. There is no limitation on the purpose for which the false document is exhibited or to whom. **Indeed, there need not be any purposeful conduct associated with the display, uttering or exhibition, and certainly no intent to defraud, deceive or injure anyone**. [emphasis added] Thus, any display, uttering or exhibition of the false document to any person for any purpose will satisfy the elements of the offense, so long as the display or exhibition of the false document was done knowing that the license or identification falsely purported to be a government issued document. On the other hand, mere possession of the false license or identification document is insufficient to constitute a violation of this statute. There must be an affirmative actthat constitutes more than mere possession. The defendant must not only possess the false document, but must exhibit, utter or display it.

The particular goal of this section was to prevent the sale of identification cards to be used by underage purchasers of alcoholic beverages. (See N.J.S.A. 2C-21-2.1 comment to Title 2C, New Jersey Criminal Code Annotated by John M. Cannel, Gann Law Books). Under the Third Circuit's minimum conduct test, pursuant to the elements of N.J.S.A. 2C:21-2.1c, Respondent could have displayed a fake I.D. to anyone for no purpose at all and been convicted under this statute.

An examination of the plain language of this statute clearly indicates that fraud is not an element necessary to be convicted, and the Respondent is not aware of any federal case which has determined that “Offenses involving false government documents” without a fraud element under this or another similarly worded statute has been categorized as a CIMT. In fact, there is an abundance of case law categorizing such conduct as non-turpitudinous.

In addition to Pinto-Diaz, Blanco v. Mukasey, 518 F.3d 714 (9th Cir. 2008), is informative in this matter, as it relates to the use of a false I.D. without fraudulent intent. In Blanco, the Court reasoned that when a crime involved a mere attempt to impede enforcement of the law, such as presenting a fake I.D. to a police officer, and no intent to induce another to act to his or her detriment, there is no element of fraud and it does not constitute a CIMT. See also Tall v. Mukasey, 517 F.3d 1115 (9th Cir. 2008) (reasoning that to be inherently fraudulent a crime must involve knowingly false representations made in order to gain something of value);

One must look to the nature of the Defendant Jones’s crime in order to determine if it involves evil intent or corruption of the mind.

Our review of crimes relating to possession reveals that some are considered to involve moral turpitude while others are not. We have stated that criminal possession is a crime involving moral turpitude when accompanied by the intent to commit a crime involving moral turpitude.Matter of Jimenez, 14 I & N Dec. 442 (BIA 1973) (holding that possession of forgery devices with the intent to use them for forgery involves moral turpitude). Thus, carrying or possessing a concealed weapon has been held to involve moral turpitude only when the intent to use it against another person has been established.United States ex rel. Andreacchi v. Curran, 38 F.2d 498 (S.D.N.Y. 1926); Ex parte Saraceno, 182 F. 955 (S.D.N.Y. 1910); Matter of Granados, 16 I & N Dec. 726 (BIA 1979); Matter of S-, 8 I & N Dec. 344 (BIA 1959). Similarly, possession of burglary tools is not a crime involving moral turpitude unless accompanied by an intent to commit a turpitudinous offense such as larceny.United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Matter of S-, 6 I & N Dec. 769 (BIA 1955).Matter of Serna, 20 I. & N. Dec. 579, 584 (BIA 1992).

Circumstances may exist under which the respondent might not have had the intent to use the altered immigration document in his possession unlawfully. Therefore, we do not consider it appropriate to hold that the offense of which he was convicted is one involving moral turpitude.See United States ex rel.Guarino v. Uhl, supra (holding that possession of burglary tool with intent to use it to commit some crime which might not involve moral turpitude is not a crime involving moral turpitude); Kaye v. United States, 177 F. 147 (7th Cir. 1910) (stating that there are many circumstances under which a person might possess counterfeit molds without intent to use them fraudulently or unlawfully); Matter of K-, 2 I & N Dec. 90 (BIA 1944) (finding that receipt of stolen goods without knowledge they are stolen or without intent to deprive owner of his possession is not a crime involving moral turpitude). Accordingly, we find that the crime of possession of an altered immigration document with the knowledge that it was altered, but without its fraudulent use or proof of any intent to use it unlawfully, is not a crime involving moral turpitude. Matter of Serna, 20 I. & N. Dec. 579, 586 (BIA 1992).

It is well established that an offense must necessarily involve moral turpitude in order for a conviction for that crime to support an order of deportation.See United States ex rel. Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933); United States ex rel. Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931); United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914); United States ex rel. Valenti v. Karnuth, 1 F. Supp. 370 (N.D.N.Y. 1932). It is equally clear that any doubts in deciding such questions must be resolved in the alien's favor. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948); United States ex rel. Giglio v. Neelly, 208 F.2d 337 (7th Cir. 1953); Matter of Hou, Interim Decision 3178 (BIA 1992).

There must be absolutely no evidence in the record of conviction that he had (or more importantly, was convicted of) any fraudulent intent or that he unlawfully used this I.D. therefore his ultimate conviction cannot be considered a CIMT and the DHS would be substantially unlikely to prevail on a charge of removability under that section of the Act/U.S.C. mandating custody, namely 8 U.S.C. § 1182(a)(2)(A)(i)(I) and 8 U.S.C. § 1226(c)(1)(A).

Very truly yours,

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Ronald P. Mondello, Esq.

Attorney for Defendant Jones