16-3922

United States Court of Appeals

for the

Second Circuit

CLEMENT OBEYA,

Petitioner,

v.

JEFFERSON B. SESSIONS III, U.S. ATTORNEY GENERAL

Respondent.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR PETITIONER CLEMENT OBEYA

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PRELIMINARY STATEMENT

Clement Obeya seeks review of the Board of Immigration Appeals' ("BIA" or the "Board") decision, holding him removable as charged under 8 U.S.C. § 1227(a)(2)(A)(i) (SA10) based on his conviction in New York state court for petit larceny. *See* N.Y. PENAL LAW § 155.25 (SA14). Immediately before deciding Mr. Obeya's case, the BIA, in a different case, reversed seven decades of its own precedent and held that larceny crimes involve moral turpitude even when they allow for convictions without proving, as an element, that defendants had an intent to permanently deprive the owners of their property rights (*viz*., the BIA announced that a "substantial erosion of property rights" is now sufficient to establish moral turpitude when that clearly was insufficient for the preceding decades). The BIA exceeded the mandate of this Court's remand order and impermissibly applied its revised rule retroactively to Mr. Obeya's case. Had the BIA applied its existing rule on remand, the petition would have been dismissed and the removal proceedings terminated.

Even under the incorrect rule the BIA applied, however, Mr. Obeya is not removable. Misdemeanor petit larceny convictions in New York do not categorically involve moral turpitude. The Court should grant the petition and terminate the removal proceedings or, in the alternative, remand the case to the BIA for further proceedings consistent with its longstanding former rule that

larceny is categorically a crime of moral turpitude only if it is committed with an intent to commit a permanent taking.

JURISDICTIONAL STATEMENT

The BIA had jurisdiction under 8 C.F.R. § 1003.1(b) over Petitioner Clement Obeya's appeal from the decision of the Immigration Judge ("IJ"), dated March 13, 2012. A781-793.[1] The IJ held Mr. Obeya removable under Section 237 of the Immigration and Nationality Act ("INA") (8 U.S.C. § 1227(a)(2)(A)(i)) (SA10) because he had been convicted of a "crime involving moral turpitude" (a "CIMT"). A787-788. The BIA dismissed Mr. Obeya's appeal on August 7, 2012, and held him removable. A716-717. After Mr. Obeya timely appealed the initial BIA decision, this Court remanded the case to the BIA "to determine in the first instance" whether Mr. Obeya's misdemeanor conviction under New York Penal Law § 155.25 (SA14) constituted a crime of moral turpitude within the meaning of the INA. A97-100. On November 16, 2016, the BIA rejected Mr. Obeya's appeal and sustained the removal order. A1-8.

This Court has jurisdiction over Mr. Obeya's timely petition for review filed on November 18, 2016, under 8 U.S.C. § 1252(a)(1), because the BIA's November

[1] Citations to the appendix are in the form of "A[page]."

16, 2016, decision affirming the IJ's March 13, 2012, decision was a final order of removal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the BIA improperly exceed the scope of the Second Circuit's remand order by failing to evaluate whether Mr. Obeya was convicted of a crime of moral turpitude under its existing standard, instead applying a new standard for the first time on remand?

Did the BIA improperly apply the rule it newly announced in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016)—that larceny is a crime of moral turpitude when it requires an intent to deprive an owner of his property ***either*** permanently ***or*** under circumstances where the owner's property rights are substantially eroded—to Mr. Obeya's case, resulting in an impermissible retroactive application?

Did the BIA err in concluding that petit larceny encompassing intents to cause less than permanent deprivations of property—that is, a "substantial erosion of property rights"—is sufficient to declare petit larceny categorically a crime of "moral turpitude" under the Immigration and Nationality Act Section 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (SA10)?

whom he grew up. *Id.* at ¶ 6. None of his family members would be able to relocate to Nigeria with him given the lives and obligations they have established in the United States. *Id.* at ¶ 6.

SUMMARY OF ARGUMENT

Mr. Obeya's petition should be granted for three independent reasons. ***First***, this Court remanded Mr. Obeya's case in 2014 because the BIA had failed to determine whether Mr. Obeya's petit larceny conviction met the "crimes involving moral turpitude" standard under the BIA's existing precedent. Instead, the BIA disregarded this Court's mandate and applied a new rule of law to uphold removal. Had the case been considered under the law as it existed at the time of remand (and for decades before that) the petition would have been dismissed and the removal proceedings terminated. Because the BIA exceeded this Court's mandate, this petition should be granted and the proceedings terminated in accordance with the BIA's own analysis under the former rule.

Second, unlike Article III courts, administrative agencies, like the BIA, that create new rules of general applicability through adjudications are not entitled to a presumption in favor of retroactive application. Instead, this Circuit applies a five-factor test to determine whether an agency may retroactively apply a new rule through adjudication. The BIA's decision in Mr. Obeya's case fails this test.

Mr. Obeya's case is not one of first impression. The BIA, this Circuit, and various other Circuits have repeatedly addressed when larceny convictions constitute crimes involving moral turpitude. Moreover, the BIA announced its revised rule in a completely separate proceeding, *Diaz-Lizarraga*, which represented a stark departure from its established standards. This factor thus weighs in favor of Mr. Obeya; retroactive application of the BIA's completely new rule to Mr. Obeya on remand denies him due process.

The BIA's decision neither clarified a longstanding ambiguity in the law nor filled a gap in the legal framework. Instead, it arbitrarily replaced settled law with a newly-fashioned rule. For decades, the BIA held that state larceny statutes amounted to crimes involving moral turpitude only when convictions required the intent to permanently deprive owners of their property rights. New York's petit larceny statute, like many other similarly worded state larceny statutes, encompasses permanent as well as temporary intents. It was clear at the time of Mr. Obeya's petit larceny plea agreement that the crime was not categorically one involving moral turpitude.

Mr. Obeya was entitled to rely on the BIA's established standard in connection with his decision to plead to the criminal charge and the subsequent DHS charges. It has been widely recognized that immigration consequences are among the most important considerations defendants weigh when deciding whether

to plead guilty or exercise their rights to have the government prove its case in court. The standard for when a crime is one involving moral turpitude was based on a long series of decisions by the BIA and the courts addressing the same question the BIA faced in *Diaz-Lizarraga*. Mr. Obeya, therefore, was not faced with vague or unsettled law at the time of his plea, but rather known, clear, and stable law on which anyone similarly situated would rely. Upending the law as it existed at the time Mr. Obeya decided plead to the misdemeanor charge, resulting in the BIA's removal result, denies Mr. Obeya due process—especially considering the minor nature of his infraction.

Allowing the BIA to impose a revised standard on Mr. Obeya would result in extreme hardship. Deportation is a draconian sanction for any defendant. It is especially so for a defendant like Mr. Obeya, who has a career and family in the United States and no meaningful connection whatsoever to Nigeria. The burden of retroactive application would weigh heavily on Mr. Obeya and his family, a consequence severely disproportionate to what could have been expected at the time of his plea when the BIA's interpretation of larceny as a crime involving moral turpitude differed significantly from what is stated in *Diaz-Lizarraga*.

Finally, when compared to the minor infraction for which he plead guilty, the burden on Mr. Obeya is completely disproportionate to any perceived benefit in applying the revised rule retroactively. There would be no harm in allowing Mr.

Obeya the benefit of the law as it existed when he plead guilty to petit larceny—indeed, a finding against retroactivity advances legal uniformity and fairness.

And ***third***, we respectfully submit that the BIA's interpretation of New York's petit larceny statue as a crime involving moral turpitude is wrong. The BIA's decision in this case admits that the plain language of the statute is insufficient to classify the crime as one categorically involving moral turpitude. The BIA looks to New York case law to overcome the plain language, but those decisions do not actually interpret the provision at issue and so do not support the BIA's analysis. Furthermore, case law interpreting parallel larceny statutes from other states undermines the BIA's reading. This Court should therefore reject the BIA's mistaken legal conclusion that classifies the New York petit larceny statute as a crime involving moral turpitude.

STANDARD OF REVIEW

This Court has jurisdiction to evaluate "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). Determinations about retroactive applications of legal rules are reviewed *de novo* without any deference to the agency's retroactive application. *Velásquez-García v. Holder*, 760 F.3d 571, 578–79 (7th Cir. 2014); *see also Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275 n.4 (9th Cir. 2015) ("[T]he BIA has no special expertise regarding retroactivity."). Similarly, while the Court affords *Chevron* deference to the BIA's

determination of what defines a crime involving moral turpitude under Section 237 of the INA, the Court reviews *de novo* whether the alien's crime of conviction contains the elements that the BIA has found necessary to constitute a crime of moral turpitude. *Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007).

ARGUMENT

I. The BIA Exceeded the Scope of This Court's Remand When It Did Not Apply Its Long-Established Standard to Evaluate Whether New York Larceny Is Categorically a Crime Involving Moral Turpitude and Instead Applied a New Rule of Law

On remand, the BIA's application of the new *Diaz-Lizzaraga* rule was case-dispositive for Mr. Obeya.[4] That application of new law, however, clearly and impermissibly exceeded the scope of this Court's remand order, which directed the BIA to apply its existing precedents to determine whether New York larceny is a crime involving moral turpitude. This Court did not give the BIA on remand the option to consider Mr. Obeya's case under a new rule of law.

"To determine whether an issue remains open for reconsideration on remand, the [lower] court should look to both the specific dictates of the remand order as well as the broader 'spirit of the mandate.'" *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 671 F.3d 261, 270 (2d Cir. 2012) (internal quotation marks

[4] Although this point establishes an independent basis to grant the petition, we explain in Section III.B, *infra*, that Mr. Obeya should not be removable even under the new *Diaz-Lizarraga* rule.

omitted). Such a rule prevents litigation "not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 175 (2d Cir. 2014) (internal quotation marks omitted).

In its remand order, this Court found error in the IJ's holding that "any type of larceny or theft offense under the Immigration laws constitutes a crime involving moral turpitude" because "under BIA precedent larceny constitutes a CIMT only when a permanent taking is intended." A97-100 (internal quotation marks omitted). This Court thus defined the issue on remand as whether petit larceny convictions in New York require an intent to permanently deprive under the BIA's long-established precedent defining when an offense qualifies as a crime involving moral turpitude.

The BIA exceeded this Court's mandate by ignoring that precedent, instead holding that New York larceny is a crime involving moral turpitude under a brand new, and improperly retroactive, standard. *See Matter of Obeya*, 26 I&N Dec. 856, 860 (BIA 2016) (SA5). It compounded the error by upholding removal even though the statute of conviction's plain language encompasses a wider range of intents than either the BIA's permanent intent standard or new substantial erosion standard. *Id.* Such a case-dispositive holding applying a legislative-type rule created in another case ***eight years*** after initiation of Mr. Obeya's removal

proceeding, violates "both the specific dictates of the remand order" and the remand's "broader 'spirit" and cannot be allowed to stand. *Parmalat Capital Fin.*, 671 F.3d at 270.

II. The BIA's Application of the New Rule Formulated in *Diaz-Lizarraga* to Mr. Obeya's Removal Proceedings Is Impermissibly Retroactive and Denies Him Due Process

"Retroactivity" is said to occur when new statutes, orders, or administrative rules "impose 'new legal consequences to events'" that have already occurred. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1168 (10th Cir. 2015) (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001)). Retroactivity is generally disfavored in the law. Although judicial decisions routinely apply "backward-looking resolutions" to discrete cases, legislation is presumed to operate prospectively only. *Id.* at 1169–70. Administrative agencies like the BIA blend judicial and legislative functions; they are at once a political, policymaking institution with the power to issue new rules of general applicability and arbiters of individual rights and disputes. *See id.* at 1170–73. Therefore, "the more an agency acts like a legislator—announcing new rules of general applicability— . . . the stronger the case becomes for limiting application of the agency's decision to future conduct." *Id.* at 1172; *see also Velásquez-García*, 760 F.3d at 579–81 ("[A] new agency rule announced by adjudication is no different from a new agency rule announced by notice-and-comment rulemaking, for purposes of retroactivity analysis.").

Due process concerns underlie the limitation on retroactive adjudications. These are "deeply rooted in our jurisprudence" and based on "[e]lementary considerations of fairness." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Therefore, the BIA "may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests." *Velásquez-García*, 760 F.3d at 579–80 (ruling BIA interpretations of the INA are not comparable to judicial statutory construction, which interprets what a statute meant before and after the adjudication) (internal quotation marks omitted); *see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 n.12 (1984). "[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265; *see also Martin v. Hadix*, 527 U.S. 343, 357–58 (1999) (Retroactivity analysis "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." (internal quotation marks omitted)).

The need to consider fairness to the parties and their settled expectations is particularly heightened in the immigration context, where the "reluctance to impose rules retroactively is 'buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Velásquez-García*, 760 F.3d at 579 (quoting *St. Cyr*, 533 U.S. at 320).

This Circuit applies a five-factor test to determine whether an agency may retroactively apply a new rule through a legal opinion. These factors are: "(1) whether the case is one of first impression, (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order places on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015).

The BIA's decision in *Obeya* to apply the new rule announced in *Diaz-Lizarraga* fails this Court's retroactivity test. First, Mr. Obeya's case is not one of first impression; it concerns a legal issue repeatedly addressed by the BIA and the courts, and the new rule was announced in an unrelated case. Mr. Obeya agreed to plead guilty to petit larceny against a background of long-settled law that suggested that his plea would not result in deportation, and he was entitled to rely on that precedent. This is especially true given the serious immigration consequences of that decision, weighed against an abstract interest in statutory uniformity that might be served by retroactive application of the new rule.

A. Mr. Obeya's Case Is Not One of First Impression

The first factor favors Mr. Obeya because his case is not one of first impression. In this context, a case of first impression is one in which an agency encounters a novel issue, announces a new rule, and applies the rule to the parties in that case; a case of second impression is a subsequent case "in which [the rule] might apply to [the] conduct of others that took place before its announcement." *Velásquez-García*, 760 F.3d at 581. Therefore, even if retroactivity ***may*** be appropriate in cases of first impression, where the parties argued over the changed rule, it is ***disfavored*** in cases of "second impression," where unexpected legal consequences might attach to already-completed acts. *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) ("[T]he problem of retroactive application has a somewhat different aspect in cases not of first but of second impression, where an agency alters an established rule defining permissible conduct . . . ."); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) ("[R]etroactivity is disfavored where the agency has confronted the problem before, has established an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted." (internal quotation marks and citation omitted)).

Here, the issues of whether larceny convictions constitute crimes involving moral turpitude is not one of first impression. As discussed in greater detail in

Section II.B., *infra*, the BIA and the courts have long held that larceny convictions must require an intent to permanently deprive for the crime to involve moral turpitude. Moreover, the BIA announced its revised rule for when larceny constitutes a moral turpitude crime—that is, when larceny "involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded"—in *Diaz-Lizarraga*, not Mr. Obeya's remand proceeding.[5] *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852–53 (BIA 2016); *Obeya*, 26 I&N Dec. at 858 (noting that the BIA is not precluded from applying the new standard it first articulated in *Diaz-Lizarraga*). As such, *Obeya* is not a case of first impression. Mr. Obeya should not be forced to endure an adverse and abrupt change in the law that the government announced in a unrelated proceeding taking place long after his plea. Therefore, under the first factor, the BIA should be precluded from retroactively applying *Diaz-Lizarraga* to Mr. Obeya's proceeding—a case of second impression. *See Lugo*, 783 F.3d at 121 (finding that the first factor "clearly favor[ed]" denying retroactivity where the BIA first announced the rule at issue in a prior unrelated opinion).

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[5] Courts may differ as to what constitutes a case of "first impression" in this context. *See Velásquez-García*, 760 F.3d at 581 (comparing a traditional case of first impression, where an "agency confronts an issue that it has not resolved before," with a case in which an agency announces a new rule (internal quotation marks omitted)). In any case, Mr. Obeya's matter is not one of first impression.

B. The Rule Created in *Diaz-Lizarraga* Represents an Abrupt Departure From the BIA's Longstanding and Well-Established Precedent for When Larceny Constitutes a Crime of Moral Turpitude

The decision in *Diaz-Lizarraga* departs from the BIA's longstanding and well-established rule—upheld by this Circuit—that larceny is a moral turpitude crime only when a permanent taking is intended. *See* 26 I&N Dec. at 849 ("From the Board's earliest days we have held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property."); A99 ("under BIA precedent[,] larceny constitutes a [crime involving moral turpitude] 'only when a permanent taking is intended'" (quoting *Wala*, 511 F.3d at 106)). In particular, *Diaz-Lizarraga* purports to render obsolete what had been the most fundamental element that determined whether a larceny conviction was categorically a crime of moral turpitude—the intent to permanently deprive. Under this former rule, if a larceny conviction did not require the intent to commit a permanent taking, that conviction could not categorically constitute a crime of moral turpitude, and therefore, could not serve as a predicate for removing an alien under Section 237(a)(2)(A)(i) of the INA. For almost seventy years before *Diaz-Lizarraga*, the BIA relied on the permanent-versus-temporary distinction to determine when a larceny conviction involves moral turpitude. *See, e.g.*, *Matter of R-*, 2 I&N Dec. 819, 828 (BIA 1947) ("[T]his Board could determine . . . whether the intention was to deprive the owner of

possession permanently, and therefore whether the crime involved moral turpitude."); *Matter of P-*, 2 I&N Dec. 887, 887 (BIA 1947) (joyriding "does not comprehend . . . [an] intent to deprive the owner thereof permanently, and, therefore, does not involve moral turpitude"); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *Matter of V-Z-S-*, 22 I&N Dec. 1338, 1350 n.12 (BIA 2000) (to be a crime involving moral turpitude, larceny must "include the turpitudinous element of intent to permanently deprive"); *Wala*, 511 F.3d at 106 (2d Cir. 2007) (noting the BIA "treated the [permanent-versus-temporary] inquiry as determinative"); *Patel v. Holder*, 707 F.3d 77, 80 n.1 (1st Cir. 2013) (same); *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1190 (9th Cir. 2014) (theft "is not categorically a crime of moral turpitude if . . . [it] is broad enough to criminalize a taking with intent to deprive the owner . . . only temporarily.").

Diaz-Lizarraga stands in direct contrast to this rule and wholly changes the potential immigration consequences attached to a larceny conviction. Indeed, the extent to which the BIA now departs from its former rule is illustrated by its previous opinions interpreting the same larceny statute at issue in *Diaz-Lizarraga* (the Arizona Statute), which, as the BIA has acknowledged, is nearly identical to

the relevant portions of the New York statute.[6] The BIA previously found that larceny under Arizona's statute was not a predicate for removal. *See Matter of Lopez-Bustos*, 2010 WL 4213214, at *4 (BIA Oct. 13, 2010) ("[T]he Arizona theft statute is not, categorically, a crime involving moral turpitude."). Given the BIA's abrupt change in law, this second factor weighs against retroactivity.

C. Obeya Was Entitled to Rely on the BIA's Pre-*Diaz-Lizarraga* Standard

The third factor weighs in Mr. Obeya's favor because he was entitled to rely upon the BIA's longstanding precedent when he agreed to plead guilty to petit larceny.[7] When a new rule represents "an abrupt departure from well[-]established practice," a party's reliance on the prior rule is likely to be reasonable compared to when the new rule "merely attempts to fill a void in an unsettled area of law." *Acosta-Olivarria*, 799 F.3d at 1275 (internal quotation marks omitted); *see also Majestic Weaving Co.*, 355 F.2d at 860–61 (precluding retroactivity in a case of

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[6] *See Diaz-Lizarraga*, 26 I&N Dec. at 851, 852, 852 n.5 (stating that Ariz. Rev. Stat. § 13-1801(A)(4) (SA7) adopts the Model Penal Code's definition of "deprive" "more or less verbatim," and that while the definition of "deprive" under New York Penal Law § 155.00(3) (SA11) is not identical to the Model Penal Code, it nevertheless "track[s]" the language of the Model Penal Code's definition).

[7] Courts have recognized that the second and third factors of the five factor retroactivity analysis are "closely intertwined." *Velásquez-García*, 760 F.3d at 582) ("[T]he longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." (internal quotation marks omitted)).

second impression where the agency overturned a longstanding rule, recognizing the possibility of "express reliance on the standard previously established").

In the immigration context, the Supreme Court has recognized the importance of immigration consequences, plea agreements, and reliance on existing laws when defendants decide whether or not to plead guilty to crimes that may serve as a predicate for removal. As the Supreme Court explained, deportation is a "particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010). And where "immigration law . . . [makes] removal nearly an automatic result for a broad class of noncitizen offenders," *id.* at 366, "there can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Lugo*, 783 F.3d at 122 (quoting *St. Cyr*, 533 U.S. at 322). Because "[p]lea agreements involve a quid pro quo between a criminal defendant and the government[,] . . . grant[ing] the government numerous 'tangible benefits'" at the cost of defendants waiving "several of their constitutional rights," it is surely "contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations" to deny a defendant the benefit of that agreement, for which he or she gave up the constitutional right to trial by jury. *St. Cyr*, 533 U.S. at 321–23 (internal quotation marks omitted).

When Mr. Obeya pled guilty to petit larceny in May 2008, A784-785, the BIA had already held for nearly seven decades that "a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property." *See Diaz-Lizarraga*, 26 I&N Dec. at 849. Furthermore, this Circuit decided *Wala* just a few months prior to Obeya's guilty plea. In *Wala*, this Circuit recognized that the Connecticut larceny statute encompasses larceny committed with an intent to commit less than a permanent taking. 511 F.3d at 110.

The relevant language of the Connecticut statute is worded almost *identically* to that of the New York statute. Both statutes require only an "intent to deprive another of property or to appropriate the same to himself or a third person." *Compare* CONN. GEN. STAT. § 53a-119 (SA9), *with* N.Y. PENAL LAW § 155.05(1) (SA13). Both statutes go on to define "deprive" and "appropriate" in near-identical terms, and each of these statutory definitions encompass intents to withhold property or take property on a less-than-permanent basis. *See* Section III, *infra*.

Indeed, when Mr. Obeya's petition for review was pending in this Court in 2013, Immigration Judge Terry Bain, sitting in 26 Federal Plaza, recognized this longstanding precedent when he denied a charge of inadmissibility based in part on

the conclusion that the New York petit larceny statute—the same provision at issue here—is not a crime involving moral turpitude:

> The Court follows the BIA and Second Circuit's presumption that an offense can constitute a CIMT only if a trier of fact was required to find, as an element of the offense, that the taking was permanent . . . . Thus, since the statute encompasses categories of offenses that "may or may not involve moral turpitude," it categorically is not a CIMT.

Matter of [ ], submitted *via* Petitioner's 28(j) Letter, *Obeya v. Holder*, No. 12-3276 (2d Cir. Nov. 13, 2013), ECF at 108-2 at 6–7 (citing *Wala*, 511 F.3d 107); *see also* A519–525.[8] The government made no effort to distinguish IJ Bain's decision, noting only that IJs have the authority to resolve cases "in any manner deemed appropriate, subject to controlling statutory and legal authority . . . [, which] may result in cases with similar issues having different outcomes, ***particularly where there is no legal authority that clearly controls***." Brief For Respondent, *Obeya v. Holder*, No. 12-3276, at 18 n.7 (2d Cir. Jan. 29, 2014), ECF at 110 (emphasis added). That position—which asks the Court to turn a blind eye to a ruling that that the government chose to let stand unreviewed but that cannot be reconciled with the position the BIA now takes—does not even fit this case. Even if one were willing to accept such inconsistent results from a system of adjudication controlled by "statutory and legal authority," this was not virgin territory: there ***was*** a long

[8] The government did not seek review of IJ Bain's decision, Brief For Respondent, *Obeya v. Holder*, No. 12-3276, at 18 n.7 (2d Cir. Jan. 29, 2014), ECF at 110, and the decision became final.

line of legal authority interpreting petit larceny statutes as exemplified by the very ruling of IJ Bain.

Mr. Obeya was entitled to rest on that long line of legal authority, under which his plea would be unlikely to result in deportation.[9] *Diaz-Lizarraga* drastically changes the immigration consequences arising from a petit larceny conviction by swapping a distant possibility for a foregone conclusion. *See St. Cyr*, 533 U.S. at 322, 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."); *Miguel-Miguel*, 500 F.3d at 952 (Petitioner reasonably relied on the BIA's former rule where the BIA's newly announced standard "made it a near (if not total) certainty that [Petitioner's] decision to plead guilty would result in his removal."); *De Niz Robles*, 803 F.3d at 1179 ("[T]he loss of [the] *chance* to remain in the country lawfully cannot be dismissed as nothing." (emphasis added)). Retroactive application of *Diaz-Lizzaraga's* new rule is thus improper under these

[9] As the Supreme Court has explicitly recognized, "a party challenging the application of a statute [need not] show he relied on prior law in structuring his conduct" for purposes of the retroactivity analysis. *Vartelas v. Holder*, 566 U.S. 257, 272 (2012). In the context of an administrative immigration ruling, courts have found the second and third factors favor non-retroactivity without requiring express, actual reliance. *E.g.*, *Miguel-Miguel*, 500 F.3d at 952. This court has recognized, that given the likelihood that defendants are "acutely aware" of the immigration consequences of a criminal plea, *St. Cyr* and *Padilla* may require an assumption of reliance. *Lugo*, 783 F.3d 119, 122.

circumstances. After establishing an explicit rule, the BIA cannot now invoke *Diaz-Lizarraga* against Mr. Obeya nine years after he waived his constitutional right to have New York prove its case against him in exchange for his plea.

D. Giving Retroactive Effect to the New Rule Announced in *Diaz-Lizarraga* Would Impose a Significant Burden on Mr. Obeya

There is no question that the fourth factor overwhelmingly weighs against retroactivity. This Circuit has recognized that the burden of deportation from the United States is "massive" and results in "life changing consequences." *Lugo*, 783 F.3d at 121; *see also Velásquez-García*, 760 F.3d at 584 (The "burden is immense [because petitioner] faces removal from the only country he has called home since he was seven years old."). And when the burden results in "enduring separation from close family members," the penalty is "made all the more devastating." *See Vartelas*, 566 U.S. at 268 (noting that familial separation exacerbates the already harsh penalty of losing the ability to travel abroad). Furthermore, even when a proper application of the old rule does not guarantee safety from deportation, "the loss of that chance to remain in the country lawfully" still results in a "significant" burden. *De Niz Robles*, 803 F.3d at 1179.

Here, the burden Mr. Obeya faces is massive, especially when compared to his minor, nonviolent infraction. He will be forced to abandon his work and leave his family behind in the United States, a country that he has called home since he was a teenager. *See* Obeya Decl. at ¶¶ 6–7. Mr. Obeya has no close ties or family

members in Nigeria, and his ability to earn a livelihood would be precarious at best. *Id.* at ¶ 7. Thus, the already harsh penalty of deportation would be made even worse given these circumstances.

E. Any Statutory Interest in Retroactively Applying *Diaz-Lizarraga* Is Slight and Outweighed by the Substantial Harm to Mr. Obeya

Finally, to the extent that the government has an interest in applying *Diaz-Lizarraga* retroactively, the interest is minimal and far outweighed by the real and substantial harm Obeya faces. As then-Judge Gorsuch recently explained, there is nothing "compelling" about the Government's "abstract" interest in statutory uniformity, especially when permitting petitioners like Mr. Obeya "the benefit of the law as it existed at the time they made their" decisions advances a more persuasive and fairer kind of uniformity. *De Niz Robles*, 803 F.3d at 1180. Additionally, neither the BIA nor the Government can identify any actual harm it would face in applying its decades-old larceny-as-a-CIMT standard to Mr. Obeya, who pled guilty to a nonviolent misdemeanor when the established rule controlled. *Cf. id.* Since the conduct that led to his removal proceedings, Mr. Obeya has had no criminal record and has continuously maintained employment as a productive member of society. *See* Obeya Decl. at ¶¶ 9, 11. Simply put, there is neither a generalized nor a particularized statutory interest in retroactively applying the novel *Diaz-Lizarraga* standard.

Alternatively, should the Government manage to articulate a statutory interest in retroactivity, this factor, at most, would "only lean" in its favor. When new rules "do[] not follow from the plain language of the statute, this factor only leans in favor of retroactive application." *Acosta-Olivarria*, 799 F.3d at 1277 (internal quotation marks omitted). Here, the new rule does not follow from the statute's plain language. Congress has never once defined "moral turpitude," and the multitude of definitions courts and agencies have attached to this "antiquated, and worse, meaningless" phrase "approach gibberish." *See Arias v. Lynch*, 834 F.3d 823, 830–31 (7th Cir. 2016) (Posner, J., concurring) ("What does 'the public conscience' mean? What does 'inherently base, vile, or depraved' [mean]—words that have virtually dropped from the vocabulary of modern Americans . . . ?"). As there is no "plain language" interpretation of the statutory term "moral turpitude," no rule—new or old—can "follow from" it. Consequently, though Petitioner maintains that this factor weighs strongly against reactivity, the alternative is at best a negligible boost to the government's otherwise weak case against Mr. Obeya, a nonviolent and productive member of society.

Since the 1940s, the BIA has consistently addressed when larceny convictions constitute crimes involving moral turpitude. Its abrupt change to a new rule that all but guarantees deportations of even lawful permanent residents for minor and nonviolent offenses upsets the legitimate expectations of individuals

like Mr. Obeya who negotiated a plea bargain against the background of the law at that time. For an individual rooted in the United States, deportation to a strange country (with no family to assist in acclimation or acculturation, and no job prospects) is an undeniably draconian consequence. The BIA should not be able to visit that consequence on a petitioner by abruptly changing settled law.

III. New York Petit Larceny Is Not a Crime Involving Moral Turpitude, and the Removal Proceedings Against Mr. Obeya Should Be Terminated

This Court should terminate the removal proceedings against Mr. Obeya because his nonviolent petit larceny conviction cannot permissibly serve as a predicate for removal. Whether applying the BIA's longstanding, pre-*Diaz-Lizarraga* precedent or the impermissibly retroactive new "substantial erosion" standard, New York's petit larceny misdemeanor statute, by its express terms, does not categorically involve moral turpitude because it lacks the requisite intent.

A. The BIA Concedes That Mr. Obeya Is Not Removable Under Its Longstanding Precedent Prior to *Diaz-Lizarraga*

As the BIA acknowledges, under the plain language of New York's petit larceny statute, a conviction for that crime does not require proof of the intent to permanently deprive or appropriate.[10] Therefore, considered under the BIA's decades-old precedent, the petit larceny statute on its face does not categorically

[10] "A person is guilty of petit larceny when he steals property. Petit larceny is a class A misdemeanor." N.Y. PENAL LAW § 155.25 (SA14).

describe a crime involving moral turpitude. In New York, a person "commits larceny when, with [the] ***intent to deprive*** another of property ***or to appropriate*** the same . . . , he wrongfully takes, obtains or withholds such property from an owner." N.Y. PENAL LAW § 155.05(1) (SA13) (emphasis added). Thus, the two essential elements of any New York larceny conviction are a "wrongful taking" of property and "larcenous intent," which can be satisfied either by proof of the "intent to deprive . . . ***or*** appropriate." *See People v. Jennings*, 504 N.E.2d 1079, 1086 (N.Y. 1986) (emphasis added); *see also* N.Y. PENAL LAW § 155.25 (SA14).

Deprive and appropriate are also defined. "To 'deprive' another of property means (a) to withhold it . . . from him permanently or for so extended period . . . that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner . . . as to render it unlikely that an owner will recover such property." N.Y. PENAL LAW § 155.00(3) (SA11). "To 'appropriate' property of another to oneself . . . means (a) to exercise control over it . . . permanently or for so extended a period . . . as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself . . . . " *Id.* at § 155.00(4) (SA12).

There are therefore six possible larcenous intents. The intent to "deprive" includes the intent (1) to permanently deprive; (2) to deprive for "so extended a period of time;" and (3) to wrongfully dispose of property in a manner that renders

it unlikely that the owner will recover it. Intent to "appropriate" also includes the intent to (1) permanently deprive and (2) deprive for "so extended a period of time," but its third definition is unique, and it includes (3) the simple disposition "of the property for the benefit of oneself."[11]

As the BIA concedes, all but the first listed definitions for both "deprive" and "appropriate," by their express and unambiguous terms, encompass intents that are less than permanent. In *Matter of Diaz-Lizarraga*, the BIA examined Arizona's statutory definition of deprive—in connection with Arizona's shoplifting statute—which like New York's statutory definition, tracks the Model Penal Code. *See* 26 I&N Dec. at 851–52, 854; *Matter of Obeya*, 26 I&N Dec. at 859–60 (SA4–SA5). The BIA then acknowledged that Arizona's near identically worded statute "does not require the accused to intend a *literally* permanent taking." *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852 (emphasis in original). Thus, the only way the BIA could find Diaz-Lizarraga removable was for it to abandon seven decades

[11] The disposition of property in subpart (b) of "appropriate" is different from its counterpart in "deprive." Subpart (b) of "appropriate" does not require the disposition to occur "under such circumstances as to render it unlikely that an owner will recover such property." *Compare* N.Y. PENAL LAW § 155.00(3) (SA11), *with id.* at § 155.00(4) (SA12). When legislatures use an express term in one part of a statutory section and omit that term from other parts, that term should not be read into sections from which it was excluded. *West Coast Truck Lines, Inc. v. Arcata Cmty. Recycling Ctr., Inc.*, 846 F.2d 1239, 1244 (9th Cir. 1988).

of its consistent precedent, which had required the intent to permanently deprive. The BIA made this abrupt departure from its precedent because Arizona's definition of deprive, which is nearly identical to New York's definition, "requires an intent to deprive . . . permanently or under circumstances where the owner's property rights are substantially eroded." *Id.* at 854.[12] It therefore encompassed conduct that was not categorically a crime involving moral turpitude as defined by the BIA's prior standard.

Implicit in *Diaz-Lizarraga*'s new substantial erosion standard is that the intent to "deprive for so extended a period of time" and the intent to "dispose of the property in such manner . . . as to render it unlikely that an owner will recover [it]" do not rise to the level of moral turpitude required for removal before *Diaz-Lizarraga*. Like Arizona, the New York Penal Law encompasses both of these intents. *See* N.Y. PENAL LAW § 155.00(3)(a)–(b) (SA11); 155.00(4)(a) (SA12); *Matter of Obeya*, 26 I&N Dec. at 859–60 (SA4–SA5) (The New York definitions "require a showing of a permanent deprivation ***or*** substantial erosion." (emphasis added)). As a result, New York law also encompasses conduct that does not categorically involve moral turpitude.

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[12] "Substantial erosion" therefore encompasses the intent (1) to permanently deprive; (2) to deprive for "so extended a period of time;" and (3) to dispose of property in a manner that renders it unlikely that the owner will recover it. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 851, 854.

Even more compelling, the BIA outright admits that New York's subsection (b) statutory definition of "appropriate"—absent from Arizona's Revised Statutes—fails to even satisfy its new *Diaz-Lizarraga* standard. *Matter of Obeya*, 26 I&N Dec. at 860 (SA5) ("[T]he plain language of this section standing alone, does not require a showing that a permanent deprivation ***or*** substantial erosion of property rights was intended." (emphasis added)). Consequently, if New York larceny convictions are not categorically crimes involving moral turpitude under the broader *Diaz-Lizarraga* standard, they certainly were not removable offenses when Mr. Obeya agreed to plead guilty to misdemeanor petit larceny almost eight years ago.

Nor do New York's judicial interpretations of the statute require a different result. The Court of Appeals of New York, as will be explained in greater detail in Section III.B *infra*, has interpreted convictions pursuant to the statutory definition of "deprive" and the subsection (a) definition of "appropriate" to require the intent "to exert permanent ***or*** virtually permanent control over the property taken." *Jennings*, 504 N.E.2d at 1086 (emphasis added). By its very definition, "virtually

permanent" is less than the "*literally* permanent" intent the BIA required under its former standard. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852.[13]

B. Mr. Obeya Is Not Removable Under an Impermissible Application of *Diaz-Lizarraga*

As referenced above, in *Matter of Obeya*, the BIA concedes that New York's subsection (b) statutory definition of "appropriate"—the simple disposition "of the property for the benefit of oneself or a third person"—does not state the requisite intent even under its new *Diaz-Lizarraga* standard. "[T]he plain language of this section standing alone, does not require a showing that a permanent deprivation ***or*** substantial erosion of property rights was intended." *Matter of Obeya*, 26 I&N Dec. at 860 (SA5) (emphasis added). And under the categorical approach, it is the minimum conduct theoretically required for conviction that determines whether the crime of conviction is one involving moral turpitude. *See Descamps v. United States*, 133 S.Ct. 2276, 2281, 2283 (2013). Consequently, the BIA's own analysis establishes that New York's petit larceny statute, on its face, does not categorically define a crime involving moral turpitude.

The BIA attempts to avoid the plain meaning of the statute by citing New York Court of Appeals cases that discuss how some elements of larcenous intent

[13] At most, the New York Court of Appeals' formulation simply repeats the permanent and for "so extended a period of time" intents already included in the New York Penal Law.

require the intent "to exert permanent or virtually permanent control over the property taken." *See Matter of Obeya*, 26 I&N Dec. at 860 (SA5) (quoting *People v. Medina*, 960 N.E.2d 377, 382 (N.Y. 2011); *Jennings*, 504 N.E.2d at 1086). But the cited New York Court of Appeals cases do not discuss, much less interpret, the subsection (b) definition of "appropriate," and so provide no support for the BIA's conclusion.

While New York larceny cases have cited the seminal case on larceny, *People v. Jennings*, for the proposition that larceny convictions require an intent to permanently or virtually permanently deprive pursuant to N.Y. Penal Law § 155.00(3) (SA11), those decisions do not support the BIA's position.[14] *See, e.g.*, *Medina*, 960 N.E.2d at 382. Indeed, at least one decision has recognized explicitly that a larceny conviction can be sustained without proof of an intent to permanently deprive the victim of property. *See People v. Wright*, No. 94K043854, 2006 WL 1068656, at *3 (N.Y. Crim. Ct. Apr. 24, 2006) ("A person may be convicted of a larceny ***even if evidence does not establish an intent to steal*** as long as he or she takes property belonging to another without the owner's

[14] The relevance of New York state case law interpreting the elements of larceny is questionable in light of the Supreme Court's decision in *Descamps*. 133 S. Ct. at 2291 ("We may reserve the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it.").

consent." (emphasis added)). Of more immediate significance, however, neither *Jennings* nor any other available authority addresses or interprets the subsection (b) definition of "appropriate."

In *Jennings*, there was no need for the Court to address subpart (b) of "appropriate" because, as the Court acknowledged, there was "no indication that defendants [in that case] intended to 'dispose of the property.'" *Jennings*, 504 N.E.2d at 1090 n.10. The "alternative theory of larcenous intent," subsection (b) of "appropriate," was therefore "unavailable to the prosecution." *Id*. Subsection (b) is mentioned nowhere else in the majority opinion other than when the Court provides the full statutory definition—and the Court's added emphasis on subsection (a) in the definition makes clear that the opinion did not interpret subsection (b). *Id.* at 1086. Throughout the remainder of the opinion, the *Jennings* Court only referenced the statutory language from subsection (a) in connection with the intent to permanently ***or*** virtually permanently deprive. *See, e.g.*, *id.* at 1087, 1090; *see also id.* at 1094–97 (Simons, J., dissenting) (disagreeing with the majority's interpretation of subsection (a) and never once referencing subsection (b)). Similarly, subsequent opinions that reiterate the intent to permanently ***or*** virtually permanently deprive do not address subsection (b). *See, e.g.*, *Medina*, 960 N.E.2d at 382 (only referring to subsection (b) in the general statutory

definition); *see also People v. Guzman*, 68 A.D.2d 58, 62 (N.Y. 1st Dep't 1979) (omitting subsection (b) from its discussion on larcenous intent).

Though New York courts are silent on the language of subsection (b), guidance on that language is available in case law interpreting Connecticut's identically-worded larceny statute. In *State v. Wieler*, the Supreme Court of Connecticut held that defendants can be convicted of larceny by embezzlement without the intent to permanently deprive. 660 A.2d 740, 741–42 (Conn. 1995). In doing so, the Court noted that the intent to permanently deprive "is only one of two alternative [definitions for appropriation] . . . . The other alternative requires disposal of the property without the intent permanently to deprive the victims of their property." *Id.* Like New York's larceny statute, the "alternative" that does not require an intent to permanently deprive is set forth in the second definition of appropriate: "to dispose of the property for the benefit of oneself or a third person." *Compare* CONN. GEN. STAT. § 53a-118(a)(4)(B) (SA8) *with* N.Y. PENAL LAW § 155.00(4)(b) (SA12) (identically worded statute).

The Court of Appeals for the First Circuit affirmed this interpretation of Connecticut's larceny statute in the immigration context. In *Patel v. Holder*, the Court of Appeals held that the BIA made improper inferences from petitioner's plea colloquy and remanded petitioner's removal proceeding to the BIA. 707 F.3d at 83. The Court acknowledged that "'to appropriate' has two meanings . . . . The

latter form of appropriation requires that the defendant have acted ***without*** the intent to cause a permanent deprivation." *Id.* at 80 (emphasis in original). Thus, the court held that petitioner's conspiracy to commit larceny in the fourth degree conviction was not categorically a crime involving moral turpitude.

In light of the BIA's admission that the statute's plain language does not categorically encompass a crime involving moral turpitude, the lack of New York case law interpreting subsection (b) of "appropriate," and the judicial interpretations of "appropriation" in cases concerning Connecticut's identically-worded larceny statute, this Court should terminate the removal proceedings against Mr. Obeya. Under the categorical approach, Mr. Obeya's guilty plea to misdemeanor petit larceny is not categorically a crime involving moral turpitude.

CONCLUSION

For the foregoing reasons, Mr. Obeya respectfully requests that this Court grant his petition to terminate the removal proceedings. In the alternative, Mr. Obeya respectfully requests the Court to remand the case to the BIA for further proceedings consistent with its longstanding former rule that larceny is categorically a crime of moral turpitude only if it is committed with an intent to commit a permanent taking.

Dated: May 10, 2017

Respectfully submitted,

/s/ Richard Mark

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16-3922

United States Court of Appeals

for the

Second Circuit

CLEMENT OBEYA,

Petitioner,

v.

JEFFERSON B. SESSIONS III, U.S. ATTORNEY GENERAL

Respondent.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

SPECIAL APPENDIX

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SPECIAL APPENDIX

Matter of Clement OBEYA, Respondent

Decided November 16, 2016

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Petit larceny in violation of section 155.25 of the New York Penal Law, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded, is categorically a crime involving moral turpitude. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), followed.

FOR RESPONDENT: Richard W. Mark, Esquire, New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY: Brian J. Counihan, Assistant Chief Counsel

BEFORE: Board Panel: PAULEY, WENDTLAND, and GREER, Board Members.

PAULEY, Board Member:

In a decision dated March 13, 2012, an Immigration Judge denied the respondent's motion to terminate proceedings and ordered him removed from the United States. We dismissed the respondent's appeal on August 7, 2012. The United States Court of Appeals for the Second Circuit granted the respondent's petition for review and remanded the case for us to determine, in the first instance, whether the respondent's conviction for petit larceny is for a crime involving moral turpitude.[1] *Obeya v. Holder*, 572 F. App'x 34 (2d Cir. 2014). The respondent's appeal will be dismissed.

I. FACTUAL AND PROCEDUAL HISTORY

The respondent is a native and citizen of Nigeria who was admitted to the United States on August 12, 2004, as a lawful permanent resident. In 2008 he was convicted in the County Court of Albany, New York, of petit larceny in violation of section 155.25 of the New York Penal Law, for

[1] On December 9, 2013, we denied the respondent's untimely motion to reopen proceedings. The denial of the respondent's motion was not referenced in the Second Circuit's remand order, and the issue is not now before us.

which he was sentenced to 3 years of probation. After a violation of his probation in 2011, he was resentenced to imprisonment for 10 months.

In November 2008, the Department of Homeland Security ("DHS") charged the respondent with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2006), as an alien who has been convicted of a crime involving moral turpitude that was committed within 5 years of admission, for which a sentence of 1 year or longer may be imposed. The Immigration Judge determined that the respondent is removable and ordered him removed to Nigeria.[2]

II. ISSUE

The issue in this case is whether a violation of the New York petit larceny statute, which has a scienter element that requires less than an intent to permanently deprive the owner of the right to his or her property, is a crime involving moral turpitude. We review this question of law de novo. 8 C.F.R. § 1003.1(d)(3)(ii) (2016).

III. ANALYSIS

Under section 237(a)(2)(A)(i) of the Act, an alien is removable if he or she has been convicted of a crime involving moral turpitude committed within 5 years after the date of admission, for which a sentence of 1 year or longer may be imposed. We have stated that 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." *Matter of Leal*, 26 I&N Dec. 20, 25 (BIA 2012) (quoting *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, 553 (BIA 2011)). Further, a finding of moral turpitude requires that a perpetrator have committed the reprehensible act with some form of scienter. *Matter of Silva-Trevino*, 26 I&N Dec. 826, 828 n.2, 833–34 (BIA 2016) (citing *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 & n.5 (A.G. 2015)). We have also long held that a theft offense only involves moral turpitude if it is committed with the intent to permanently deprive the owner of property. *See, e.g.*, *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

In its brief on remand, the DHS contends that we should abandon the distinction between temporary and permanent takings when determining whether a theft or larceny offense involves moral turpitude. According to

[2] The Immigration Judge did not clearly err in finding that the respondent's relevant date of admission is August 12, 2004, and that his conviction is based on conduct that occurred within 5 years after that date.

the DHS, such a distinction is unnecessary and impractical and has created confusion among the Federal courts of appeals because there are myriad larceny charges encompassed by the more than 50 State penal laws enforced in the country. In his reply brief, the respondent argues that we should conclude, consistent with more than seven decades of precedent, that only larceny offenses requiring an intent to permanently deprive the owner of property should constitute crimes involving moral turpitude.

The respondent's conviction was under section 155.25 of the New York Penal Law, which provides in pertinent part:

> A person is guilty of petit larceny when he steals property.

Other sections of the New York Penal Law further describe the offense of petit larceny. Section 155.05(1) defines the term "larceny" as follows:

> A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

In turn, section 155.00(3) defines the term "deprive" as follows:

> To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

As an initial matter, we conclude that we are not precluded here from applying *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), which is published as a companion to this case and revisits our precedent decisions concerning the requisite intent for larceny crimes in the context of a crime involving moral turpitude. The Second Circuit's remand order in this case stated that "under [Board] precedent larceny constitutes a [crime involving moral turpitude] ""only when a permanent taking is intended,""" quoting its prior decision in *Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2007) (quoting *Matter of Grazley*, 14 I&N Dec. at 333). *Obeya*, 572 F. App'x at 35. Nonetheless, the court did not decide, either in its published disposition in *Wala* or its unpublished remand order in this case, whether the distinction between temporary and permanent takings is a necessary one in the context of a crime involving moral turpitude. Instead, in *Wala* the Second Circuit noted that the Board "recently suggested that whether this distinction [between a permanent and temporary taking] actually exists is an open question." *Wala*, 511 F.3d at 106 (citing *Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006)). The court further acknowledged that the Board is

"free to reconsider its view of what types of larcenies amount to [crimes involving moral turpitude]" and stated that it expressed "no position . . . on whether any such change in position would be entitled to or receive deference." *Id.*

In *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 852–53, we determined that a theft offense may be found to categorically involve moral turpitude even if it does not require the accused to intend a literally permanent taking. We held, instead, that an offense qualifies as a categorical crime involving moral turpitude if it "embodies a mainstream, contemporary understanding of theft, which requires an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." *Id.* at 854. We concluded that Arizona's shoplifting statute, the relevant portion of which closely tracks the Model Penal Code, embodies this mainstream, contemporary understanding of theft and accordingly defines a categorical crime involving moral turpitude.[3]

The New York larceny statute, which requires an intent to "deprive," largely tracks the Model Penal Code formulation. However, it differs from many other State statutes because it may also be violated with an intent to "appropriate" property. Section 155.00(4) of the New York Penal Law provides:

> To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

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[3] The Model Penal Code definition of theft and the Arizona shoplifting statute at section 13-1805(A) of the Arizona Revised Statutes require that the accused have an intent to deprive an owner of property. Section 223.0(1) of the Model Penal Code defines the term "deprive" as

> (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

In addition to Arizona, 18 other States have adopted the Model Penal Code's definition of "deprive." Five other States, including New York and Connecticut, essentially track the Model Penal Code, omitting solely the mental state regarding the intent to restore the property only upon payment of a reward or some other compensation. *See, e.g.*, Conn. Gen. Stat. § 53a-118(a)(3) (West 2016); N.Y. Penal Law § 155.00(3) (McKinney 2016); *see also Matter of Diaz-Lizarraga*, 26 I&N Dec. at 851–52 & nn.4–8 (collecting statutes and cases).

On its face, New York's definition of the term "appropriate" in section 155.00(4)(a) appears very similar to the definition of "deprive" in section 155.00(3)(a). Both definitions require that "the major portion of [the property's] economic value or benefit" is either lost to the owner because the offender deprived him or her of it, or acquired by the offender through appropriation. Section 155.00(4)(a) would therefore likely require a showing of a permanent deprivation or substantial erosion of property rights, as articulated in *Matter of Diaz-Lizarraga*.

However, in defining the term "appropriate," section 155.00(4)(b)—which requires disposal of the property for the benefit of the accused or a third person—does not address the duration or extent of the requisite intended loss to the owner. Therefore the plain language of this section, standing alone, does not require a showing that a permanent deprivation or substantial erosion of property rights was intended. We nevertheless conclude that this reading of the statute, which the respondent urges on appeal, is foreclosed by New York's case law.

Notwithstanding the language of section 155.00(4)(b), New York's highest court has determined that a conviction for larceny requires proof of an intent "to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof." *People v. Medina*, 960 N.E.2d 377, 382 (N.Y. 2011) (emphases omitted) (quoting *People v. Jennings*, 504 N.E.2d 1079, 1086 (N.Y. 1986)) (internal quotation marks omitted); *see also, e.g.*, *People v. Parker*, 466 N.Y.S.2d 700, 702 (N.Y. App. Div. 1983) (finding no larcenous intent where there was no evidence of intent to permanently or virtually permanently appropriate the property or deprive the owner of the use of the property, "as distinguished from a 'borrowing' type of intent to obtain temporary use or cause temporary loss" (emphasis omitted) (quoting Arnold D. Hechtman, Practice Commentaries (McKinney's Cons. Laws of N.Y., Book 39, Penal Law, § 160.00, at 195))); *People v. Guzman*, 416 N.Y.S.2d 23, 25–26 (N.Y. App. Div. 1979) ("The people are required to prove that there was a specific intent to steal, and the act must contemplate such a permanent appropriation of the property. A temporary taking will not establish the larcenous intent.").

Although the respondent cites several cases in support of his argument that a violator can be convicted of New York larceny without a showing that he or she intended a permanent or virtually permanent deprivation, none of them is persuasive. One citation is to the dissent in *Jennings*, which, while forcefully articulating the respondent's position, is not controlling here because it is directly opposed to the majority opinion in that binding case. *People v. Jennings*, 504 N.E.2d at 1095 (Simons, J.,

dissenting in part). Two other citations are to cases that construe Connecticut's larceny statute—not New York's. *Patel v. Holder*, 707 F.3d 77, 80 (1st Cir. 2013) (addressing sections 53a-118(a)(4) and 53a-119(1) of the Connecticut General Statutes); *State v. Wieler*, 660 A.2d 740, 741–42 (Conn. 1995) (same). We acknowledge that the text of the relevant Connecticut statutes is similar to that of the New York statutes. However, the State courts' interpretations of their statutes—not the language of those statutes—are dispositive here.

Unlike Connecticut courts, whose case law permits a larceny conviction without the intent to cause a permanent deprivation, New York courts have long held that larceny requires proof of intent to permanently or virtually permanently appropriate property or deprive the owner of the use of property.

IV. CONCLUSION

Applying the holding in *Matter of Diaz-Lizarraga* to the facts of this case, we conclude that the respondent's offense—which requires proof of the intent to permanently or virtually permanently deprive an owner of property—satisfies the requirement of an intent to deprive the owner of his property either permanently or under such circumstances that the owner's property rights are substantially eroded. It is therefore categorically a crime involving moral turpitude. The Immigration Judge properly determined that the respondent is removable under section 237(a)(2)(A)(i) of the Act for having been convicted, within 5 years of the date of his admission, of petit larceny in violation of section 155.25 of the New York Penal Law, for which a sentence of 1 year or longer may be imposed. Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

Ariz. Rev. Stat. § 13-1801(A)(4)

"Deprive" means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation or to transfer or dispose of it so that it is unlikely to be recovered.

Conn. Gen. Stat. § 53a-118(a)(4)(B)

To "appropriate" property of another to oneself or a third person means (A) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (B) to dispose of the property for the benefit of oneself or a third person.

Conn. Gen. Stat. § 53a-119

A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner.

NB: Unreferenced portions of statutory text omitted

INA § 237(a)(2)(A)(i), codified at 8 U.S.C. § 1227(a)(2)(A)(i)

(a) 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.

N.Y. Penal Law § 155.00(3)

"Deprive." To "deprive" another of property means (a) to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

N.Y. Penal Law § 155.00(4)

"Appropriate." To "appropriate" property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, permanently or for so extended a period or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

N.Y. Penal Law § 155.05(1)

A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

N.Y. Penal Law § 155.25

A person is guilty of petit larceny when he steals property.

Petit larceny is a class A misdemeanor.

CERTIFICATE OF SERVICE

I hereby certify that on Wednesday, May 10, 2017, an electronic copy of the foregoing Brief for Petitioner and Special Appendix was filed with the Clerk of the Court using this Court's CM/ECF system.

I further certify that the foregoing brief was served electronically via the Court's CM/ECF system by Notice of Docket Activity, and via Electronic Mail to:

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