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

REPLY BRIEF FOR PETITIONER CLEMENT OBEYA

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PRELIMINARY STATEMENT

Petitioner's opening brief established that the Board of Immigration Appeals' (the "Board" or "BIA") remand decision erred in holding that New York State petit larceny is categorically a crime involving moral turpitude and a sufficient predicate for removal. In opposition, Respondent offers irrelevant *Chevron* claims coupled with erroneous presentations of this matter's remand order, the BIA's own precedent, and New York state law. First, Respondent argues that because the BIA is owed *Chevron* deference with regards to its new interpretation of the Immigration and Nationality Act ("INA"), this Court must defer to the retroactive application of that interpretation to Petitioner. But neither the BIA's misreading of New York's criminal law nor the improper retroactive application of its new rule are afforded any kind of deference. Second, Respondent attempts to protect the Board's decision to discard decades of precedent by mischaracterizing this Court's mandate as a general remand, giving the BIA carte blanche to apply a completely new standard in Petitioner's long-running case. The Court's mandate told the BIA on remand to consider the case "under BIA precedent," and the BIA improperly exceeded that constraint. Third, Respondent cannot explain why its new rule should be given retroactive effect. None of the factors in the five-factor retroactivity test favor Respondent, and Respondent's mischaracterization of the underlying law does not change that.

This Court should grant Mr. Obeya's petition to terminate the removal proceedings. In the alternative, this Court should remand the case to the BIA for further proceedings consistent with its longstanding former rule that larceny involves moral turpitude only if it is committed with an intent to commit a permanent taking.

ARGUMENT

I. *Chevron* Deference Plays No Role In Mr. Obeya's Appeal.

Respondent's "Counterstatement of the Issues" sets up *Chevron* deference as the controlling question on this Petition for Review. But the legal issues actually presented by Mr. Obeya's Petition have nothing to do with *Chevron* deference. Petitioner has not challenged the BIA's right to announce new administrative rules (pursuant to delegated authority) founded upon well-reasoned explanations or that courts give *Chevron* deference to such pronouncements. It is therefore surprising that Respondent devoted one-third of its legal argument to proving the proposition of *Chevron* deference. The argument is a distraction that this Court should ignore.

This Petition challenges the BIA's retroactive application of a concededly new rule and argues that petit larceny convictions in New York do not categorically involve moral turpitude under either the BIA's old rule (which should

be the framework for analysis) or the new rule.[1] Neither of these legal issues involves a question of deferring to the BIA's administrative expertise. First, courts determine "the retroactive effect of legal rules *de novo* without giving any deference to the agency on that question." *Velásquez-García v. Holder*, 760 F.3d 571, 578–79 (7th Cir. 2014) (deferring to the BIA's newly devised rule under *Chevron* but finding retroactive application unjust); *see also INS v. St. Cyr*, 533 U.S. 289, 320–21, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." (internal citations omitted)). Second, courts "review *de novo* whether [an immigrant's] conviction . . . under [a state's criminal law] falls within" what the BIA defines as a crime involving moral turpitude. *Wala v. Mukasey*, 511 F.3d 102, 105 (2d Cir. 2007) ("[T]he BIA has no expertise in construing . . . state *criminal* statutes. . . ." (emphasis in original)). The government's *Chevron* argument is thus beside the point. Even assuming that the BIA's new "substantial erosion" rule introduced in *Matter of Diaz-Lizarraga* is entitled to deference as an interpretation of the INA, that does not constrain this

[1] Petitioner also argues that the BIA exceeded this Court's remand mandate, but that argument does not intersect with Respondent's misuse of *Chevron* deference.

Court's review of either the BIA's improper retroactive application of the new rule, or the BIA's erroneous construction of New York state law as stated in *Matter of Obeya*.

II. This Court's Mandate Required the BIA on Remand to Apply its Existing Precedent.

In its brief, Respondent argues that this Court's mandate left the BIA free to develop and apply a completely new standard that, in this case, yields an outcome opposite from that which would have happened under the BIA's previous precedent. Resp. Br. at 21 ("The Board was free to determine whether Mr. Obeya's conviction under NYPL § 155.25 was a crime involving moral turpitude applying the analysis and case law it deemed most relevant."). What the BIA did, however, exceeded the scope of this Court's remand order. Had the BIA obeyed the mandate and applied its existing precedent (not its newly minted rule), the removal proceeding would have terminated.

Appellate courts have the authority to grant either general or limited remand. BETH BATES HOLIDAY, 12A CYC. OF FED. PROC. § 52:1 (3d ed.). When a court "convey[s] clearly its intent to limit the scope of the [tribunal's] review," anything outside that scope is considered decided as the law of the case. *Id.* The ultimate arbiter of the scope of the mandate is the appellate court that issued it. *Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015).

This Court's remand to the BIA was specific, not general. It read: "*For the foregoing reasons*, the petition for review is GRANTED, and the case REMANDED to the BIA for further proceedings." *Obeya v. Holder*, 572 F. App'x 34, 35 (2d Cir. 2014) (emphasis added). Those "foregoing reasons" limited the scope of further proceedings the Board could permissibly undertake, and were as follows: Mr. Obeya's immigration judge erroneously held that "any type of larceny or theft offense . . . constitutes a crime involving moral turpitude." *Id.* (internal quotation marks omitted). The Board erred in affirming that ruling "because, as we have observed, under BIA precedent larceny constitutes a CIMT 'only when a permanent taking is intended.'" *Id.* (internal quotation marks and citation omitted). Instead of correcting that error in the application of "BIA precedent," however, the Board ignored "BIA precedent" in favor of an entirely new standard. Not only did that approach impermissibly exceed the scope of this Court's mandate; the BIA relied on the new rule to uphold Petitioner's removal.

The cases Respondent cites do not suggest a different conclusion. General remand orders do not carry the same limitations as specific remand orders like the one issued to the BIA here. Therefore, *United States v. Salameh*, in which this Court issued a general remand order "permitt[ing] the [district c]ourt to entertain whatever collateral attacks . . . defendants wished to present," is inapposite. 84 F.3d 47, 49 (2d Cir. 1996).

Respondent relies on *Sompo Japan Insurance Co. v. Norfolk Southern Railway Co.*, 762 F.3d 165, 176 (2d Cir. 2014) as support for the BIA's application of its own new law to Mr. Obeya's case on remand. There is, however, no comparison between Mr. Obeya's case and the "utterly implausible" reading of the mandate rejected by the *Sompo Japan* Court. In *Sompo Japan*, the case was remanded for further proceedings in light of a United States Supreme Court ruling that changed the state of the law while the appeal was pending, making claims that were previously preempted available to the plaintiffs. *Id.* at 172. On remand, the district court was instructed to consider the newly-available claims in the first instance. After reinstating the claims, the district court allowed the defendants to also raise applicable defenses. *Id.* at 175–76. On appeal, plaintiffs argued that the remand order "required the district court to consider only plaintiffs' 'further grounds' for relief, and not any defenses the [defendants] might have to those grounds." *Id.* at 176. The Court rejected that argument, concluding that a remand that allowed consideration of new claims could not be read to deny defendants an opportunity to respond fully to those claims. *Id.*

The remand in this case was for the purpose of having the BIA consider and properly apply its existing precedent to Mr. Obeya's case. There was no issue, as in *Sompo Japan*, of remanding to allow an inferior tribunal to address issues that could be newly raised based on new Supreme Court authority. Petitioner is not

seeking to restrict the BIA's ability to respond to changes in the law. Rather, Petitioner requests this Court to enforce its mandate that directed the BIA to correct its error of law in failing to apply its existing precedents.

That the BIA is an agency with its own rulemaking power does not authorize it to disregard this Court's mandate. *See, e.g.*, *Reich v. Contractors Welding*, 996 F.2d 1409, 1414 (2d Cir. 1993). While the BIA is, of course, generally entitled to *Chevron* deference in interpreting the law it is charged to administer, in this instance that is beside the point. This Court's remand resolved, as a matter of the law of the case, all issues except those which were articulated for remand. The remand ordered further proceedings to address an error of law, which was specifically identified as the failure to apply BIA precedent holding that larceny constitutes a crime involving moral turpitude only when a permanent taking is intended. *Obeya*, 572 F. App'x at 35. The Board cannot be allowed to invoke its rulemaking power to establish new, self-created law that allows it to avoid what it may consider the undesirable result of correcting that error. To hold otherwise would effectively circumvent this Court's mandate.

The Court should hold as a matter of law that the BIA exceeded its mandate by applying the newly articulated *Diaz-Lizarraga* rule to Mr. Obeya's case on remand, rather than the BIA's then-existing precedent.

III. New York Petit Larceny is Not a Crime Involving Moral Turpitude.

A. Under the Pre-*Diaz-Lizarraga* Standard, New York Larceny Does Not Categorically Involve Moral Turpitude.

Nowhere in its brief does Respondent challenge the assertion that under the pre-*Diaz-Lizarraga* standard, Petitioner would not be removable for having pled guilty to New York petit larceny. As stated in Petitioner's opening brief, New York larceny does not require proof of the intent to literally permanently deprive or appropriate, but can be satisfied by other intents. *See* Pet. Br. at 29–34.

The New York larceny statute encompasses six possible larcenous intents between the intent to deprive and the intent to appropriate. Pet. Br. at 30–31; *see also* NYPL §§ 155.00(3), (4); 155.25.[2] All but two of these intents describe something other than the intent to permanently deprive. The BIA concedes as much in *Diaz-Lizarraga* by acknowledging that Arizona's nearly identically worded statute "does not require the accused to intend a *literally* permanent taking," 26 I&N Dec. 847, 852 (BIA 2016) (emphasis in original), and in *Obeya*, by admitting that even the *Diaz-Lizarraga* standard does not encompass the

[2] As explained in Mr. Obeya's opening brief, there are "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.'" Pet. Br. at 30–31.

subsection (b) definition of appropriate. *Matter of Obeya*, 26 I&N Dec. 856, 860 (BIA 2016) ("[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)).

Even the New York cases that Respondent repeatedly cites support Petitioner.[3] *See, e.g.*, *People v. Jennings*, 504 N.E.2d 1079, 1086 (N.Y. 1986); (stating that the definitions of deprive and appropriate "connote a purpose to exert permanent *or virtually permanent* control over the property taken . . ." (emphasis added)). If Respondent is correct, and New York case law reads in a "permanent or virtually permanent" intent requirement, "virtual permanence" falls short of the "literally" permanent intent BIA precedent required under the old rule. *See Diaz-Lizarraga*, 26 I&N Dec. at 852–53; *id.* at 853–54 (stating that precedent "does not provide [the BIA] with good reasons to persist in the rule that moral turpitude requires a taking involving a *literally* permanent intended deprivation" (emphasis in original)). Because virtual permanence does not meet the literal permanence standard required by the pre-*Diaz-Lizarraga* rule for determining whether a crime

[3] Petitioner also contends that the case law does not address the second definition of "to appropriate" at all. That definition on its face does not require an intent to take property permanently, and no court decision says otherwise. *See infra* Section III.B.

involves moral turpitude, Petitioner's conviction cannot result in removal thereunder, even accepting Respondent's reading of the case law.

B. Applying The New *Diaz-Lizarraga* Standard, New York Larceny Is Still Not A Crime Involving Moral Turpitude.

Should the Court approve the BIA's retroactive application of the new *Diaz-Lizarraga* standard to this case, Petitioner is still not removable. Petitioner's opening brief demonstrated that New York petit larceny is not a crime involving moral turpitude even applying the new *Diaz-Lizarraga* standard because under NYPL § 155.00(4)(b), there is no requirement for an intended deprivation of property for any particular duration or extent. Instead, intent to "dispose of the property for the benefit of [the defendant] or a third person" can satisfy the element of larcenous intent. Pet. Br. at 34–38. And because it is the minimum theoretical conduct required for conviction that determines whether the crime is categorically one of moral turpitude, New York petit larceny on its face does not meet the required test of permanent taking. *See Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013).

Instead of addressing the argument regarding appropriation's "prong b" definition, Respondent simply repeated the BIA's over-generalization that "New York state courts have long held that the statutory definitions of both 'deprive' and 'appropriate' require an intended taking that is either permanent or virtually permanent." Resp. Br. at 25. Petitioner understands that the intent to permanently

or virtually permanently take is required in cases *based on intent to deprive or the first prong of "to appropriate."* But Petitioner does *not* concede—and Respondent does not address, let alone establish—that such a requirement applies to the second, "prong b," definition of "to appropriate." None of the cases Respondent relies upon even discuss the second definition of "to appropriate." *See, e.g.*, *Jennings*, 504 N.E.2d 1076; *People v. Medina*, 960 N.E.2d 377 (N.Y. 2011); *People v. Guzman*, 68 A.D.2d 58 (1st Dep't 1979); *Ponnapula v. Spitzer*, 297 F.3d 172 (2d Cir. 2002); *People v. Pauli*, 130 A.D.2d 389 (1st Dep't 1987); *People v. Brigante*, 186 A.D.3d 360 (1st Dep't 1992); *People v. Blacknall*, 472 N.E.2d 1034 (N.Y. 1984). Not one of these cases evaluated the evidence at issue to determine if it supported the element of an intent to "dispose of the property for the benefit of oneself or a third person."

It is therefore clear that a defendant in New York may be convicted of larceny absent a showing of the intent to permanently deprive or virtually permanently deprive an owner of property, or substantially erode an owner's interest in property.[4] And as discussed thoroughly above, the Board is entitled to no deference when it comes to its interpretation of New York law. *See supra*

[4] As discussed in Petitioner's opening brief at 37–38, such an interpretation is consistent with Connecticut law, which has a larceny statute worded virtually identical to the New York statute.

Section I; *see also infra* Section IV.A. This Court should therefore disregard Respondent's and the Board's analysis and hold that under the categorical approach, Mr. Obeya's guilty plea to misdemeanor petit larceny is not categorically a crime involving moral turpitude.

C. Petitioner Need Not Show a "Realistic Probability" of Conviction to Support A Finding that New York Larceny Is Not a Crime of Moral Turpitude.

Continuing its pattern of ignoring unfavorable law, Respondent would have this Court believe that "Mr. Obeya need[s] to demonstrate a realistic probability that an individual could be convicted in New York of violating NYPL § 155.25 without proof of an intended permanent or virtually permanent deprivation or appropriation of property." Resp. Br. at 27. First, "virtually permanent" played no role under the BIA's original rule, which required a "literally" permanent intent. *See Diaz-Lizarraga*, 26 I&N Dec. at 852; *Obeya*, 26 I&N Dec. at 857. Second, as the BIA itself has acknowledged—in a case Respondent itself cites to—the Second Circuit has "adopted the categorical approach based on Supreme Court precedent, without expressly addressing the realistic probability test" in the context of crimes involving moral turpitude. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 831–32 (BIA 2016) (noting that only four circuits have "adopted the realistic probability standard" and that the Third and Fifth Circuits have expressly "rejected the use of the realistic probability

test"). Thus, the pure categorical approach, not the "realistic probability" standard, should apply here.

But, assuming *arguendo* that the realistic probability standard did apply and the Court had to perform that further analysis, Petitioner satisfies the standard under both the BIA's old and new rules. The BIA acknowledges that its former rule required "the accused to intend a *literally* permanent taking." *Diaz-Lizarraga*, 26 I&N Dec. at 852 (emphasis in original). And according to Respondent's oft-repeated position, New York larceny cases require an intent to take property "permanent[ly] ***or virtually permanent[ly]***." *See, e.g.*, *Jennings*, 504 N.E.2d at 1086 (emphasis added). Thus, although the second appropriation definition—which has no intent to deprive element—may remain unsettled, Petitioner satisfies this standard because for virtual permanence to have meaning, it must be something less than literal permanence. Regarding the new *Diaz-Lizarraga* rule, Petitioner has demonstrated more than a realistic probability that conviction could lie for conduct not involving moral turpitude. *See supra* Section III.B.

IV. Respondent's Argument that *Diaz-Lizarraga* Should be Retroactively Applied is Meritless.

A. *Chevron* Deference is Irrelevant to the Question of Whether *Diaz-Lizarraga* Should be Retroactively Applied to Mr. Obeya.

Respondent turns again to *Chevron* to argue that this Court should defer to the BIA's retroactive application of the new *Diaz-Lizarraga* standard to Mr.

Obeya. Resp. Br. at 28–29. The Respondent's misguided reliance on *Chevron* here is a legally unsupportable attempt to tip the scales in Respondent's favor. As explained in Section I, *Chevron* has no place in a retroactivity analysis. Furthermore, *Chevron* is wholly irrelevant to this proceeding. Mr. Obeya has never questioned the BIA's authority to make a reasoned, prospective change to the meaning of "crime of moral turpitude" under the INA.

But, strip away the *Chevron* argument and Respondent cannot explain why *Diaz-Lizarraga* should be given retroactive effect. Indeed, Respondent attempts to do so by mischaracterizing the five-factor retroactivity analysis adopted by this and other circuits, *see, e.g.*, *Lugo v. Holder*, 783 F.3d 119, 121 (2d Cir. 2015) (setting forth the five factors that determine whether an agency decision may be applied retroactively); *Velásquez-García*, 760 F.3d at 580–81 (7th Circuit decision noting that the retroactivity test is also applied in the D.C., 5th, and 9th Circuits), and by relying upon case law that fails to support—and in some cases contradicts—its position.

B. Respondent Distorts the Legal Standard Governing the Analysis Under the First Factor.

First, with regards to the first factor, Respondent concedes that Petitioner's case is not one of first impression, but argues that this factor nevertheless "does not favor either party" because courts have previously presumed theft and larceny to be moral turpitude crimes. Resp. Br. at 30. Respondent's conclusion here is

inaccurate and misleading. Even if one were to agree with Respondent's claim that courts have previously presumed larceny crimes to categorically involve moral turpitude (a claim that is unsupported by the case law Respondent cites, *see infra* Section IV.D) this has no bearing on the analysis under the first factor. Courts have long recognized that retroactivity is disfavored where the issue presented is not one of first impression—that is, where the issue was confronted in an earlier adjudication but is now being applied in a case where the conduct at issue occurred *before* that earlier adjudication. The inquiry stops there. *See Velásquez-García*, 760 F.3d at 581 (stating that retroactivity is more likely to apply "in the case where [a new rule] is first announced (that is, to the parties involved in that case) than in later cases in which it might apply to conduct of others that took place before its announcement"). Because the issue presented in Petitioner's case is not one of first impression—as Respondent concedes—this factor weighs in Petitioner's favor, regardless of how prior courts have resolved this issue. *See Lugo*, 783 F.3d at 121 (finding that the first factor "clearly favors" the petitioner because the case is not one of first impression, notwithstanding an existing Circuit Court split).

C. The BIA Acknowledges in *Diaz-Lizarraga* and *Obeya* That It Is Departing From Its Preexisting Moral Turpitude Standard.

As for the second factor, Respondent claims that Petitioner "cannot reasonably argue that *Matter of Diaz-Lizarraga* and the Board's decision in his case represent an 'abrupt departure' from prior law or policy." Resp. Br. at 30.

Here, however, Respondent's contradictory assertions are undermined by the very points that it spends over eight pages of its opposition brief arguing: that the BIA's decision in *Diaz-Lizarraga* should be afforded *Chevron* deference *because* the BIA provided a well-reasoned explanation for why it was promulgating a *new* legal standard. *See* Resp. Br. at 15–22, 28–29. Indeed, Respondent even contends that "[the BIA] provided a reasoned explanation for its ***new standard*** and explained why the revision was warranted." Resp. Br. at 18 (emphasis added); *see also id.* at 2 ("Whether the Court should . . . not disturb the Board's determination that Mr. Obeya's conviction . . . is categorically a crime involving moral turpitude under its ***new standard*** . . . ." (emphasis added)). Moreover, Respondent repeatedly refers to the new rule announced in *Diaz-Lizarraga* as a "revised" standard no less than thirteen times throughout its opposition brief. *See id.* at 2, 13, 14, 17, 18, 20, 22, 33. Thus, by Respondent's very own admission, *Diaz-Lizarraga* represents an abrupt departure from the BIA's prior precedent.

Respondent's assertions are also further undermined by the BIA's own statements in *Obeya* and *Diaz-Lizarraga*, which Respondent conveniently ignores. In *Diaz-Lizarraga*, the BIA describes at length how its new interpretation of moral turpitude crimes is intended to conform with "new economic and social realities" that were not prevalent at the time that the BIA decided, in its "earliest days," 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." 26 I&N Dec. at 849; *see also Obeya*, 26 I&N Dec. at 857 ("We have . . . long held that a theft offense only involves moral turpitude if it is committed with the intent to permanently deprive the owner of property."). In explaining why it was overturning its own standard of seven decades' standing, the BIA stated that "from a modern perspective . . . our early jurisprudence *does not provide us with good reasons to persist in the rule* that moral turpitude requires a taking involving a literally permanent intended deprivation." *Diaz-Lizarraga*, 26 I&N Dec. at 849 (emphasis added). The BIA's own language in *Diaz-Lizarraga* shows beyond cavil that the BIA set forth a new interpretation of when larceny constitutes a moral turpitude crime. This departure from decades of BIA precedent confirms that the second factor favors Petitioner.

D. The Case Law Does Not Support Respondent's Claim that Petitioner Did Not Reasonably Rely on the BIA's Preexisting Moral Turpitude Standard.

Respondent goes on to claim that the third factor weighs in its favor because Mr. Obeya could not have relied on the BIA's old rule. In particular, Respondent argues that in several cases prior to *Diaz-Lizarraga*, "crimes of theft and larceny, however defined, [were] presumed to involve moral turpitude." Resp. Br. at 30. Respondent also emphasizes that prior BIA decisions have found that a conviction under NYPL § 155.25 constitutes a moral turpitude crime. Yet Respondent offers

only weak and inconsistent support for these claims. Indeed, Respondent repeatedly relies on cases that, at best, do little to support these contentions, and at worst, actually undermine the very arguments that Respondent seeks to advance.

First, Respondent points out that "long before" Mr. Obeya's May 2008 guilty plea the BIA presumed that ***all*** larceny crimes involved moral turpitude. But none of the cases Respondent cites actually support this sweeping proposition. *See* Resp. Br. at 32–33. Both *Chiaramonte v. INS*, 626 F.2d 1093, 1097 (2d Cir. 1980), and *Giammario v. Hurney*, 311 F.2d 285 (3d Cir. 1962), found that larceny always involves moral turpitude, but only in reference to common law larceny—which inherently involves the intent to permanently deprive—not a statutorily defined conviction, as is the case with Mr. Obeya. Neither of these cases refute the BIA's own decisions showing that the BIA has consistently treated larceny as a crime involving moral turpitude only when a permanent taking is intended. *See Obeya*, 26 I&N Dec. at 857 ("We have also long held that a theft offense only involves moral turpitude if it is committed with the intent to permanently deprive . . . ."). Respondent's claim that *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006), supports the proposition that the BIA has presumed theft and larceny to be moral turpitude crimes is inaccurate. Rather, the BIA's analysis of Pennsylvania's specific retail theft statute was based on a determination of whether *an intent to permanently deprive* could be presumed from the language of that retail theft

statute. *See id.* at 34 ("[W]e find that the nature of the [retail theft] offense is such that it is reasonable to assume that the taking is with the intention of retaining the merchandise permanently."). *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000), a case primarily discussing aggravated felonies, is similarly inapposite to Respondent's claim. *See* 22 I&N Dec. at 1350 n.12 ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.").

Brett v. INS, 386 F.2d 439 (2d Cir. 1967), *Savchuck v. Mukasey*, 518 F.3d 119 (2d Cir. 2008), and *Matter of Westman*, 17 I&N Dec. 50 (BIA 1979), also fail to support Respondent's position. Neither *Brett* nor *Savchuck* discuss at any length the question of whether a statutory conviction for larceny involves moral turpitude. *See, e.g.*, *Savchuck*, 518 F.3d at 122 (summarizing the contentions that Savchuck raised on appeal, which do not include a claim that the BIA erred in finding that his conviction for fourth degree grand larceny constituted a moral turpitude crime). *Matter of Westman*, on the other hand, involves passing a bad check, a separate crime for which the BIA requires "guilty knowledge" in order for it to involve moral turpitude. 17 I&N Dec. at 51. Additionally, the language of the Washington law at issue in *Westman* bears little to no resemblance to the New York larceny statute. *See id.*

Second, Respondent cites three unpublished BIA opinions to support the claim that the BIA has held, at least since 2004, that a conviction under N.Y. Penal Law 155.25 is categorically a crime of moral turpitude. *See Matter of Roman Arturo Gomez*, 2011 WL 6965228, at *1 (BIA Dec. 21, 2011); *Matter of Luis Manuel Germosen Nunez*, 2009 WL 2981799, at *1 (BIA Aug. 28, 2009); *Matter of Joseph Pierre*, 2004 WL 5537104, at *1 (BIA Jan. 31, 2004). None of these cases support Respondent's contention. The question of whether a conviction under NYPL 155.25 is categorically a moral turpitude crime was not before the court in *Joseph Pierre*—the oldest of the three unpublished opinions—because the petitioner there never appealed the Immigration Judge's ruling in that regard. With regards to *Arturo Gomez* and *Germosen Nunez*, those decisions were issued years after Mr. Obeya agreed to plead guilty. And in the context of an alien subjected to removal proceedings as a consequence of accepting a guilty plea, courts ask whether the alien could have reasonably relied on the preexisting rule *at the time that they pled guilty*. *See St. Cyr*, 533 U.S. at 322 ("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."); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 952 (9th Cir. 2007) (finding that the third factor favored the petitioner because he reasonably relied on the BIA's preexisting standard at the time that he entered his guilty plea, at which

time his conviction rendered his removal from a possible to almost certain outcome). Because *Arturo Gomez* and *Germosen Nunez* were decided after Mr. Obeya pled guilty, he could not have been on notice of—and therefore, could not have reasonably relied upon—these decisions.[5]

E. Respondent Cannot Provide a Compelling Explanation for Why the Fifth Factor Weighs In Its Favor.

With regards to the fifth factor, Respondent provides an abstract explanation for why the Government's interest in the "uniformity of immigration law" pushes this factor in Respondent's favor. There is nothing compelling about this explanation. Indeed, Respondent makes no effort to address how the Government could be negatively impacted by a decision not to apply *Diaz-Lizarraga* to Mr.

[5] In addition, both *Arturo Gomez* and *Germosen Nunez* relied on the now-vacated *Matter of Silva-Trevino* ("*Silva-Trevino I*"), 24 I&N Dec. 687 (A.G. 2008), to analyze whether a crime involved moral turpitude. *Silva-Trevino I* provided for an improper framework that ran contrary to Supreme Court precedent regarding how to conduct the categorical and modified categorical approach. *See Silva-Trevino III*, 26 I&N Dec. at 827–28 (explaining the vacatur of *Silva-Trevino I*). Moreover, *Arturo Gomez* misinterprets New York state law to conclude that petit larceny in New York categorically involves moral turpitude. As explained in Section III of Petitioner's opening brief, (1) New York cases have never addressed the second prong of the appropriation definition, which has no intent element, and (2) even if New York case law applied to the second prong, New York case law only requires a "permanent ***or virtually permanent***" intent. *See, e.g.*, *Jennings*, 504 N.E.2dat 1086 (emphasis added). However, as the BIA conceded in *Diaz-Lizarraga*, their old rule required "the accused to intend a *literally* permanent taking." 26 I&N Dec. at 852 (emphasis in original).

Obeya's case. *See De Niz Robles v. Lynch*, 803 F.3d 1165, 1180 (10th Cir. 2015) ("[I]t would still be hard to see [the BIA's 'abstract' interest] amounting to much, for the agency nowhere seeks to explain why it thinks its claimed interest in 'uniformity' is compelling."). In contrast, giving retroactive effect to *Diaz-Lizarraga* would have life-changing consequences for Mr. Obeya, and would deprive him of his fairer and more persuasive interest in maintaining the kind of uniformity that would allow him to benefit from the law as it was at the time that he pled guilty. *See id.* ("[A]ll petitioners should receive the benefit of the law as it existed at the time they made their administrative applications."). Accordingly, the fifth factor weighs in Petitioner's favor.

CONCLUSION

For the reasons set forth in Petitioner's opening brief and above, this Court should grant Mr. Obeya's 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.

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Respectfully submitted,

/s/ Richard Mark

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7) because the principal part of this brief contains 5,329 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, August 15, 2017, an electronic copy of the foregoing Reply Brief for Petitioner 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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