NO. 21-211109

IN THE

Supreme Court of the United States

Attorney General of the United States,
Petitioner,

v.

Nur Khat,
Respondent.

ON WRIT OF CERTIORARI TO THE
FOURTEENTH CIRCUIT COURT OF APPEALS

Issues on Writ of Certiorari:

1. Is Mr. Khat's claimed group a cognizable particular social group under 8 U.S.C. 1101(a)(42)(A)?
2. Does Mr. Khat's conviction under 42 U.S.C. § 408(a)(7)(B) qualify as a crime of moral turpitude?

****NOTE TO COMPETITORS:**

1. No cases decided, nor legislation, regulation, or agency policy enacted after November 9, 2021, may be cited or relied upon in either briefs or oral argument.

Names and Pronunciations

Shikor (She-coor): demonym Shikorian
Kajol (Ka-jol)
Duzza (Dooz-za)
Papia (Pa-p-ah)
Nur (Noor) Khat (Kah-aht), Mr. Khat

No. 9186-0480 _____

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Nur Khat

Appellant,

v.

Attorney General of the United States

Appellee.

ON APPEAL FROM BOARD OF IMMIGRATION APPEALS

Filed November 9, 2021

Before: Judges Adety, Sarkis, and Miller

Opinion by Judge Adety

Dissent by Judge Sarkis

ADETY, Circuit Judge, joined by MILLER, Circuit Judge:

I. Factual Background

Nur Khat grew up in the poor city outskirts of Kajol in the Duzza region of Shikor. Every week in his youth Mr. Khat would draw crude chalk murals on the sidewalks, streets, and sides of buildings in the city center. Over time, Mr. Khat became consumed with practicing his art. As he grew older, he broadened his art to graffiti and more traditional art on paper and canvas using natural dyes obtained from the factories where his family worked. Under the cover of night, Mr. Khat began drawing images of females standing proudly above kneeling males on the streets, sidewalks, and buildings of Kajol. In gauging the reactions of the people, he would see them spitting on his murals and throwing their food and drinks as they passed by. Mr. Khat persisted in his craft nonetheless and has since stated that he found his art to be his only outlet in expressing himself, his values, and his soul.

Mr. Khat's native country, Shikor, has conservative ideologies about the depiction of men and women, particularly the female form. Although there is no law punishing these depictions, they are harshly condemned throughout the country. In the Duzza region specifically, depictions of men in any form of subservience are strongly denounced. The Papia, a distinct subsect of the population, live in Shikor's Duzza region and maintain their own culture. Members of the Papia were the smallest but most aggressive group of people who would react to Mr. Khat's artwork, regardless of medium. In December of 2007, Papia people threw rocks and food at another artist while he was trying to protect his own mural. He suffered minor injuries and was taken to the hospital. In March 2008, Papia persons broke the windows and damaged a wall with sledgehammers of a building adorned with Mr. Khat's artwork. Fearing for his safety because of the artwork he had created, Mr. Khat immediately fled to the US and entered without authorization. Since Mr. Khat left Shikor, the Papia have grown into a large segment of the country's population, obtaining powerful leadership positions while condoning or acquiescing in violence towards art and artists that depict the men in any subservient manner.

Since entering the United States, Mr. Khat has made a concerted effort to be an upstanding citizen. Upon meeting a recruiter in the construction industry, he was given a social security number. The recruiter told him that having a social security number was standard procedure and necessary to procure employment. In addition, he was instructed to obtain an Individual Taxpayer Identification Number (ITIN), which he did. Soon after, he found work as a mason utilizing his new social security number and excelled due to his artistic acumen. Mr. Khat continued to paint in his free time under a pseudonym and gradually established a small following in the artistic community. Two years after his arrival, he met his wife and fathered one son and one daughter. Both children are citizens of the United States.

Mr. Khat used his ITIN to pay taxes throughout his time in America. Although he felt trepidation in paying taxes, Mr. Khat felt he owed a duty to his community, of which he became a prominent member. This prominence did not go unnoticed however and spurred a neighbor to call in an anonymous tip to U.S. Immigration and Customs Enforcement. Following a brief investigation, Mr. Khat was indicted under 42 U.S.C. § 408(a)(7)(B), for falsely representing a social security number. He was found guilty, and soon after the Department of Homeland Security charged Mr. Khat as being subject to removal from the United States.

II. Procedural History

In 2019, Mr. Khat was convicted under 42 U.S.C. § 408(a)(7)(B) for falsely representing a social security number. After his conviction, the Department of Homeland Security filed suit that Mr. Khat was a removable noncitizen under 8 U.S.C. § 1182(a)(2)(A)(i)(I). Mr. Khat promptly filed for asylum and in the alternative, cancellation of removal.

The Immigration Judge ("IJ") determined Mr. Khat's asylum claim was permissible despite the one-year application requirement due to the "changed circumstances" exception. *See Fakhry v. Mukasey,* 524 F.3d 1057, 1064 (9th Cir. 2008). This determination is not challenged here.

On asylum, the IJ ultimately found that Mr. Khat did not demonstrate that he belonged to a cognizable particular social group under the Immigration and Nationality Act ("INA") 8 U.S.C. § 1101(a)(42)(A). On cancellation of removal, the immigration judge found Mr. Khat removable as charged.

On appeal, the Board of Immigration Appeals ("BIA") affirmed the IJ's ruling. The BIA determined that Mr. Khat's proposed social group of "artists subject to violence for their art" was not cognizable under 8 U.S.C. § 1101(a)(42)(A) because there was no shared immutable characteristic, and the group was impermissibly circularly defined by the harm directed at its members.

The BIA, analyzing Mr. Khat's cancellation of removal appeal under 8 U.S.C. § 1229b(b)(1) found both 8 U.S.C. § 1229b(b)(1)(A) and 8 U.S.C. § 1229b(b)(1)(D) to be satisfied. However, the BIA deemed Mr. Khat ineligible for cancellation of removal due to its determination that his prior conviction qualified as a crime involving moral turpitude (CIMT), thus violating 8 U.S.C. § 1229b(b)(1)(C) and by extension, 8 U.S.C. § 1229b(b)(1)(B).

Mr. Khat appeals the BIA's determination that 1) his proposed group does not qualify as a cognizable particular social group under 8 U.S.C. 1101(a)(42)(A) and 2) that his 42 U.S.C. § 408(a)(7)(B) conviction qualifies as a CIMT.

III. Analysis

A. Standard of Review

Our review is limited to the BIA's decision except where the IJ's opinion is expressly adopted. *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000). We review legal conclusions *de novo*. *Davila v. Barr*, 968 F.3d 1136, 1141 (9th Cir. 2020). We review for substantial evidence the factual findings underlying the BIA's determination that a petitioner is not eligible for asylum. *Id.* To prevail under the substantial evidence standard, the petitioner "must show that the evidence not only supports, but compels the conclusion that these findings and decisions are erroneous." *Plancarte v. Garland*, 9 F.4th 1146, 1151 (9th Cir. 2021). Whether an asserted group qualifies as a "particular social group" under the INA is a question of law. *Malu v. U.S. Att'y Gen.,* 764 F.3d 1282, 1290 (11th Cir. 2014). On cancellation of removal, we have jurisdiction to review the legal question as to whether the crime involves moral turpitude. *Lagunas-Salgado v. Holder*, 584 F.3d 707, 710 (7th Cir. 2009).

B. Particular Social Group

An applicant for asylum bears the burden of establishing eligibility. 8 U.S.C. § 1158(b)(1)(B)(i). To be eligible for asylum, the applicant must show that "(1) [his] treatment rises to the level of persecution; (2) the persecution was on account of one or more protected grounds; and (3) the persecution was committed by the government, or by forces that the government was unable or unwilling to control." *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010); *see also* 8 U.S.C. § 1101(a)(42)(A). To be eligible for asylum, an applicant must demonstrate that his life will be "threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Asylum depends on a finding that the applicant was harmed, or threatened with harm, on account of a protected ground. One such ground is that the applicant is a member of a particular social group. An applicant who requests asylum based on membership in a particular social group must establish that the group is: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Reyes v. Lynch*, 842 F.3d 1125, 1131 (9th Cir. 2016) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (BIA 2014)). A social group may not be circularly defined by its persecution, rather the individuals in the group must share a narrowing characteristic other than their risk of persecution. *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005).

1. Common Immutable Characteristic

The BIA has defined "immutable" to mean a characteristic "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 212 (BIA 2014) (quoting *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)). The "critical requirement" is that the defining characteristic of the group be something that "either cannot be changed" or "should not be required to [be] change[d] in order to avoid persecution." *Id.* at 213. In *Acosta*, the BIA rejected the claimed social group of members of a taxi driver cooperative in El Salvador after finding that the identifying characteristics of the group—working as a taxi driver and refusing to participate in guerrilla-sponsored work stoppages—were not immutable because group members could avoid the asserted harm by either changing jobs or cooperating with the work stoppages.

In *Plancarte v. Garland*, the petitioners claimed the social group of "female nurses" possessed an immutable characteristic that could not be remedied by changing jobs. *Plancarte v. Garland*, 9 F.4th 1146, 1151 (9th Cir. 2021). There the Ninth Circuit noted that professional nursing skills, the primary reason the cartel sought her service, are not shared by the general population. There the petitioner could not avoid compulsion by the cartel simply by changing jobs, because even if she ceased employment as a nurse, she would still be a nurse. Unlike the drivers in *Acosta*, the petitioner lacked "the power to change" the immutable characteristic—her specialized medical knowledge and nursing skills—that made her important to the cartel.

Here, the BIA concluded that "artists subject to violence for their art" are not a cognizable "particular social group" because being an artist—like being a taxi driver— is not an immutable characteristic. *Matter of Acosta*, 19 I. & N. Dec. at 233. Mr. Khat developed his artistic abilities from childhood to adulthood and has developed a specialized set of skills like the "female nurses" in *Plancarte*. Unlike being a taxi driver, an occupation which the population is generally capable of performing, the talents of an artist that elicits the reactions of the Papia demonstrate some skill. Additionally, Mr. Khat's has asserted that his artistic expression is an immutable characteristic that is fundamental to his identity and conscience.

2. Defined with Particularity

"A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 239. The "group must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *Id.* A social group "cannot be defined merely by the fact of persecution" or "solely by the shared characteristic of facing dangers in retaliation for actions they took against alleged persecutors." *Jonaitiene v. Holder,* 660 F.3d 267, 271–72 (7th

Cir. 2011). That shared trait, however, does not disqualify an otherwise valid social group. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013). The BIA denied Mr. Khat's social group as not cognizable under the INA because the group was defined in part by the harm inflicted on the group and did not exist independently. The BIA concluded Mr. Khat's proposed social group of "artists subject to violence for their art" was defined by the violence the group would be subjected to and failed to particularly set forth any limiting standards for the group. Here, Mr. Khat has set forth the characteristics of his group (1) artists (2) subject to violence (3) for their art. Although there may be numerous individuals who may satisfy this criteria, the safeguards against innumerable asylum claims include the strict statutory requirements that require an applicant to prove (1) that he has suffered or has a well-founded fear of suffering harm that rises to the level of persecution, (2) on account of race, religion, nationality, membership in a particular social group, or political opinion, and (3) is unable or unwilling to return to her country because of the persecution or a well-founded fear of persecution. 8 U.S.C. § 1101(a)(42)(A), 1158(b)(1); *Cece v. Holder,* 733 F.3d 662, 675 (7th Cir. 2013).

3. Socially Distinct within the Society

An applicant for asylum must show that his particular social group is "socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I. & N. Dec. at 252. Social distinction is a fact-based inquiry. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1083–84 (9th Cir. 2014). "To have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (BIA 2014). Here, Mr. Khat has offered evidence that Shikor condemns and rejects depictions of the female form and subservient males by damaging the art he created. Additionally, the Papia have established a pattern of damaging art, property, and individuals who create these artworks. By extension, Shikorian society would recognize Mr. Khat as an "artist subject to violence for their art."

Therefore, we vacate the finding of the BIA regarding Mr. Khat's proposed social group, and remand for further proceedings. With additional findings required by the BIA on remand, we address Khat's claim of cancellation of removal as a matter of first impression in our circuit.

C. Crimes Involving Moral Turpitude

The definition of moral turpitude is imprecise and has vexed our judicial system since its introduction in the Immigration Act of 1891. Justice Jackson's often cited dissent in *Jordan v. De George* rings true seventy years later. "The chief impression from [moral turpitude] cases is the caprice of the judgments. How many [noncitizens] have been deported who would not have been had some other judge heard their cases, and vice versa, we may only guess." *Jordan v. De*

George, 341 U.S. 223 (1951) (Jackson, J., dissenting). This caprice is exhibited by the circuit split on the precise question as to whether falsely representing a social security number is a CIMT. *See Munoz-Rivera v. Wilkinson*, 986 F.3d 587, 592 (5th Cir. 2021).

In deciding whether Mr. Khat's conviction was a CIMT, we apply the categorical approach. "The categorical approach 'focuses on the inherent nature of the crime, as defined in statute…rather than the circumstances surrounding the particular transgression.'" *Id*. at 591 (quoting *Villegas-Sarabia v. Sessions*, 874 F.3d 871, 877 (5th Cir. 2017)). "To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental state." *Matter of Cristoval Silva-Trevino*, 26 I. & N. Dec. 826, 834 (BIA 2016). 42 U.S.C. § 408(a)(7)(B) provides that a person commits a felony who

> for the purpose of obtaining anything of value from any person, or for any other purpose—
>
> (B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person;

Mr. Khat was convicted under the statute "with intent to deceive." Therefore, we find the culpable mental state element is satisfied. Reprehensible conduct on the other hand, requires more thorough analysis.

1. Reprehensible Conduct

Reprehensible conduct has been defined as that which "shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007) (citation and internal quotation marks omitted). We agree with the Second, Seventh, and Ninth Circuits that falsely representing a social security number is not categorically a crime of moral turpitude, because it is not necessarily "base, vile, or depraved."

The Seventh Circuit opinion in *Arias v. Lynch* informs our opinion. *Arias v. Lynch*, 834 F.3d 823 (7th Cir. 2016). In *Arias*, a noncitizen who came to the United States without authorization faced deportation for falsely using a social security number. *Id.* at 824. The *Arias* court homed in on the statute's language of "for *any* other purpose." *Id.* at 826.

> It is not difficult to imagine some purposes for which falsely using a social security number would not be "inherently base, vile, or depraved." For example, hospitals and

> other health care providers often ask for patients' social security numbers. Would it be "inherently base, vile, or depraved" for a person without a social security number to take a child who has fallen ill to a hospital and give a false social security number to obtain treatment for her sick child, knowing she is ready, willing, and able to pay for the care?

Id. at 826-27. Countless hypotheticals along similar veins can be concocted. "Any other purpose" in the statute is too broad of language to create a categorical rule that falsely using a social security number is a CIMT. The concurrence in *Arias* is even more critical of creating a categorical rule. "If anything is clear it's that 'crime of moral turpitude' shouldn't be defined by invoking broad categorical rules that sweep in harmless conduct." *Id*. at 836 (Posner, J., concurring). As noted in Judge Posner's concurrence, the U.S. Department of State's own definitions of moral turpitude, now listed in the *U.S. Department of State Foreign Affairs Manual* (FAM), in Volume 9 Visas, 9 FAM 302.3-2(B)(2)(c)(2) Crimes Committed Against Governmental Authority (2021), exclude a multitude of offenses much more serious than falsely representing a social security number. These include "desertion from the Armed Forces, prison escape, smuggling, and failure to report for military induction (i.e., draft dodging, when there is a draft)." *Arias* 834 F.3d at 833. Along this same vein, the Department of State lists drunk driving as being without moral turpitude. *Id*. We decline to conclude that falsely representing a social security number is more "base, vile, or depraved" than any of the aforementioned crimes.

The Ninth Circuit in *Beltran-Tirado* provides further weight to our decision. *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9th Cir. 2000). Beltran-Tirado had lived in the United States for twenty-three years before being convicted of false attestation on an employment verification form and falsely representing a social security number. *Id*. at 1182. The court noted that the text of 42 U.S.C. § 408(a)(7)(B) does not directly answer the question of whether falsely representing a social security number is morally turpitudinous. *Id*. at 1183. However, Congress has recognized the issue and spoke to it generally in amending 42 U.S.C. § 408, the statute at issue in our case. *Id*. Congress stated:

> [A]n alien who used a false social security number in order to obtain employment which results in eligibility for social security benefits or the receipt of wage credits would be considered exempt from prosecution…
>
> ...The Conferees believe that individuals who are provided exemption from prosecution under this proposal should not be considered to have exhibited moral turpitude…

Id. (quoting H.R. Conf. Rep. No. 101-964, at 948 (1990)). This legislative history is a firmly planted guidepost that falsely using a social security number is not a crime involving moral turpitude. We feel Congress's language makes clear that Mr. Khat's use of a false social security

number to secure employment, pay taxes, and contribute to his community is not an act of moral turpitude.

2. Malum In Se vs. Malum Prohibitum

The *Beltran-Tirado* court also cited the BIA's language in evaluating moral turpitude. "[Moral turpitude] has been defined as an act which is per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Id.* at 1184-85 (quoting *In re Flores,* 17 I. & N. Dec. 225, 227 (BIA 1980)). The *Beltran-Tirado* court concluded Beltran-Tirado's convictions were malum prohibitum, not malum in se, thereby precluding a finding of moral turpitude. *Id*. at 1184. The same reasoning applies to Mr. Khat today. "The courts, as well as the BIA itself, have repeatedly made clear that the indispensable component of a CIMT is 'evil intent'..." *Mendez v. Bar*, 960 F.3d 80, 84 (2nd Cir. 2020). As discussed supra, it is all too easy to create scenarios wherein society would not find a violation of 42 U.S.C. § 408(a)(7)(B) to be an act of "evil intent."

3. Deceit and Fraud

The dissent argues that any crime involving deceit automatically satisfies the standard of moral turpitude. We disagree as "cases finding crimes of moral turpitude based on deception rely on other aggravating factors, especially actual or intended harm to others." *Arias v. Lynch*, 834 F.3d 823, 828 (7th Cir. 2016). A principle that all forms of deception qualify is too inflexible. In addition, the dissent seeks to equate deception with fraud, or at least place them on the same level. Then-judge Sotomayor addressed this contention aptly in *Ahmed v. Holder*:

> The intent to deceive is not equivalent to the intent to defraud, which generally requires an intent to obtain some benefit or cause a detriment...a person who secures employment on the basis of a false social security number has the intent to deceive the employer and violates § 408(a)(7)(B), but has not necessarily acted with the intent to defraud the employer or the government.

Ahmed v. Holder, 324 Fed. Appx. 82, 84 (2nd Cir. 2009). We agree that deception and fraud are distinct and should dictate different outcomes. To say otherwise would have far reaching consequences and hinder judicial review.

We therefore vacate the finding of the BIA regarding cancellation of removal upon remand.

SARKIS, Circuit Judge, Dissenting:

A. Mr. Khat Is Not Entitled to Asylum nor Cancellation of Removal

The BIA closely evaluated Mr. Khat's case. His appeal for asylum should be denied based on Mr. Khat's failure to establish particularity of his claimed social group. The proposed group of "artists" is amorphous and enlarges into a catch-all for persons alleging persecution who do not fit into the other four categories. Regarding cancellation of removal, the categorical approach to defining moral turpitude does not allow for moral pontification in justifying his actions. Mr. Khat used a false social security number to deceive his employer and our government into believing that he was present in the country legally. Our circuit should create a clear rule that convictions hinged upon deceit are crimes of moral turpitude, disqualifying an applicant from seeking relief under 8 U.S.C. § 1229b(b)(1).

1. Defined Particularity of the Claimed Social Group

To be entitled to asylum, a noncitizen must demonstrate that he is unable or unwilling to return to his homeland because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. §1101(a)(42)(A). To prove persecution on account of membership in a particular social group, a noncitizen must show at a bare minimum that he is a member of a legally cognizable social group. *See Faye v. Holder,* 570 F.3d 37, 41 (1st Cir. 2009). A "particular social group" must be: (1) composed of "a group of persons all of whom share a common, immutable characteristic"; (2) "defined with particularity"; and (3) "socially distinct within the society in question." *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1308-09 (quotation marks omitted) (11th Cir. 2019); *Matter of M-E-V-G-,* 26 I. & N. Dec. 227, 237 (BIA 2014).

For the first requirement, the common characteristic must be immutable and fundamental to a member's individual conscience or identity—other than their risk of being persecuted. *Amezcua-Preciado v. United States Att'y Gen.*, 943 F.3d 1337, 1342-43 (11th Cir. 2019). As to the second requirement, a group is "defined with particularity" when it is "discrete," has "definable boundaries," and is not "amorphous, overbroad, diffuse, or subjective." *Alvarado v. U.S. Att'y Gen.*, 984 F.3d 982, 989 (11th Cir. 2020). For the third requirement, a group is socially distinct when society as a whole perceives it as a distinct group. *Amezcua-Preciado*, 943 F.3d at 1342-43. The claimed particular social group must have sufficient "social visibility," and persecution based on membership in a particular social group should not be defined so broadly that it becomes "a catch-all for all groups who might claim persecution." *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1195 (11th Cir. 2006).

In *In Matter of W–G–R–*, the BIA denied the petition for withholding of removal because the proposed group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular. *In Matter of W–G–R–*, 26 I. & N. Dec. 208, 209 (BIA 2014). The BIA reasoned that the group could include "persons of any age, sex, or background" and is "not limited to those who have had a meaningful involvement with the gang and would thus consider themselves—and be considered by others—as 'former gang members.'" *Id*. Thus, it concluded that the proposed social group was too diffuse, broad, and subjective. *Id.*

Here, the claimed group of "artists subject to persecution for their art" could include persons of any age, sex, or background since there is not a defining characteristic or skill that one needs to be considered an "artist." Moreover, even possessing such talent, persons within the group are not limited to those who have meaningful involvement with art to define the boundaries of the group. Art has neither a guiding principle nor an identifiable boundary this court can adopt to ground the proposed group into a cognizable class. If this court were to accept Mr. Khat's group, the social group would be ill-defined by the subject matter and its practitioners. Mr. Khat's claimed social group collapses to a catch-all term for any person who draws the form of a woman or man in any unflattering light.

2. Crimes Involving Moral Turpitude

While well meaning, my fellow judges fail to address the contrary holdings from the Fifth, Sixth, and Eighth Circuits, which have all concluded that misusing a social security number is a CIMT. The reasoning employed by these circuits is not only more persuasive, but also allows for a clearer application of the law.

First, the BIA is due "substantial deference" in its decision. *Lateef v. Department of Homeland Sec.,* 592 F.3d 926, 929 (8th Cir. 2010). "Thus, the BIA's construction of an ambiguous statutory phrase will be upheld if reasonable." *Id*. There is no indication here that the BIA's determination was unreasonable, and it should be upheld. The Eighth Circuit went on to hold that a violation of 42 U.S.C. § 408(a)(7)(A), the sister statute of 42 U.S.C. § 408(a)(7)(B), was in fact a CIMT. *Id*. at 931.

More importantly, the majority fails to provide a substantive explanation *why* the holdings of the other circuits should be ignored. Not only did the aforementioned circuits disagree with our holding today, they explicitly rejected the decades old case *Beltran-Tirado*. *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179 (9th Cir. 2000). "The mere fact that Congress chose to exempt a certain class of aliens from prosecution for certain acts does not necessarily mean that those acts do not involve moral turpitude in other contexts." *Hyder v. Keisler*, 506 F.3d 388, 393 (5th Cir. 2007). *Beltran-Tirado* used a Congressional report on a newly added subsection of the

statute and applied it to a different subsection. Congress could have easily made such a clarification themselves if they intended for their comments to extend to the whole statute. They did not, and it is unwise to make such an assumption in this case. Just as the petitioner was outside of the proper class of noncitizens in *Hyder*, so too is Mr. Khat here. Furthermore, the majority relies heavily on *Arias v. Lynch* but fails to note the holding of that case ultimately was decided on the framework used by the BIA. *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016). The *Arias* court also explicitly noted it was not overruling a contrary case in its own circuit, *Marin-Rodriguez v. Holder*, 710 F.3d 734 (7th Cir. 2013). *Arias,* 834 F.3d at 830. *Marin-Rodriguez* both rejected *Beltran-Tirado* and held "using a fraudulent social security card to obtain and maintain employment was a crime involving moral turpitude…" *Marin-Rodriguez* 710 F.3d at 741.

Finally, using lies and deception to obtain a benefit is closely related to an act of fraud and should be treated similarly. "Further, even if the statute does not explicitly require an intent to defraud or use the language of fraud, if fraud or deception is inherent in the nature of the offense, then the crime involves moral turpitude." *Yeremin v. Holder*, 738 F.3d 708, 714 (6th Cir. 2013). Mr. Khat was found guilty of falsely using a social security number "with intent to deceive." His actions are "contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007) (citation and internal quotation marks omitted). That conviction is not in contention here. While Mr. Khat certainly garners sympathy, that is not a factor our court can use in evaluating the law itself. For these reasons, I must dissent.