No. 10-992

In the Supreme Court of the United States

GUILLERMO GUARDADO-GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Board of Immigration Appeals' determination that a conviction for false representation of a social security number, in violation of 42 U.S.C. 408(a)(7)(B), is a "crime involving moral turpitude" because an element of the offense is that the false representation was made with intent to deceive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-9a) is reported at 615 F.3d 900. The decisions of the immigration judge (Pet. App. 15a-20a) and the Board of Immigration Appeals (Pet. App. 12a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2010. A petition for rehearing was denied on November 3, 2010 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 31, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, specifies classes of aliens who are inadmissible into, and may not be lawfully admitted into,

the United States. 8 U.S.C. 1182. With exceptions not relevant here, an alien is inadmissible if he has been "convicted of," "admits having committed," or "admits committing acts which constitute the essential elements of" a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I).

An inadmissible alien who is ordered removed may seek various forms of relief from removal, including cancellation of removal and adjustment of status under 8 U.S.C. 1229b(b). To qualify for that relief, the applicant (*inter alia*) must not have "been convicted of an offense under [8 U.S.C.] 1182(a)(2)," including a crime involving moral turpitude. 8 U.S.C. 1229b(b)(1)(C). Even if an alien meets all of the statutory requirements to be eligible for cancellation of removal and adjustment of status, the decision whether to grant the application is confided to the Attorney General's discretion. See 8 U.S.C. 1229b(b)(1); see also 8 U.S.C. 1252(a)(2)(B)(i).

2. Petitioner is a native of El Salvador who entered the United States illegally in 1989. Pet. App. 16a. He has never been admitted to the United States.

Beginning in 1994, and continuing through at least September 23, 2001, petitioner made false representations that a particular number was his social security number, including for employment purposes. Thereafter, petitioner was granted temporary protected status and issued a social security account number card.[1] He

[1] Aliens granted temporary protected status (TPS) may not be removed from the United States while that status is in effect, and are provided work authorization. 8 U.S.C. 1254a(a)(1). Nationals of El Salvador have been eligible for TPS since March 2001. See 75 Fed. Reg. 39,556, 39,557-39,558 (2010). Petitioner's TPS was terminated in January 2003 based on his conviction, and that decision is not at issue here.

then provided his employer with the new, genuine number, revealing that his previous representations were false. See Pet. C.A. Br. 7-8, 11-12 & Add. 11.

In October 2002, pursuant to a guilty plea in the Eastern District of Missouri, petitioner was convicted of falsely representing a social security number to be his own, with intent to deceive, in violation of 42 U.S.C. 408(a)(7)(B). Administrative Record (A.R.) 93. By his plea, petitioner admitted that on or about September 23, 2001, he had used a false social security number with intent to deceive so that he could obtain or retain an airport identification badge. Pet. App. 14a, 18a-19a; see A.R. 98 (indictment). Petitioner was placed on probation for two years and ordered to pay a special monetary assessment of $100. A.R. 94-95.

3. In January 2003, the Immigration and Naturalization Service (whose functions have since been transferred to the Department of Homeland Security (DHS)) charged petitioner with being inadmissible for two reasons: (1) he is present in the United States without having been admitted, and (2) he has been convicted of a crime involving moral turpitude. Pet. App. 17a; A.R. 112. The charges were filed in immigration court in May 2006. A.R. 112.

Through his counsel, petitioner conceded that he is inadmissible as an alien present in the United States without having been admitted, and also admitted the factual allegation that he was convicted of violating 42 U.S.C. 408(a)(7)(B). See Pet. App. 17a. In January 2007, the immigration judge (IJ) sustained the charge that petitioner's conviction rendered him inadmissible as an alien convicted of a crime involving moral turpitude, and ordered petitioner removed based on both of the charged grounds of inadmissibility. *Id.* at 19a-20a. Peti-

tioner made no application for relief from removal, *id.* at 20a, but his counsel stated that "he would have been eligible for cancellation of removal and [also] seeking voluntary departure," if he had not been found inadmissible as an alien convicted of a crime involving moral turpitude. A.R. 84.

4. The Board of Immigration Appeals (Board) affirmed. Pet. App. 10a-14a. The Board determined that violation of Section 408(a)(7)(B) is a crime involving moral turpitude because it "requires an intent to deceive" and "involves a crime that impedes the efficiency of the government by deceit or dishonest means." Pet. App. 14a. Petitioner's use of a false social security number to obtain an airport security badge "involve[d] both an intent to deceive and an impairment of government function." *Ibid.* The Board found "persuasive" the Fifth Circuit's decision in *Hyder* v. *Keisler*, 506 F.3d 388 (2007), which sustained a ruling that misusing a social security number obtained by fraud, in violation of 42 U.S.C. 408(a)(7)(A), is a crime involving moral turpitude. Pet. App. 14a. The Board accordingly rejected petitioner's reliance on a purportedly contrary Ninth Circuit decision, *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (2000). Pet. App. 14a.

5. The court of appeals denied a petition for review. Pet. App. 3a-9a.

The court held that the Board's conclusion that violation of Section 408(a)(7)(B) is a crime involving moral turpitude was reasonable and entitled to deference. Pet. App. 7a, 9a. Petitioner had committed an offense involving "[i]ntent to deceive for the purpose of wrongfully obtaining a benefit," and the court held that under controlling precedent, the Board was reasonable when it held that element to establish moral turpitude. *Id.* at 7a.

Like the Board, the court of appeals rejected petitioner's contention regarding *Beltran-Tirado, supra.* Pet. App. 8a. That case arose "in the context of a statutory exemption from prosecution for a limited category of cases," and that exemption did not control the moral-turpitude inquiry "'in other contexts'" such as this one. *Ibid.* (quoting *Lateef* v. *DHS*, 592 F.3d 926, 931 (8th Cir. 2010)).

The court also rejected petitioner's claim that the Board had violated principles of due process of law by not analyzing his claim using the framework set forth in *In re Silva-Trevino,* 24 I. & N. Dec. 687 (Att'y Gen. 2008). The court concluded that the Board's "analysis was sound and that its conclusion is consistent with the established approach in our circuit." Pet. App. 7a-8a.

ARGUMENT

Petitioner renews his challenge to the Board of Immigration Appeals' decision that his use of a false social security number in violation of 42 U.S.C. 408(a)(7)(B) was a crime involving moral turpitude. The court of appeals correctly rejected that claim. Petitioner pleaded guilty to an offense that includes an element of intent to deceive, which suffices to establish moral turpitude as defined by the Board and accepted by the courts of appeals. The sole decision on which petitioner relies does not create a circuit conflict: petitioner would not qualify for relief under that decision. And even if there were a conflict on the question presented that might warrant this Court's review, this case would not be an appropriate one: petitioner is indisputably inadmissible to the United States irrespective of how the question presented is resolved, and he has not shown any realistic possibility that reversing the decision below would affect

his ability to obtain discretionary relief from removal. This Court's review therefore is not warranted.

1. As the court of appeals correctly recognized, crimes involving fraud or deceit have been understood to involve moral turpitude at least since this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951). In that case, the Court ruled that conspiring to defraud the United States of a lawfully due tax on distilled spirits was a crime involving moral turpitude. *Id.* at 227-229. As the Court observed, "in *every* deportation case where fraud has been proved, federal courts have held that the crime in issue involved moral turpitude." *Id.* at 227 (emphasis added). The Board and the federal courts have likewise concluded that a defendant's intent to deceive, like intent to defraud, makes his crime one involving moral turpitude. See, *e.g.*, *In re Jurado-Delgado*, 24 I. & N. Dec. 29, 35 (B.I.A. 2006) ("[I]t is the intent to mislead that is the controlling factor."); *Ghani* v. *Holder*, 557 F.3d 836, 841 (7th Cir. 2009) ("[N]early every court to consider the issue has concluded that crimes involving willful false statements are turpitudinous.").

Thus, for instance, the courts of appeals agree that the element of "intent to deceive" in another subparagraph of 42 U.S.C. 408(a)(7) makes that offense one involving moral turpitude. *Lateef* v. *DHS*, 592 F.3d 926, 929 (8th Cir. 2010) ("Since intent to deceive for the purpose of wrongfully obtaining a benefit is essential to conviction under § 408(a)(7)(A), the [Board's] interpretation of that crime as one involving moral turpitude is reasonable."); *Hyder* v. *Keisler*, 506 F.3d 388, 391-392 (5th Cir. 2007) ("[A] crime that involves dishonesty as an essential element * * * falls well within this circuit's understanding of the definition of [crimes involving moral turpitude]."); see also *Serrato-Soto* v. *Holder*, 570 F.3d 686,

690 (6th Cir. 2009) (reaching the same conclusion with respect to a state statute prohibiting use of a false social security number, because the crime, "in the ordinary case, involves dishonesty as an essential element"). As the court of appeals correctly recognized, the same principle applies to convictions under Section 408(a)(7)(B), which also involves the element of "intent to deceive." Pet. App. 7a (citing *Lateef*, 592 F.3d at 929).[2]

Petitioner contends (Pet. 7 n.3) that the court of appeals should have decided whether *his* violation of 42 U.S.C. 408(a)(7)(B) involved moral turpitude by "look-[ing] to the ultimate goal which he was seeking to accomplish" by committing his crime. But where the statute of conviction includes an element that is alone sufficient to establish moral turpitude under the Board's definition, the Board is not required to engage in a more granular examination of the facts of each particular conviction.[3]

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[2] Petitioner briefly asserts (Pet. 10-11) that violation of Section 408(a)(7)(B) is less culpable than violation of Section 408(a)(7)(A). The decisions cited in the text, however, rely on the element of "intent to deceive," which is common to both offenses.

[3] Petitioner also argues (Pet. 10 n.6, 12-14) that the court of appeals should have remanded based on *In re Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008). As petitioner recognizes, however, *Silva-Trevino* would affect the analysis only if neither the statute of conviction nor the record of conviction were sufficient to establish that petitioner's offense involved moral turpitude. See *id.* at 698-699. But an IJ "need not consider additional evidence or testimony except when and to the extent he or she determines that it is necessary." *Id.* at 703; see also *id.* at 703 n.3 (where an alien's crime includes a fraud element that makes it turpitudinous, the alien "cannot avoid categorical treatment of his conviction as a crime involving moral turpitude by arguing that he did not actually have such intent when he committed the crime"). Because the statute and record of conviction are sufficient here, neither the IJ, nor the Board, nor the court of appeals had any need to seek or consider ad-

2. Petitioner contends (Pet. 2, 4-9) that the decision of the court of appeals conflicts with *Beltran-Tirado* v. *INS*, 213 F.3d 1179 (9th Cir. 2000). That claim lacks merit and, in any event, would not be a basis for further review in this case.

a. In *Beltran-Tirado*, a divided panel of the Ninth Circuit ruled that an alien did not commit a crime involving moral turpitude when she violated 42 U.S.C. 408(g)(2) (1988), the statutory predecessor of Section 408(a)(7)(B).[4] Beltran-Tirado began using another person's name and social security number as her own beginning in 1972. She was arrested in April 1991, and she was subsequently convicted under Section 408(g)(2) of making a false attestation to obtain employment at a restaurant. 213 F.3d at 1182. She applied for registry under 8 U.S.C. 1259, a form of relief from removal available to aliens who, *inter alia*, entered the United States before 1972 and are persons of "good moral character." 8 U.S.C. 1259(a) and (c). The Board held that her conviction was for a crime involving moral turpitude and therefore prevented her from satisfying the character criterion. 213 F.3d at 1183.

The Ninth Circuit majority stated that the "text of the statute and federal decisional law provide[d] no clear answer to" the question whether violation of Section 408 is a crime involving moral turpitude. 213 F.3d at 1183.

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ditional evidence. See Pet. App. 7a-8a (rejecting petitioner's argument based on *Silva-Trevino*).

[4] Congress redesignated the provision in 1990 but did not substantively amend it. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5121(b)(2)-(4), 104 Stat. 1388-283. Beltran-Tirado also violated 18 U.S.C. 1546(b)(3), but the convictions involved identical facts and the court analyzed the moral-turpitude issue identically with respect to both convictions. See 213 F.3d at 1182, 1183, 1184.

But, the court concluded, the Board's decision was contrary to legislative history of a subsequent amendment to another part of Section 408, was therefore due no deference, and must be reversed. *Id*. at 1183-1184.

In 1990, Congress had amended Section 408 expressly to exempt certain violations of Section 408(a)(7) from prosecution, *if* those violations were committed before January 4, 1991, by an alien who (inter alia) was awarded registry under Section 1259. See 42 U.S.C. 408(d) (1994) (now 42 U.S.C. 408(e)).[5] Beltran-Tirado was not exempted by that amendment, because she had not yet sought or been awarded registry and because she fell outside the statute's time period. 213 F.3d at 1184 & n. 9. But at the time the exemption from prosecution was adopted, members of a House-Senate conference committee had stated in a conference report that they "believe[d] that individuals who are provided exemption from prosecution under this proposal should not be considered to have exhibited moral turpitude with respect to the exempted acts for purposes of determinations made by the Immigration and Naturalization Service." *Id.* at 1183 (quoting H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 948 (1990) (Conference Report)). Based on that legislative history, the Ninth Circuit concluded that "the crimes of which [Beltran-Tirado] was convicted do not establish 'moral turpitude,'" because even though Beltran-Tirado was not eligible for the exemption from prosecution, "the underlying behavior is the same." *Id.* at 1184.

b. Petitioner cannot establish a conflict based on *Beltran-Tirado*, because he gives no reason to conclude

[5] Congress redesignated Subsection (d) as Subsection (e) in 2004. Social Security Protection Act of 2004, Pub. L. No. 108-203, § 209(a)(1), 118 Stat. 513.

that the Ninth Circuit would reach a similar conclusion in his case. The exemption at issue in *Beltran-Tirado* applied only to aliens who were eligible for particular, limited categories of relief, such as registry, which (as noted above) is open only to aliens who entered the United States before 1972. 8 U.S.C. 1259(a); 42 U.S.C. 408(e)(1). And the exemption did not apply to crimes committed after January 4, 1991. Petitioner has never applied for registry or any other qualifying form of relief, and there is no indication that he could; he entered the United States long after 1972. And petitioner's unlawful conduct began long after the exemption ceased to apply to *anyone*, whereas Beltran-Tirado's offenses were committed at most "a few weeks too late." 213 F.3d at 1184.[6] Accordingly the holding of *Beltran-Tirado* may have little continuing relevance, as the exemption under Section 408(e) no longer applies to anyone and the class of aliens who, like Beltran-Tirado, only barely missed qualifying for the exemption presumably is now vanishingly small.[7]

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[6] Moreover, the Ninth Circuit emphasized that Beltran-Tirado used a false social security number "to further otherwise legal behavior," *i.e.*, employment. 213 F.3d at 1184; see Conference Report 948 ("otherwise lawful conduct," such as "employment"). It is far from clear that the congressional conferees, or the Ninth Circuit, would take the same view of petitioner's use of a false social security number to gain access to secure areas of an airport—even if, as petitioner contends, he did so for employment purposes, Pet. 7 n.3.

[7] The Ninth Circuit has not subsequently decided in any precedential opinion how the holding of *Beltran-Tirado* would apply to a conviction under Section 408(a)(7)(B) obtained long after the exemption expired. But cf. *Jimenez* v. *Gonzales*, 158 Fed. Appx. 7, 8-9 (9th Cir. 2005) (remanding based on *Beltran-Tirado* in the case of an alien who used a false social security number, but was not convicted under Section 408(a)(7) or any other statute).

c. The Ninth Circuit's outlier decision in *Beltran-Tirado* would not in any event furnish a basis for review by this Court. The Ninth Circuit's decision did not address or apply this Court's decision in *Jordan*, *supra*, or any other generally applicable precedent on the meaning of moral turpitude. Rather, the Ninth Circuit concluded that "the intent of Congress [wa]s clear" to create a special rule applicable only to violations of Section 408(a)(6) and (7). 213 F.3d at 1185. The holding of *Beltran-Tirado* therefore does not affect any class of moral-turpitude cases in the Ninth Circuit except (at most) cases involving this specific offense.

The Ninth Circuit's reasoning was also unpersuasive. In adopting the exemption from prosecution now set out in Section 408(e), Congress did not amend the INA at all, let alone the provisions governing moral turpitude. Neither the statutory text nor the Conference Report manifested any intent to overturn the agency's longstanding view, grounded in this Court's decision in *Jordan*, that an element of intent to deceive supports classifying an offense as one involving moral turpitude. Nor did Congress remove the element of intent to deceive from the offense of which petitioner was later convicted.

Moreover, even if it were proper to give controlling weight to the passage of legislative history on which the Ninth Circuit relied, the Ninth Circuit nonetheless misread that passage. The conferees did not opine that individuals who were *ineligible* for the exemption from prosecution, and who thus were convicted under Section 408(a)(7)(B), necessarily acted without moral turpitude. To the contrary, the conferees emphasized that "individuals *who are provided exemption from prosecution* under this proposal should not be considered to have exhibited moral turpitude." Conference Report 948 (em-

phasis added). Several provisions of the INA treat individuals who admit committing crimes involving moral turpitude as equivalent to those who are formally convicted of such crimes. See 8 U.S.C. 1182(a)(2)(A)(i)(I) ("[A]ny alien convicted of, *or* who admits having committed, *or* who admits committing acts which constitute the essential elements of * * * a crime involving moral turpitude * * * is inadmissible.") (emphases added); see also 8 U.S.C. 1101(f)(3) (aliens described in Section 1182(a)(2)(A) do not meet "good moral character" requirements). The better reading of the conferees' statement is that individuals actually exempted from prosecution under Section 408(e) should not be treated as having committed a crime involving moral turpitude if they admit only that they committed a crime for which they are exempted from prosecution. The conferees did not opine that violation of Section 408(a)(7) is *never* turpitudinous, even when committed by an individual who lacks the mitigating characteristics that would make him eligible for the exemption.

For these reasons, every other court of appeals that has examined the question since *Beltran-Tirado* has declined to follow the Ninth Circuit's decision, as the Board did here. See *Hyder*, 506 F.3d at 393 (observing that the *Beltran-Tirado* court "appears to have expanded a narrow exemption beyond what Congress intended," and declining to follow *Beltran-Tirado* because it "would require us to ignore our existing precedents, which establish that crimes involving intentional deception as an essential element are generally [crimes involving moral turpitude]"); accord Pet. App. 8a; *Serrato-Soto*, 570 F.3d at 692; *Lateef*, 592 F.3d at 930-931. Should the issue recur in the Ninth Circuit, therefore, that court may re-examine or limit *Beltran-*

Tirado in light of the broad consensus view adopted by the other circuits.

3. Even if this issue might warrant the Court's review in some case, this case is not an appropriate vehicle, because petitioner fails to show that resolving this issue in his favor would make any difference. Petitioner has conceded that he is inadmissible on grounds unrelated to his conviction. Pet. App. 17a; A.R. 77. Petitioner contends (Pet. 2) that he seeks further review because classifying his conviction as one involving moral turpitude precludes him from seeking cancellation of removal and adjustment of status. But even if the conviction did not disqualify petitioner from that form of discretionary relief—for which he has never applied—petitioner has not shown any realistic possibility that he would be able to obtain relief.

Petitioner did not file an application for cancellation of removal, see 8 C.F.R. 1240.20(a) (application required), and did not have a hearing on his eligibility. Pet. App. 20a; pp. 3-4, *supra*. He therefore has presented no evidence that he could carry his burden to show that he meets the other eligibility requirements: continuous physical presence and good moral character for ten years, see 8 U.S.C. 1229b(b)(1)(A)-(B), and "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or a [lawful permanent resident]," 8 U.S.C. 1229b(b)(1)(D). His petition asserts (Pet. 3) only that he has children who are United States citizens, but petitioner has not claimed that any hardship to them resulting from his removal would rise to the level of "exceptional and extremely unusual hardship" as required under the statute, which is greater than the ordinary hardship to be expected to result from an alien's removal.

See *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 62 (B.I.A. 2001). Furthermore, even if eligible, petitioner would have to establish that he warrants relief as a matter of discretion. See, *e.g.*, *In re A-M-*, 25 I. & N. Dec. 66, 76-77 (B.I.A. 2009). He has presented no evidence from which to conclude that he could do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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