U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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525 West Van Buren Street
Chicago, IL 60607

Name: DELGADO, SIXTO

A 075-423-408

Date of this notice: 1/2/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

Enclosures
Userteam: Docket

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DELGADO, SIXTO
A075-423-408
C/O DHS CUSTODY
101 WEST CONGRESS APRKWAY
CHICAGO, IL 60605

DHS/ICE Office of Chief Counsel - CHI
525 West Van Buren Street
Chicago, IL 60607

Name: DELGADO, SIXTO

A 075-423-408

Date of this notice: 1/2/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

Userteam:

File: A075 423 408 – Chicago, IL

Date: JAN - 2 2015

In re: SIXTO DELGADO a.k.a. Sixto Delgado-Vine

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lynsay Gott, Esquire

ON BEHALF OF DHS: Daniel Rah
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: None

The respondent appeals from the Immigration Judge's August 25, 2014, decision finding that the Department of Homeland Security, Immigration and Customs Enforcement ("DHS"), established that the respondent is removable as charged and ordering the respondent removed from the United States to Mexico. The respondent's appeal will be sustained and the record will be remanded to the Immigration Judge for further consideration.

The respondent is charged with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude. The respondent is also charged with removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien who has been convicted of an offense defined as an aggravated felony under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). The respondent's offenses are alleged to be defined as aggravated felonies both under section 101(a)(43)(A) of the Act as an offense related to rape and under section 101(a)(43)(F) of the Act as a crime of violence for which the term of imprisonment is at least one year.

The record establishes that the respondent was convicted by the Commonwealth of Kentucky on March 12, 2003, for the offenses of sexual misconduct under KRS 510.140 and unlawful imprisonment in the second degree in violation of KRS 509.030. The plea agreement resulting in the respondent's plea of nolo contendere to his crimes sets forth the following facts as the basis for his plea: On April 22, 2001, in Jefferson County, Kentucky, the respondent had sexual intercourse with his victim without her consent on two occasions, bruising her arms when he

held her down and not allowing her to leave the house for a period of time. The arrest report provides further details regarding the incident for which the respondent was convicted. The arrest report indicates that the respondent's victim reported that the respondent had forced sexual intercourse with her with a vibrator and with his penis after repeatedly being told "no," that her arms were bruised where he had twisted them, and that she was not able to contact police until April 23, 2001. After his arrest, the respondent was initially charged with two counts of rape, assault in the fourth degree, unlawful imprisonment in the second degree, and intimidating a witness.

The respondent's actual conduct meets the common-law definition of rape, constitutes a violent crime, and is reprehensible and morally turpitudinous. However, the respondent's conduct is not the focus of the legal inquiry this Board is required to undertake. Rather, the issue before this Board is whether the statutes under which the respondent was convicted constitute crimes involving moral turpitude or crimes described in section 101(a)(43)(A) or (F) of the Act. *See generally Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013).

Under 8 C.F.R. § 1003.1(d)(3), the Board defers to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. The issue before this Board is a pure question of law which we consider de novo.

First, this Board will consider whether the respondent's conviction under KRS 510.140 is a conviction for rape as set forth in section 101(a)(43)(A) of the Act. A person is guilty of sexual misconduct under KRS 510.140 when he engages in sexual intercourse or deviate sexual intercourse with another person without the latter's consent. Deviate sexual intercourse is defined as any act of sexual gratification involving the sex organs of one person in the mouth or anus of another. KRS 510.010(1). Sexual intercourse is defined as sexual intercourse in its ordinary sense and occurs upon any penetration, however slight. KRS 510.010(8). Emission is not required for an act to be defined as sexual intercourse. *Id.*

In *Perez-Gonzalez v. Holder*, 667 F.3d 622, 626-27 (5th Cir. 2012), the United States Court of Appeals for the Fifth Circuit explained that, at the time Congress added rape to the list of aggravated felonies, Congress maintained the common law definition of the crime. While the decision of the Fifth Circuit in *Perez-Gonzalez v. Holder*, *supra*, is not controlling authority in this case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, this Board finds, based upon the reasoning of the Fifth Circuit, that the common law definition of rape is the definition of rape properly applied to a determination of rape under section 101(a)(43)(A) of the Act.

The common law definition of rape is "unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will where there was at least a slight penetration of the penis into the vagina. *See Perez-Gonzalez v. Holder*, *supra*. A conviction under KRS 510.140 may result from acts other than penetration of a penis into a vagina. Furthermore, force is not an element of an offense under KRS 510.140. *See Cooper v. Commonwealth*, 550 S.W. 2d 478, 480 (Ky. 1977) (The commentary accompanying the code

may be used as an aid in construing the provisions of the code); *Yarnell v. Commonwealth*, 833 S.W.2d 834 (Ky. 1992) (A jury instruction on sexual misconduct as a lesser-included offense to first degree rape is not required where the evidence clearly establishes that the defendant used forcible compulsion by means of threats and intimidation to engage in sexual intercourse). Thus, a conviction under KRS 510.140 is categorically overbroad to be a conviction for rape. In this regard, KRS 510.140 is overbroad regardless of whether the underlying act is identified as sexual intercourse or deviate sexual intercourse.[1] As such, the respondent's conviction under KRS 510.140 is not for a crime of rape as set forth in section 101(a)(43)(A) of the Act, and his removability under section 237(a)(2)(A)(iii) of the Act has not been established on that basis.

A conviction under KRS 510.140 is also overbroad to be a crime of violence under 18 U.S.C. § 16(a). As set forth above, the use, attempted use, or threatened use of physical force is not an element of the offense under KRS 510.140. *See also Xiong v. INS*, 173 F.3d 601 (1999) (In the case of an 18-year-old man convicted of having voluntary sex with his 15-year-old girlfriend, the state crime of conviction, which prohibited sexual contact or sexual intercourse with a person who has not attained the age of 16 years, but did not specify the age of the perpetrator, was not a crime of violence). Furthermore, a conviction under KRS 510.140 is for a class A misdemeanor under Kentucky law. Therefore, it is also not a crime of violence under 18 U.S.C. § 16(b). Accordingly, he has not been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, and his removability under section 237(a)(2)(A)(iii) of the Act has also not been established on this basis, as well.

Finally, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: When the victim is 14 or 15 and the defendant is less than 21; or, when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. *See Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993); *Deno v. Commonwealth*, 177 S.W.3d 753; *Cooper v. Commonwealth*, *supra*. Although a useful plea-bargaining tool for the prosecutor in cases where there is some degree of forcible compulsion, which is how it was used in this case, the purpose of KRS 510.140 is to preserve the concept of statutory rape and statutory sodomy. As such, it applies, to voluntary sexual intercourse between a 17-year-old and a 15-year-old where the latter's consent was legally insufficient due to lack of capacity. While the Commonwealth of Kentucky deems such conduct undesirable, the commentary accompanying KRS 510.140 reflects a determination that bearing a criminal record labeling the defendant a rapist or sodomist for engaging in such conduct seems unnecessarily harsh for a defendant within the prescribed age limitation.

Inasmuch as KRS 510.140 is intended to reach sexual intercourse between non-adults where there is little disparity in age, the application of KRS 510.140 to such conduct is not a theoretical possibility, but a realistic probability. *See Gonzales v. Duenas–Alvarez*, 549 U.S. 183, 193 (2007). In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General

[1] The United States Supreme Court has held in *Descamps v. Holder*, 133 S.Ct. 2276 (2013), that the modified categorical approach is not applicable to statutes that are overbroad rather than divisible.

determined that any intentional sexual conduct by an adult with a child under the age of 16 necessarily involves moral turpitude. *See Matter of Guevara*, 25 I&N Dec. 417 (BIA 2011). However, there is no legal authority for the proposition that intentional sexual contact by non-adults necessarily involves moral turpitude. This Board is satisfied that, while the Commonwealth of Kentucky views voluntary sexual intercourse between teenagers, one of whom is under the age of 16, as undesirable, voluntary sexual intercourse between non-adults who are close in age is not viewed as inherently evil or outside of accepted rules of morality. In this regard, KRS 402.020(f), provides that in the case of pregnancy of a person under 16 years of age, either the male or the female may apply to a District Judge for discretionary permission to marry which suggests that Kentucky does not view all instances of sexual intercourse with a 15-year-old female as morally turpitudinous.

A conviction under KRS 510.140 is not defined as an aggravated felony under sections 101(a)(43)(A) or (F) of the Act, and is not a crime involving moral turpitude. Therefore, the DHS has not established the respondent's removability under section 237(a)(2)(A)(i) of the Act or under section 237(a)(2)(A)(iii) of the Act on the basis of the respondent's conviction under KRS 510.140.

The respondent has also been convicted under KRS 509.030 for unlawful imprisonment in the second degree. Unlawful imprisonment is defined as knowingly and unlawfully restraining another person. Restraint is defined at KRS 509.010(2), in part, as accomplishing movement or confinement by physical force, intimidation, or deception, or by any means. In ruling on the respondent's removability, the Immigration Judge did not address whether the respondent's conviction for unlawful imprisonment is defined as a crime of violence under 18 U.S.C. § 16(a), or a crime involving moral turpitude, and did not consider whether the modified categorical approach applies under the language of KRS 509.030 and 509.010(2). In this regard, the Immigration Judge has not considered in the first instance whether the specific means by which the restraint was accomplished must be proven in order to satisfy the statutory element of restraint. Accordingly, this Board finds it appropriate to remand the record for further consideration of whether the respondent's conviction under KRS 509.030 satisfies the burden of the DHS to establish the respondent's removability under section 237(a)(2)(A)(iii) of the Act, by operation of section 101(a)(43)(F) of the Act, and under section 237(a)(2)(A)(i) of the Act. The following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A075-423-408 August 25, 2014

In the Matter of

SIXTO DELGADO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(i) in that the respondent has been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(A) of the Act, a law relating to rape. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act in that you have been convicted at any time after admission of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a law relating to a crime of violence for which the term of imprisonment is at least one year.

APPLICATIONS: Motion for a continuance.

ON BEHALF OF RESPONDENT: JEFFREY KYLE MCCLAIN
McClain DeWees Law Offices
6008 Brownsboro Park Boulevard G
Louisville, Kentucky 40206

ON BEHALF OF DHS: DANIEL RAH
Assistant Chief Counsel
Department of Homeland Security
Officer of the Chief Counsel's Office
Chicago, Illinois 60607

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male native and citizen of Mexico who adjusted his status to that of a lawful permanent resident on May 18, 2000 under Section 245 of the Immigration and Nationality Act. Respondent was placed into removal proceedings when he was served with a Notice to Appear issued by the Department of Homeland Security on or about April 21, 2014. See Exhibit number 1. At a master calendar hearing held in this case, the respondent through his attorney did admit the seven factual allegations. While the respondent did through his attorney deny the three charges of removability, the Court did in fact sustain those three charges based upon documentation supporting the charges which was provided to the Court by the Government establishing that the respondent had in fact been convicted of these offenses. See Group Exhibit number 1.

The Court would note that the case was initially heard beginning with the June 4, 2014 hearing at which time the Court identified the Notice to Appear as the charging document and as one that the respondent had received. And the Court continued the case to July 2, 2014 for the respondent and his attorney to work together on any forms of relief and to plead to the Notice to Appear. The Court continued the case ~~again~~ from June 4, 2014 to July 2, 2014 and again to July 14, 2014, and finally to today's date August 25, 2014. On each of these occasions, the Court has given counsel the opportunity to submit any additional forms of relief for the respondent, however, to date there have been no applications for relief filed.

On July 14, 2014 the Court did make a finding that the respondent was removable as charged and gave counsel one final continuance to try to determine what, if any, relief the respondent could seek before the Court. The Court found that

removability had been established by clear, convincing, and unequivocal evidence as is required under Section 240(c)(1)(A) of the Immigration Act. The issue before the Court today concerns the respondent's request for an additional continuance at this time.

The Court does not find at this time that there is a basis upon which it may grant a motion to continue the case given that the respondent does not currently have any available relief and that there has been no evidence produced that the respondent has any type of post-conviction relief pending, or that the respondent has any ability to negate his criminal conviction. While the Court appreciates that the respondent does have significant factors here in the United States such as children, there is nothing in the record currently that allows this Court to take jurisdiction over the respondent's criminal convictions. And without any further evidence that the respondent has any type of post-conviction relief pending the Court cannot continue the case any further beyond today as it has been established that his convictions are final for Immigration purposes as of today. See Matter of Chavez, 24 I&N Dec. 272 (BIA 2007).

Given that the respondent has no other relief available to him at this time and based upon his convictions, which I determine subject him to removal on the charges in the Notice to Appear, I find that he is ineligible for any other form of relief for the Court and I hereby enter the following order.

ORDER

The respondent is hereby ordered removed from the United States to Mexico on the charges contained in the Notice to Appear.

Please see the next page for electronic signature

SHEILA MCNULTY
Immigration Judge

//s//

Immigration Judge SHEILA MCNULTY

mcnultys on October 22, 2014 at 5:07 PM GMT