U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: P[redacted], J[redacted]

A [redacted]-007

Date of this notice: 11/5/2018

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:
Mullane, Hugh G.
Liebowitz, Ellen C
Morris, Daniel

Userteam: Docket

File: A[redacted]-007 – Miami, FL

Date: NOV - 5 2018

In re: J[redacted] P[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael S. Vastine, Esquire

APPLICATION: Termination; cancellation of removal

The respondent, a native and citizen of Haiti, and a lawful permanent resident, appeals from the Immigration Judge's May 30, 2018, decision finding him removable. The respondent also appeals the Immigration Judge's decision denying his application for cancellation of removal. Section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security ("DHS") has not filed a response to the appeal. The appeal will be sustained and the proceedings will be terminated.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the respondent is removable as charged under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i), due to his conviction for the offense of domestic violence battery in violation of Fla. Rev. Stat. §§ 741.28, 784.03 in 2013 and 2017 (IJ at 2; Tr. at 16-17; Exhs. 2-3).[1] Whether the respondent's conviction qualifies as an offense under section 237(a)(2)(E)(i) of the Act is a question of law that we review de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

An offense qualifies as a crime of domestic violence under section 237(a)(2)(E)(i) of the Act if at any time after admission, an alien is convicted of a crime of domestic violence for having

[1] The respondent was initially charged with being removable under section 237(a)(2)(A)(ii) of the Act due to his convictions for burglary of a structure and battery on a law enforcement officer (Exhs. 1, 5, 7). However, the Immigration Judge did not sustain the charge (IJ at 2; Tr. at 9, 16). The DHS lodged an additional charge of removability against the respondent under section 237(a)(2)(A)(i) of the Act based on his convictions for improper exhibition of a firearm or a dangerous weapon and for giving a false name to a law enforcement officer (Exhs. 1A, 3, 6). The Immigration Judge, however, did not sustain this charge (IJ at 2; Tr. at 8-9, 16). The DHS later lodged an additional charge against the respondent under section 237(a)(2)(E)(i) of the Act, which the Immigration Judge sustained and which is at issue in this case (IJ at 2; Tr. at 16-17; Exhs. 1B, 2-3). As the DHS has not challenged any of the Immigration Judge's findings regarding the dismissed charges, those issues are not before us.

committed a "crime of violence" as defined in 18 U.S.C. § 16 against certain individuals, including individuals who are protected under the domestic or family laws of the United States or any state. A "crime of violence," as defined by 18 U.S.C. § 16(a), means "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

To determine whether a state criminal conviction is a crime of violence, we must follow the "categorical approach." *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). Under the categorical approach, we look at the "elements" of the respondent's offense and determine whether the full range of conduct that has a "realistic probability" of prosecution under those elements corresponds to the relevant removability ground. *See id.*

Fla. Rev. Stat. § 741.28 defines "domestic violence" as "any assault, battery, aggravated battery, sexual assault, sexual battery, stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member." It is uncontested that, as reflected in the respondent's criminal record, he was convicted under the "battery" portion of the domestic violence statute (IJ at 2; Exhs. 2-3). Fla. Rev. Stat. § 784.03 defines "battery" as the actual and intentional touching or striking of another person against their will or intentionally causing bodily harm to another person. Thus the elements of battery are: (1) actual and intentional touching, or (2) intentionally causing bodily harm to another person.

In *Johnson v. United States*, the Supreme Court found that "physical force" as established in § 16(a) must be "violent force" or "force capable of causing physical pain or injury to another person." *Johnson v. United States*, 130 S. Ct. 1265 (2010); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (holding that § 16(a) "suggests a category of violent, active crimes"); *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016) (stating that *Johnson* and *Leocal* control our interpretation of § 16(a)). "Battery" under Fla. Rev. Stat. § 784.03 does not require as an element physical force or violence against an individual. *Bradley v. State*, App. 4 Dist., 155 So.3d 1248 (2015). Thus, we conclude that the respondent's offense lacks as an element "violent force" or "force capable of causing physical pain or injury to another person," and as such, he was not convicted of a crime of violence under 18 U.S.C. § 16(a). *See Johnson v. United States*, 559 U.S. at 1269-74 (holding, in the context of the Armed Career Criminal Act, which is similar to § 16(a), that the Florida offense of battery by "[a]ctually and intentionally touch[ing]" another person does not have "as an element the use . . . of physical force against the person of another"). Thus, we agree with the respondent that Fla. Rev. Stat. § 784.03 is not a categorical match to 18 U.S.C. § 16(a) (Respondent's Br. at 4-6).

On appeal, the respondent also correctly points out that the United States Supreme Court recently held that 18 U.S.C. § 16(b), which also defines a "crime of violence," is unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (April 17, 2018). As the respondent's conviction under Fla. Rev. Stat. §§ 741.28, 784.03 does not qualify as a "crime of violence" under 18 U.S.C. § 16(a), and as the *Dimaya* Court held that 18 U.S.C. § 16(b) is unconstitutionally void for vagueness, the respondent's sole ground of removability is no longer sustainable. Inasmuch as the respondent is no longer removable as charged, we will terminate the respondent's proceedings. Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the respondent's proceedings are terminated.

Ellen Kuhowitz
FOR THE BOARD