U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MENDOZA-LOPEZ, RAUL ALBE... **A 072-067-090**

Date of this notice: 7/22/2020

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:
MONSKY, MEGAN FOOTE

Userteam: Docket

File: A072-067-090 – Boston, MA Date: JUL 22 2020

In re: Raul Alberto MENDOZA-LOPEZ a.k.a. Raul Mendoza

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joseph M. Flynn, Esquire

ON BEHALF OF DHS: Christy M. DiOrio
Assistant Chief Counsel

APPLICATION: Termination

The respondent is a native and citizen of El Salvador and a lawful permanent resident of the United States. The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 30, 2020, decision terminating the respondent's removal proceedings. The DHS's appeal will be dismissed.

This Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

It is undisputed that the respondent was convicted of intimidation of a witness in violation of Mass. Gen. Laws ch. 268, § 13B on June 8, 2018, and strangulation in violation of Mass. Gen. Laws ch. 265, § 15D(b) on July 30, 2018 (Exhs. 1, 1A, 4, 5). Based on these convictions, the DHS charged the respondent as removable under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two or more crimes involving moral turpitude (CIMTs) (IJ at 3; Exh. 1A). The Immigration Judge determined that the respondent's witness intimidation conviction under Mass. Gen. Laws ch. 268, § 13B is not a CIMT, and found that the respondent is not removable under section 237(a)(2)(A)(ii) of the Act (IJ at 4-10).

To determine whether the respondent's offense of conviction is a CIMT, we employ the "'categorical approach' by 'comparing the elements of the state offense to those of the generic [definition of a CIMT] to determine if there is a categorical match.'" *See Matter of J-G-D-F-*, 27 I&N Dec. 82, 83 (BIA 2017) (citation omitted); *Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016); *see also Coelho v. Sessions*, 864 F.3d 56, 61 & n.1 (1st Cir. 2017). This approach requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under that statute. *See Matter of J-G-D-F-*, 27 I&N Dec. at 83; *Matter of Silva-Trevino*, 26 I&N Dec. at 831; *see also Rosa Pena v. Sessions*, 882 F.3d 284, 287 (1st Cir. 2018) (to ascertain whether a crime categorically involves moral turpitude, the focus must be on the "'least of th[e] acts criminalized' under the statute" (quoting *Coelho v. Sessions*, 864 F.3d at 61 n.1)).

An offense involves moral turpitude if its elements require reprehensible conduct committed with a corrupt mental state. *See, e.g.*, *Matter of Silva-Trevino*, 26 I&N Dec. at 834. Conduct is "reprehensible" if it is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general," while a "culpable" mental state requires specific intent, deliberateness, willfulness, or recklessness. *Id.* at 833; *Matter of Cortes Medina*, 26 I&N Dec. 79, 82 (BIA 2013).

The Immigration Judge found that the elements of the offense are, in essence, the following four elements: (1) willfully misleading, directly or indirectly; (2) a police officer; (3) with the intent to impede, obstruct, delay, harm, punish, or otherwise interfere thereby with; (4) a criminal investigation (IJ at 5). *See, e.g.*, *Commonwealth v. Paquette*, 62 N.E.3d 12, 16 (Mass. 2016) (identifying the elements of Mass. Gen. Laws ch. 268, § 13B (2010)). Further, the Immigration Judge noted that, under Massachusetts law, an individual's reckless disregard of the possibility that his or her conduct might interfere with the proceeding at issue is sufficient to establish the third element of this offense (IJ at 5-6). *See id.* at 16 n.5.

We have held that "recklessness is a sufficiently 'culpable mental state for moral turpitude purposes where it entails a conscious disregard of a substantial and unjustifiable risk posed by one's conduct.'" *Matter of Salad*, 27 I&N Dec. 733, 735 (BIA 2020) (quoting *Matter of Leal*, 26 I&N Dec. 20, 23 (BIA 2012)). However, the Immigration Judge found that, in Massachusetts, "a defendant . . . so stupid [or] so heedless that . . . he did not realize" the risk posed by his conduct can nonetheless be deemed to have acted recklessly, so long as "an ordinary normal man under the same circumstances would have realized the gravity of the danger" (IJ at 6). *Commonwealth v. Welanksy*, 55 N.E.2d 902, 910 (Mass. 1944); *see also Coelho v. Sessions*, 864 F.3d at 61 (citing *Welansky*).

We conclude that a conviction for witness intimidation does not require a culpable mental state that falls within the definition of a CIMT. With regard to the "reckless" mens rea, we agree with the Immigration Judge that the prescription set forth in *Commonwealth v. Welansky* establishes a mens rea that prevents the offense from being a CIMT (IJ at 7-8). *See generally Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017); *Matter of Perez-Contreras*, 20 I&N Dec. 615, 619 (BIA 1992). In other words, a person who is unaware of the risk caused by his behavior when a reasonable person would be aware of such risk can be found to have acted recklessly under this statute – and this necessarily precludes a finding of a sufficiently culpable mental state.

We disagree with the DHS that *Matter of Wu*, 27 I&N Dec. 8 (BIA 2017) is applicable in the instant matter (DHS's Br. at 9-13). In *Matter of Wu*, we held that assault with a deadly weapon or force likely to produce great bodily injury under California law is categorically a CIMT because the statute at issue required that a perpetrator willfully engage in dangerous conduct, by means of either an object employed in a manner likely to cause great bodily injury or force that is, in and of itself, likely to cause such an injury. *Matter of Wu*, 27 I&N Dec. at 14. We further found that the statute required that a perpetrator have knowledge, while not of the risk of causing such injury, of the facts that make such an injury likely. *Id.* We observed, however, that we would reach a different conclusion where a statute does not require knowledge that the conduct is itself dangerous or of the facts that make the proscribed conduct dangerous. *Id.* at 14-15 n.10. In consideration of

the foregoing, we decline to disturb the Immigration Judge's determination that Mass. Gen. Laws ch. 268, § 13B is not a categorical CIMT.

Further, even if we assume that Mass. Gen. Laws ch. 268, § 13B is a divisible statute with respect to the CIMT definition, so as to warrant consideration of the conviction record under the modified categorical approach, *see Matter of Silva-Trevino*, 26 I&N Dec. at 833, the admissible documents contained in the present record do not meaningfully narrow down the elements of the respondent's offense of conviction (IJ at 8-9). And while the record does contain a police report which describes the respondent's offense conduct, that document cannot be considered under the modified categorical approach (IJ at 9; Exh. 4 at 10-12). *See Shepard v. United States*, 544 U.S. 13, 21-26 (2005).

Based on the foregoing, we agree with the Immigration Judge the respondent is not removable under section 237(a)(2)(A)(ii) of the Act. Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

FOR THE BOARD