U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted] D[redacted], A[redacted] **A[redacted]-646**

Date of this notice: 12/11/2015

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:
Guendelsberger, John
Malphrus, Garry D.
Geller, Joan B

EllisM
Userteam: Docket

File: A[redacted]646 – Elizabeth, NJ Date: DEC 11 2015

In re: A[redacted] C[redacted] D[redacted] a.k.a. [redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steven Lyons, Esquire

APPLICATION: Custody redetermination

The respondent, a native and citizen of Mexico, has appealed from an Immigration Judge's July 14, 2015, decision denying his request for custody redetermination and motion to reconsider.[1] The Department of Homeland Security ("DHS") has not filed a response to the respondent's appeal. The appeal will be sustained, and the record will be remanded.

The respondent is the subject of removal proceedings in which he is charged with removability for being present in the United States without having been admitted or paroled. *See* section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). The DHS determined that the respondent is subject to discretionary detention under section 236(a) of the Act, and ordered that he be held without bond. The respondent requested a custody redetermination hearing. At the hearing, the Immigration Judge held that the respondent is subject to mandatory custody under section 236(c)(1)(A) of the Act because his conviction for operating a motor vehicle during a period of license suspension in violation of N.J. Stat. § 2C:40-26(a) is a crime involving moral turpitude which would render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act (I.J. at 3-4). The respondent argues that he is not subject to mandatory detention because his conviction for operating a motor vehicle during a period of license suspension is not a crime involving moral turpitude.

An alien whom the DHS alleges is subject to mandatory detention may seek a determination from the Immigration Judge—and, on appeal, from this Board—that he is "not properly included" within a mandatory detention category. 8 C.F.R. § 1003.19(h)(2)(ii). An alien is "not properly included" in such a category if the Immigration Judge or the Board determines that the DHS is "substantially unlikely" to prove that the alien is inadmissible or deportable on a ground that would subject him to mandatory detention. *See generally Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

In this case, the DHS did not allege that the respondent is subject to mandatory detention, and the Immigration Judge did not specifically make a finding that the DHS is not substantially unlikely to prove that the respondent is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

[1] The reasons for the Immigration Judge's decision are set forth in a bond memorandum dated August 21, 2015.

She concluded during the custody hearing that the respondent's conviction is a crime involving moral turpitude, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act and thus subject to mandatory detention.

We find that the respondent's conviction does not constitute a crime involving moral turpitude. As the Immigration Judge found, the New Jersey statute criminalizes operating a motor vehicle during a period when the person's license is suspended or revoked because of a prior driving while intoxicated offense or refusal to submit to a breath test (I.J. at 3). The statute was designed to create criminal penalties for persons whose driver's licenses are suspended for drunk driving offenses and who, while under suspension for these offenses, unlawfully operate a vehicle. *New Jersey v. Perry*, 439 N.J. Super. 514, 522-23 (App. Div. 2015).

The Immigration Judge cited the New Jersey jury instructions for N.J. Stat. § 2C:40-26, which require the prosecution to prove beyond a reasonable doubt that the individual knowingly operated a motor vehicle, that the individual's license was suspended or revoked due to prior driving while intoxicated offenses, and that the individual knew that his or her license was suspended or revoked (I.J. at 3). The Immigration Judge cited *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999). However, that case is distinguishable from the respondent's case. *Matter of Lopez-Meza* involved Arizona aggravated driving under the influence ("DUI") statutory provisions in which a person may be found guilty by committing a DUI offense while knowingly driving on a suspended, canceled, or revoked license or by committing a DUI offense while already on a restricted license owing to a prior DUI. *Id.* at 1195-96. We held that a person who drives while under the influence, knowing that he or she is absolutely prohibited from driving, commits a crime so base and so contrary to the currently accepted duties that persons owe to one another and to society in general that it involves moral turpitude. *Id.* at 1196; *see also Marmolejo-Campos v. Holder*, 558 F.3d 903, 912 (9th Cir. 2009).

In the respondent's case, he did not drive under the influence with a suspended license but rather operated a motor vehicle with a license that had been suspended because of a prior DUI offense. The respondent did not commit a DUI offense knowing that he was prohibited from driving like the respondent in *Matter of Lopez-Meza*. The New Jersey statute is intended to deter the behavior of operating a motor vehicle during a court-imposed period of suspension for a prior DUI offense by requiring a sentence of incarceration for such an offense. *New Jersey v. Perry, supra*, at 531. We do not find that the respondent's offense is such a deviance from the accepted rules of contemporary morality that it amounts to a crime involving moral turpitude. *Cf. Matter of Lopez-Meza, supra*, at 1196.

In light of the foregoing, we conclude that the respondent is not subject to mandatory detention because the DHS is substantially unlikely to prove that the respondent is inadmissible by reason of having committed a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act. Thus, the Immigration Judge erred in finding the respondent subject to mandatory detention under section 236(c)(1) of the Act, and she has authority to redetermine the respondent's custody status. The record will be remanded to afford the respondent a bond hearing.

ORDER: The appeal is sustained, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD