U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

LE, TU KIM
A063-261-404
C/O DHS/NWDC, F-3
1623 EAST J STREET
TACOMA, WA 98421

DHS/ICE Office of Chief Counsel - TAC
1623 East J Street, Ste. 2
Tacoma, WA 98421

Name: LE, TU KIM

A 063-261-404

Date of this notice: 3/10/2017

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

Userteam: Docket

File: A063 261 404 – Tacoma, WA

Date: MAR 10 2017

In re: TU KIM LE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Kathleen W. Patrick
Assistant Chief Counsel

ORDER:

This Board has been advised that the Department of Homeland Security's appeal has been withdrawn. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WA 98421

Law Office of Kim-Khanh T. Van, PLLC
Van, Kim Khanh Thi
PO Box 1246
Renton, WA 98057

IN THE MATTER OF
LE, TU KIM

FILE A 063-261-404 DATE: Jan 27, 2017

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

_X_ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WA 98421

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT FF

CC: DHS ASSISTANT CHIEF COUNSEL
1623 EAST J STREET, SUITE 2
TACOMA, WA, 98421

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NORTHWEST DETENTION CENTER
IMMIGRATION COURT
TACOMA, WASHINGTON

File No. A063-261-404
In the Matter of:

LE, Tu Kim
Respondent

In Removal Proceedings

DETAINED

Charges: INA § 237(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude within five years of admission for which a sentence of one year or longer may be imposed

Application: Motion to Terminate

On Behalf of the Respondent
Kim-Khanh T. Van, Esq.
Law Office of Kim-Khanh T. Van
P.O. Box 1246
Renton, Washington 98057

On Behalf of DHS
Kathleen W. Patrick, Esq.
Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
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Decision of the Immigration Judge

I. Introduction and Procedural History

Respondent is a native and citizen of Vietnam. Exh. 2 at 1. Respondent was admitted to the United States as a lawful permanent resident on January 15, 2014. Exh. 2 at 2. Respondent was convicted of one count of assault in the third degree with a sexual motivation enhancement, in violation of Revised Code of Washington (RCW) §§ 9A.36.031(1)(f), 9.94A.030, 9.94A.835, and 9.94A.533, and felony assault in the third degree, in violation of RCW § 9A.36.03(1)(f). Exh. 2 at 13-14. On January 14, 2015, he was sentenced to a total of fifteen months of incarceration for the offenses. *Id.* at 14, 17, 28. The Department of Homeland Security (DHS)

initiated removal proceedings by filing a Notice to Appear (NTA), dated August 4, 2016, charging Respondent as removable under Section 237(a)(2)(A)(i) of the Immigration and Nationality Act (INA) as an alien convicted of a crime involving moral turpitude within five years after admission and for which a sentence of one year or more may be imposed. Exh. 1.

Respondent appeared with counsel at a master calendar hearing on November 8, 2016. Respondent admitted the factual allegations and conceded the charge of removability in the NTA. *See* Exh. 1; Exh. 4. However, the court requested a briefing on the charge of removability from the Department, due on November 22, 2016, and a reply from Respondent due on December 6, 2016. *See* Exh. 4. Respondent filed a reply to the Department's brief and moved to terminate the proceedings. Exh. 4.

Respondent appeared at an individual hearing on December 15, 2016. The court informed the parties that it intended to grant Respondent's motion, and counsel for DHS reserved the government's right to appeal.

II. Statement of the Law

1. Legal Framework

The court applies the categorical approach to determine whether a conviction constitutes a predicate offense in the INA. *See Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014); *Taylor v. United States*, 495 U.S. 575 (1990); *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2015) (en banc). Under the categorical approach, the court first identifies the elements of the statute of conviction and the elements of the federal generic definition of the crime. *Almanza-Arenas*, 815 F.3d at 475 (citing *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1208 (9th Cir. 2013)). Second, the court compares the elements of the statute of conviction with the federal

generic definition of the relevant crime to determine if the statute of conviction categorically fits within the generic definition of the offense listed in the INA. *Mathis*, 136 S. Ct. at 2248. If the statute of conviction has the same elements as—or defines the crime more narrowly than—the generic offense, the conviction is a categorical match for immigration purposes. *Descamps*, 134 S. Ct. at 2283. If, on the other hand, the statute of conviction "sweeps more broadly than the generic crime," the respondent's conviction may not categorically serve as a predicate offense. *Id.*

In a "narrow range of cases," the court may proceed to the modified categorical approach if a statute that is not a categorical match to the relevant crime is nevertheless divisible. *Id.* (citing *Taylor*, 495 U.S. at 602). A statute is divisible if it has "multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id.* at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). The Ninth Circuit has emphasized that an "element" is a substantive component of the statute on which the jury must unanimously agree, whereas a "means" is a fact or method of committing an offense on which a jury need not agree yet still convict. *See Almanza-Arenas v. Lynch*, 815 F.3d at 477 (explaining that "a single element must be part of a charged offense with which a jury necessarily found the defendant guilty"); *see also see also Mathis*, 136 S. Ct. at 2248 (distinguishing between "elements," which the prosecution must prove beyond a reasonable doubt to sustain a conviction and "brute facts" (means), which "need neither be found by a jury nor admitted by a defendant."). In order to determine whether a statute is made up of alternative elements or alternative means, the court reviews (1) the statutory language itself, (2) authoritative state court interpretations of the statute, and (3) the respondent's conviction records "if state law fails to provide clear answers." *Mathis*, 136 S. Ct. at 2256-57. If a statute is divisible, the court may consider certain reliable documents in the record beyond the

statutory text to determine which elements of the statute of conviction formed the basis for the respondent's conviction. *See id.* at 2249; *Descamps*, 133 S. Ct. at 1083; *see also Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that the sentencing court may review "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to determine whether defendant necessarily admitted the elements of the generic offense).

2. Application and Analysis

Respondent was convicted of one count of assault in the third degree, in violation of RCW § 9A.36.031(1)(f), which provides that "[a] person is guilty of assault in the third degree if he . . . , under circumstances not amounting to assault in the first or second degree: . . . [w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." Exh. 2 at 3. Assault in the third degree is a Class C felony, which is punishable by up to five years in prison and/or a $10,000 fine. RCW § 9A.36.031(2). Respondent's assault offense was committed "with sexual motivation," a sentencing enhancement that allows for the imposition of an exceptional sentence. RCW § 9.94A.535(3)(f); RCW § 9.94A.533. Acting with a "sexual motivation" in Washington means that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW § 9.94A.030(48). A sexual motivation enhancement must be proven beyond a reasonable doubt. RCW § 9.94A.835(2). The imposition of a sexual motivation sentence enhancement on a conviction for a class C felony like third degree assault adds an additional one year of incarceration to the standard sentence range. RCW § 9.94A.533(8)(a)(iii).

DHS accordingly charges that Respondent is removable under INA § 237(a)(2)(A)(i), which provides that "[a]ny alien who (1) is convicted of a crime involving moral turpitude

committed within five years . . . after the date of admission, and (2) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." INA § 237(A)(2)(a)(i); Exh. 1. DHS bears the burden of demonstrating that Respondent is removable as charged. 8 C.F.R. § 1240.8(a). Respondent's conviction clearly exceeds the necessary possible length of punishment under INA § 237(a)(2)(A)(i)(II), but the analysis of whether the conviction is a crime involving moral turpitude under INA § 237(a)(2)(A)(i)(I) is less straightforward.

The term "crime involving moral turpitude" is not defined in the INA. *See, e.g.*, *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012). The Court must consider on a case-by-case basis whether a particular crime involves moral turpitude. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011). Although the INA does not specifically define offenses constituting crimes involving moral turpitude, they are general crimes that are (1) vile, base, or depraved, and (2) violate accepted moral standards. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015); *see also Ceron v. Holder*, 747 F.3d 773, 779-80 (9th Cir. 2014) (en banc). "Assault may or may not involve moral turpitude." *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007). For example, both the Ninth Circuit and the Board of Immigration Appeals have consistently held that simple assault cannot be a crime involving moral turpitude because it does not require the requisite evil intent or vicious motive. *Uppal v. Holder*, 605 F.3d 712, 716 (9th Cir. 2010); *Matter of Solon*, 24 I&N Dec. at 241. Outside the simple assault context, assault statutes are reviewed under a totality of the circumstances approach, including a consideration of the required level of consciousness, resulting harm to the victim, and any other aggravating factors. As the Board of Immigration Appeals has explained:

> [A] finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of

> conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

Matter of Solon, 24 I&N Dec. at 242; *see also Ceron v. Holder*, 747 F.3d 773, 782-83 (9th Cir. 2014) (quoting and discussing the BIA's reasoning from *Solon*); *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) ("In order for an assault . . . to be deemed a crime involving moral turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury."). When considering an assault statute with a mens rea lower than intent, the courts focus on whether or not the statute nevertheless requires some degree of awareness or willful action. *See Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (relying on the awareness requirement when finding that Illinois assault with a deadly weapon, involving a mens rea of recklessness, was a crime involving moral turpitude); *see also Ceron*, 747 F.3d at 784 (noting that CPC § 245(a)(1) required neither intentional conduct nor that the "offender actually perceive the risk created by his or her actions").

The basic offense underlying Respondent's conviction – assault in the third degree under RCW § 9A.36.031(1)(f) – standing alone is categorically not a crime involving moral turpitude. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-20 (BIA 1992) (holding that a conviction under RCW § 9A.36.031(1)(f) is not a crime involving moral turpitude because it involves neither intentional nor reckless conduct); *see also* Washington Pattern Jury Instructions Criminal (WPIC) 35.24, Assault – Third Degree – Criminal Negligence and Suffering – Elements. Respondent, however, was convicted of assault in the third degree with sexual motivation and not basic statutory assault in the third degree under RCW § 9A.36.031(1)(f) standing alone. *See* Exh. 2. Thus, Respondent's conviction involves an additional element from the generic assault in the third degree under RCW § 9A.36.031(1)(f) previously considered by the Board of

Immigration Appeals: that Respondent acted with sexual motivation, meaning with the purpose of causing Respondent sexual gratification. *See* Exh. 2 at 21 (Respondent's plea statement) (stating that Respondent "negligently and unlawfully caused bodily harm by touching T.K. . . . this created substantial pain that extended for a period sufficient to cause considerable suffering by sexual motivation").

The parties disagree on whether Respondent's assault in third degree conviction with the inclusion of the sexual motivation enhancement element would categorically be a crime involving moral turpitude. The Ninth Circuit discussed the effect a sentencing enhancement can have on the underlying conviction in *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015). There, the court held that a conviction for possession of a billy club, in violation of California Penal Code (CPC) § 12020(a), together with a sentence enhancement under CPC § 186.22(b)(1), which provided that the defendant's felony was committed for the benefit of and with the specific intent to assist a criminal street gang, was not a conviction for a crime involving moral turpitude. *Id.* at 796. The court first noted that the underlying statute of conviction – unlawful possession of a weapon – is not a crime involving moral turpitude. *Id.* at 801. Then, the court explained that the sentencing enhancement did not categorically involve only conduct that constitutes a crime involving moral turpitude because it did not require "an intent to injure, actual injury, or a protected class of victims" and it could apply to "run-of-the-mill criminal conduct." *Id.* at 802. The court reasoned that "[t]he gang enhancement does not provide a sufficient 'evil intent' to transform an otherwise non-turpitudinous crime into one involving moral turpitude." *Id.* at 804.

This court finds that the sexual motivation enhancement is similarly insufficient to transform an otherwise non-morally turpitudinous assault into a crime involving moral turpitude.

First, the court finds that the sexual motivation enhancement does not elevate the mens rea necessary for Respondent's assault conviction to include conduct that would constitute a crime involving moral turpitude. In order to prove the sexual motivation enhancement, Washington law requires the state to present "evidence of identifiable conduct by the defendant while committing the offense [that] proves beyond a reasonable doubt that the offense was committed for the purpose of sexual gratification." *State v. Thompson*, 290 P.3d 996, 1018 (Wash. Ct. App. 2012) (quoting *State v. Halstien*, 857 P.2d 270, 277 (Wash. 1993) (en banc) (discussing a parallel juvenile offense sexual motivation provision)). However, the purposeful act that demonstrates a sexual motivation does not have to be the same conduct that constitutes the underlying offense. In other words, a defendant can engage in purposeful conduct that is undertaken for the purpose of his or her sexual gratification and, in the midst of that purposeful act, commit an act of negligence that leads to a conviction like Respondent's assault in the third degree offense; the assault can be tangential to the sexual motivation in order to sustain a conviction under the statute. The Washington court of appeals discussed a similar set of circumstances in *State v. Hudnall*, 108 Wash. App. 1052, 2001 WL 1301398 (Wash. Ct. App. 2001) (unpublished). There, the defendant was also convicted of assault in the third degree with sexual motivation, and the court of appeals explained that her conduct was sufficient to show both that she acted "for sexual gratification and with sexual motivation" and that she acted with criminal negligence. *Id.* at *7.

Second, acting for the purpose of one's own sexual gratification (i.e., acting with a sexual motivation) is not itself categorically morally turpitudinous conduct. The Ninth Circuit previously likened the offense of indecent exposure under CPC § 3145 for the sexual gratification of either oneself or of the viewer to the offense of annoying a child. *Nunez v. Holder*, 594 F.3d 1124, 1135 (9th Cir. 2010). The court explained that the offense was not

categorically a crime involving moral turpitude because it could be "committed without any intention of harming anyone, . . . need not result in actual harm, and . . . does not necessarily involve a protected class of victim." *Id.* The same is true under the Washington sexual motivation provision. All that is required is that one act for the purpose of one's own sexual gratification, which does not necessarily require an intent to injure, actual injury, or a protected class of victim. *See e.g.*, *Halstien*, 857 P.2d at 272-74 (finding that a juvenile committed burglary with a sexual motivation).

Thus, the court finds that the sexual motivation sentencing enhancement does not elevate Respondent's conviction for assault in the third degree in violation of RCW § 9A.36.031(1)(f) from a categorically non-morally turpitudinous crime into a categorical crime involving moral turpitude. Accordingly, the court finds that DHS has not met its burden to show by clear and convincing evidence that Respondent's conviction constitutes a crime involving moral turpitude under INA § 237(a)(2)(A)(i).

III. Orders

It is **ORDERED** that the charge of removability under INA § 237(a)(2)(A)(i) is not sustained.

It is **FURTHER ORDERED** that Respondent's Motion to Terminate is granted.

1/25/17
Date

John C. Odell
Immigration Judge