U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Z[redacted]-P[redacted], R[redacted]

A [redacted]-090

Date of this notice: 3/12/2020

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:
Mann, Ana
Kelly, Edward F.
Liebmann, Beth S.

[illegible]
Userteam: Docket

File: [redacted]-090 – Adelanto, CA

Date: MAR 12 2020

In re: [redacted] Z[redacted]-P[redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Nassim Arzani, Esquire

APPLICATION: Reconsideration

This matter was last before the Board on May 23, 2019, when we denied the respondent's motion to reopen and terminate proceedings based on the decision of the United States Supreme Court in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that the Notice to Appear (NTA) in that case, which did not designate a specific time or place for an alien's hearing, was not a "Notice to Appear" under section 239(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229(a), for purposes of qualifying for cancellation of removal). The respondent argued that the decision in *Pereira v. Sessions* rendered the removal proceedings invalid because the similarly defective NTA in his case was ineffective to confer jurisdiction on the Immigration Court. The motion was denied in reliance on the Board's subsequent precedent decision in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), which held that a NTA that does not specify the time and place of an alien's initial removal hearing will vest an Immigration Judge with jurisdiction over removal proceedings so long as a notice of hearing specifying that information is later sent to the alien, as was done in this case. *See also Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019) (deferring to holding in *Matter of Bermudez-Cota*).

The respondent has now filed a motion to reconsider and remand so that he may apply for cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b), in light of the precedent decision of the United States Court of Appeals for the Ninth Circuit in *Lopez v. Barr*, 925 F.3d 396 (9th Cir. 2019) (holding that for purposes of the "stop-time rule" relating to cancellation of removal, a defective NTA omitting the time and place of the hearing cannot be cured by a subsequent notice of hearing, rejecting a contrary holding in *Matter of Mendoza-Hernandez*, 27 I&N 520 (BIA 2018)). He argues that under *Lopez v. Barr*, he is now able to demonstrate the 10 years of continuous physical presence required for that relief. *See* section 240A(b)(1)((A) of the Act (Respondent's Br. at 2-4).

The Ninth Circuit has withdrawn its opinion in *Lopez v. Barr*, and a rehearing en banc in that case is now pending. *See Lopez v. Barr*, 948 F.3d 989 (9th Cir. 2020). Therefore, the Board's contrary holding in *Matter of Mendoza-Hernandez* is controlling at this time. However, as the Ninth Circuit's position will not necessarily change on rehearing, and we conclude that a remand for further proceedings is otherwise appropriate, we will not address the issue at this time.

The respondent acknowledges that he also has a potentially disqualifying conviction for statutory rape. However, he argues that the offense does not constitute a bar to cancellation of removal because it does not categorically constitute a crime involving moral turpitude, citing the

Board's decision in *Matter of Guevara Alfaro*, 25 I&N Dec. 417 (BIA 2011), involving the same statute. *See* sections 240A(b)(1)(B), (C) of the Act.

The statute under which the respondent was convicted, California Penal Code section 261.5(d), provides that:

> Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

We indicated in *Matter of Guevara Alfaro* that the offense at issue would be a crime involving moral turpitude where the perpetrator was over 21 and knew or should have known that his victim was a child under the age of 16. *See Matter of Guevara Alfaro*, 25 I&N Dec. at 424. We rejected the contrary decision of the Ninth Circuit in *Quintero-Salazar v. Keisler*, 506 F.3d 688, 694 (9th Cir. 2007) (holding that Cal.Penal Code § 261.5(d) does not categorically involve moral turpitude because it lacks the scienter requirement of willfulness or evil intent).

We subsequently clarified in *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017) (*Jimenez-Cedillo I*), that a sexual offense in violation of a statute enacted to protect children is a crime involving moral turpitude where the victim is particularly young, under 14 years of age, or is under 16 and the age differential between the perpetrator and victim is significant, or both, even though the statute requires no culpable mental state as to the age of the child. We concluded that such offenses are categorical crimes involving moral turpitude because they "contravene society's interest in protecting children from sexual exploitation." *Id.* at 5. Like the Maryland statute at issue in *Matter of Jimenez-Cedillo*, Cal. Penal Code § 261.5(d) requires the child victim to be under 16 years old and the adult perpetrator to be at least 21. Here, the respondent does not dispute the Immigration Judge's finding that he was over 21 and that his victim was 15 years old (IJ at 10). Therefore, we conclude that the respondent's offense is categorically a crime involving moral turpitude.

After our publication of *Matter of Jimenez-Cedillo*, the case was remanded to us by the United States Court of Appeals for the Fourth Circuit. *See Jimenez-Cedillo v. Sessions*, 885 F.3d 292 (4th Cir. 2018). The Fourth Circuit determined that our decision created a new standard of strict liability with respect to sex crimes perpetrated against very young victims, and that we had altered our previous position that a culpable mental state is required for an offense to be considered a crime involving moral turpitude. *Id.* at 297-300. Observing that the Board's prior position may have created serious reliance interests for defendants who had pled guilty to such crimes, the Fourth Circuit instructed the Board to provide a reasoned basis for the new rule, and to determine whether it should be applied retroactively to the alien in the case.

We recently reaffirmed our holding that a violation of the Maryland statute in *Matter of Jimenez-Cedillo* is a categorical crime involving moral turpitude. *See Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020) (*Jimenez-Cedillo II*). However, noting the Fourth Circuit's concerns regarding detrimental reliance on our prior case law, we determined that the holding should only be applied prospectively to aliens in cases arising in the Fourth Circuit. *Id.* at 784. We declined

to consider the question of retroactive application in other circuits. Inasmuch as the Ninth Circuit, like the Fourth Circuit, appears to have recognized that *Matter of Jimenez-Cedillo* represents a departure from our previous requirement of a culpable mental state to find that an offense is a crime involving moral turpitude, we will only apply its holding prospectively in the Ninth Circuit, as well. *See Barrera-Lima v. Sessions*, 901 F.3d 1108, 1112 n. 1 (9th Cir. 2018).

In view of the foregoing, absent a different outcome in *Lopez v. Barr* on rehearing en banc, we conclude that the respondent is no longer ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. The respondent's criminal record remains a significant factor which the Immigration Judge should weigh in the exercise of discretion, however. We will return the record to the Immigration Judge to await the outcome in *Lopez v. Barr*, and to determine if the respondent is otherwise eligible and deserving of cancellation of removal.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD