U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: EVOLA, MARIA

A 031-061-019

Date of this notice: 10/1/2018

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:
Malphrus, Garry D.
Mullane, Hugh G.
Geller, Joan B

Userteam: Docket

File: A031-061-019 – Eloy, AZ

Date: OCT - 1 2018

In re: Maria EVOLA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Brent H. Johnson, Esquire

APPLICATION: Termination; adjustment of status

The respondent, a native and citizen of Italy and lawful permanent resident of the United States, appeals the Immigration Judge's February 23, 2018, decision denying her motion for termination of proceedings and pretermitting her application for adjustment of status.[1] Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be sustained, in part, and the record will be remanded to the Immigration Judge.

We review 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 a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted in 2014 and 2015 of shoplifting under Ariz. Rev. Stat. Ann. § 13-1805(A)(1) (Exhs. 3-4). Based on these convictions, the DHS charged her with removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The Immigration Judge found the respondent removable as charged.

An individual is guilty of shoplifting under Ariz. Rev. Stat. Ann. § 13-1805(A)(1) if, while in an establishment where merchandise is sold, the person knowingly obtains goods of another with the intent to deprive that person of such goods by removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price. The respondent contends that her convictions under this statute are not crimes involving moral turpitude because they do not require an intent to permanently deprive the owner of the property (Respondent's Br. at 8-17).

In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 852-53 (BIA 2016), we held that a theft offense is a crime involving moral turpitude if it involves a taking or exercising of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights were substantially eroded.

[1] The respondent does not challenge the Immigration Judge's determination that she is not a United States citizen.

During the pendency of this appeal, the Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, determined that *Matter of Diaz-Lizarraga* could not be applied retroactively to theft offenses where the alien pled guilty to and was convicted of the offense prior to the Board's decision. *See Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1293-96 (9th Cir. 2018).

Because the respondent pled guilty to and was convicted of shoplifting prior to the issuance of *Matter of Diaz-Lizarraga*, we are bound under Ninth Circuit law to apply the definition of a crime involving moral turpitude for theft offenses in effect prior to *Matter of Diaz-Lizarraga*. *See Garcia-Martinez v. Sessions*, 886 F.3d at 1294-96. Thus, we must determine whether the respondent's convictions under Ariz. Rev. Stat. Ann. § 13-1805(A)(1) require an intent to permanently deprive another of property. *See Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).

On the face of the statute, Ariz. Rev. Stat. Ann. § 13-1805(A)(1) requires only a general "intent to deprive," without further specifying whether the intent must be to permanently deprive. Arizona law defines "deprive" in the context of theft offenses as "to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost, to withhold with the intent to restore it only on payment of any reward or other compensation . . . ." Ariz. Rev. Stat. Ann. § 13-1801(A)(4) (2014). This definition juxtaposes permanent takings with takings of a temporary nature, indicating that a conviction for shoplifting does not require an intent to permanently deprive. *See Garcia-Martinez v. Sessions*, 886 F.3d at 1294 (finding that an Oregon statute that defined "deprive" in a similar way did not require an intent to permanently deprive). Additionally, Arizona courts have found that theft offenses in related Arizona statutes using the same "intent to deprive" language do not require an intent to permanently deprive. *See, e.g., State v. Yarbrough*, 638 P.2d 737, 739 (Ariz. Ct. App. 1981) (noting that theft under Ariz Rev. Stat. Ann. § 13-1802(A)(1) does not require an intent to permanently deprive).

An intent to permanently deprive can be assumed for some retail theft convictions. *Matter of Jurado-Delgado*, 24 I&N Dec. 29, 33-34 (BIA 2006). However, that premise is not applicable in this instance. Arizona statutes and case law indicate that a conviction under Ariz. Rev. Stat. Ann. § 13-1805(A)(1) can be based on something less than an intent to permanently deprive the person of the goods. Thus, the respondent's conviction is not categorically for a crime involving moral turpitude. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 831 (BIA 2016) (holding that the categorical approach is applicable in the crime involving moral turpitude context); *see also Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-10 (9th Cir. 2015) (holding that if a statute explicitly defines a crime more broadly than the generic definition, "no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.").

Based on the foregoing, we conclude, upon de novo review, that the respondent's convictions are not for crimes involving moral turpitude under binding Ninth Circuit precedent. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent is therefore not removable as charged under section 237(a)(2)(A)(ii) of the Act. Her appeal will be sustained, in part. We need not

address the respondent's arguments regarding her eligibility for adjustment of status (Respondent's Br. at 17-23).

The respondent is not removable as charged for the reasons discussed. Because our decision is based on intervening Ninth Circuit precedent, remand to the Immigration Judge is appropriate to allow the DHS the opportunity to file any additional charges of removability. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained, in part.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.

FOR THE BOARD