



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: B [REDACTED], N [REDACTED]

A [REDACTED]-877

Date of this notice: 1/23/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Adkins-Blanch, Charles K.
Rosen, Scott

Humacyl
Userteam: Docket

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Falls Church, Virginia 22041

File: A-877 – York, PA

Date:

JAN 23 2020

In re: N- B-

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

The respondent, a native and citizen of Haiti and lawful permanent resident of the United States since 2000, appeals from the Immigration Judge's August 15, 2019 decision, finding the respondent removable as charged, denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture, and ordering his removal from the United States. The Department of Homeland Security has not responded to the appeal. The appeal will be sustained and these removal proceedings will be terminated.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In August 2018, the respondent was convicted of child pornography under 18 Pennsylvania Consolidated Statutes (Pa. Stat. Cons.) § 6312(d). The Immigration Judge concluded that the respondent's conviction qualifies as an aggravated felony under section 101(a)(43)(I) of the Act, 8 U.S.C. § 1101(a)(43)(I), and that the respondent is therefore removable as charged under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (IJ at 2-3).

Section 101(a)(43)(I) of the Act defines the term "aggravated felony" to mean "an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography)." The Immigration Judge found that 18 Pa. Stat. Cons. § 6312(d) was categorically an aggravated felony under section 101(a)(43)(I) of the Act, because the state statute is "analogous to the Federal statutes listed in 18 U.S.C. Section 2251, 2251(a) and 2252." The Immigration Judge noted the Third Circuit's decision *Salmoran v. Attorney General United States*, 909 F.3d 73 (3d Cir. 2018), holding that the New Jersey child pornography statute was not categorically an aggravated felony under section 101(a)(43)(I) of the Act because elements of the New Jersey statute were broader than the elements of the generic federal offense (IJ at 2). The Immigration Judge found that the Pennsylvania statute at issue in these proceedings, 18 Pa. Stat. Cons. § 6312(d), was "not as broadly written as the New Jersey statute" and was "more akin to the federal definition" and therefore a categorical aggravated felony (IJ at 2). We disagree.

The statute of conviction at issue in this matter, 18 Pa. Stat. Cons. § 6312(d), provides:

Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

In relevant part, “prohibited sexual act” is defined under 18 Pa. Stat. Cons. § 6312(g), as:

Sexual intercourse ..., masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purposes of sexual stimulation or gratification of any person who might view such depiction.

The federal analog to 18 Pa. Stat. Cons. § 6312(d) is set forth in 18 U.S.C. § 2252(a)(4)(B), a violation of which constitutes an aggravated felony under section 101(a)(43)(I) of the Act. Section 2252(a)(4)(B) provides, in relevant part, that it is a punishable offense to:

knowingly receive[], or distribute[], any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if-

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct.

For purposes of 18 U.S.C. § 2252(a)(4)(B), “sexually explicit conduct” is defined as:

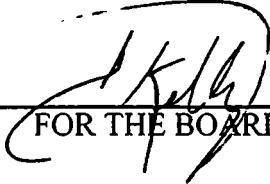
actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.

18 U.S.C. § 2256(2)(A). Like the statute at issue in these proceedings, the New Jersey child pornography statute at issue in *Salmon v. Attorney General United States* criminalized “[n]udity, if depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.” 909 F.3d at 79-80. The *Salmon* court concluded that because the nudity provision in the New Jersey statute criminalized *any* nudity, not just nudity limited to genitals or the pubic area, it was broader than the federal analog, which contained no such counterpart. *Id.*; see 18 U.S.C. § 2252(a)(4)(B). Such is the case in these proceedings. See 18 Pa. Stat. Cons. §§ 6312(d) and (g) (criminalizing “nudity if such nudity is depicted for the purposes of sexual stimulation or gratification of any person who might view such depiction.”).

Accordingly, pursuant to the holding in *Salmoran v. Attorney General United States*, 18 Pa. Stat. Cons. §§ 6312(d) encompasses a broader range of conduct than the federal offense and is therefore not a categorical aggravated felony. In such circumstances, the respondent is not required to demonstrate a realistic probability that the state would prosecute conduct falling outside the generic crime in order to defeat the charge of removability. *Id.* at 80-82; *see also Singh v. Att’y Gen.*, 839 F.3d 273, 286 (3d Cir. 2016). The respondent’s conviction is therefore not for an aggravated felony as defined under section 101(a)(43)(I) and the respondent, who is a lawful permanent resident, is not removable as charged under section 237(a)(2)(A)(iii) of the Act. The appeal will be sustained and removal proceedings will be terminated.

ORDER: The appeal is sustained and the Immigration Judge’s August 15, 2019, decision is vacated.

FURTHER ORDER: The removal proceedings are terminated and the record is returned to the Immigration Court without further action.



 FOR THE BOARD