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

Brewer, Ryan
The Bronx Defenders
360 East 161 Street
Bronx, NY 10451

DHS/ICE Office of Chief Counsel - NYD
201 Varick, Rm. 1130
New York, NY 10014

Name: KAMINSKI, JACEK

A 044-014-301

Date of this notice: 5/11/2017

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

schwarzA
Userteam: Docket

File: A044 014 301 – New York, New York

Date: MAY 11 2017

In re: JACEK KAMINSKI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Ryan Brewer, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Reconsideration

ORDER:

On March 22, 2017, the Department of Homeland Security filed a motion to reconsider the March 15, 2017, decision of the Board in these proceedings. The motion to reconsider does not identify any error of law or fact in the Board's prior decision or identify any argument advanced on appeal that was overlooked by the Board. *See* section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b)(1); *see also Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006). Further, a motion to reconsider is not a vehicle for advancing supplemental legal arguments that could have been previously raised on appeal. We do not find that reconsideration of the March 15, 2017, decision of the Board has been shown to be warranted.

Accordingly, the motion to reconsider is denied.

FOR THE BOARD

Cite as: Jacek Kaminski, A044 014 301 (BIA May 11, 2017)

U.S. Department of Justice

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Bronx, NY 10451

DHS/ICE Office of Chief Counsel - NYD
201 Varick, Rm. 1130
New York, NY 10014

Name: KAMINSKI, JACEK

A 044-014-301

Date of this notice: 3/15/2017

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:
Pauley, Roger

Userteam: Docket

File: A044 014 301 – New York, NY

Date: MAR 15 2017

In re: JACEK KAMINSKI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ryan Brewer, Esquire

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

CHARGE:

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination of proceedings

The Department of Homeland Security ("DHS") appeals the decision of the Immigration Judge, dated October 27, 2016, terminating these removal proceedings. The respondent, a native and citizen of Poland who was previously admitted to the United States as a lawful permanent resident, is opposed to the DHS's appeal. We will dismiss the DHS's appeal.

We affirm the Immigration Judge's decision. We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii). It is the DHS's burden to establish, by clear and convincing evidence, that the respondent is inadmissible as charged. *See Matadin v. Mukasey*, 546 F.3d 85, 91 (2d Cir. 2008); *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011); *Matter of Huang*, 19 I&N Dec. 749 (BIA 1988).

We recognize that the respondent has been convicted under a criminal statute which, at times, has been used to prosecute offenses which involved reprehensible conduct and a culpable mental state. *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). However, the mere fact that the statute under which the respondent was convicted has been used to prosecute individuals for morally tupitudinous conduct does not, in itself, establish that there is no realistic probability that the State would prosecute an individual under the statute for conduct that does not involve moral turpitude. The statute under which the respondent was convicted covers a wide range of exhibitionist criminal conduct. We are not persuaded that the proscribed conduct which is subject to prosecution under the statute necessarily entails morally tupitudinous conduct. *See People v. Darryl M.*, 475 N.Y.S.2d 704, 710 (Crim. Ct. New York, N.Y. 1984) ("[A]ny intentional lewd act committed in public can be proscribed regardless of whether defendant intended that he be observed."); *People v. Anonymous Female*, 539 N.Y.S.2d 868 (City Ct. Buffalo, N.Y. 1989) (recognizing that, as defendants will rarely "test the law," N.Y. PENAL LAW § 245.00 has been applied in an expansive manner).

The DHS has not presented any evidence which would warrant a remand for the Immigration Judge to further consider the immigration consequences of the respondent's conviction under the modified categorical approach. The record of conviction does not reveal the subsection of N.Y. PENAL LAW § 245.00 under which the respondent was convicted (I.J. at 4). On appeal, the DHS has also not pursued an argument that it is able to otherwise establish that the respondent is inadmissible as a result of his conviction for criminal possession of a weapon (I.J. at 4-5).

For the reasons set forth above, we affirm the Immigration Judge's decision to terminate these removal proceedings as the DHS has not established that the respondent is inadmissible under the provisions of section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as charged in the Notice to Appeal. Accordingly, the following order is entered.

ORDER: The DHS's appeal is dismissed and these proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
201 VARICK ST., RM 1140
NEW YORK, NY 10014

The Bronx Defenders
Brewer, Ryan
360 East 161 Street
Bronx, NY 10451

IN THE MATTER OF
KAMINSKI, JACEK

FILE A 044-014-301 DATE: Oct 28, 2016

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

* 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
201 VARICK ST., RM 1140
NEW YORK, NY 10014

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: ASSISTANT CHIEF COUNSEL
201 VARICK STREET, ROOM #1130
NEW YORK, NY, 10014

DHS/ICE OFFICE OF CHIEF COUNSEL
201 VARICK ST. N.Y.
16 OCT 28 AM 9:48

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
201 VARICK STREET, ROOM 1140
NEW YORK, NEW YORK

File No.: A044-014-301

In the Matter of	
KAMINSKI, Jacek	**IN REMOVAL PROCEEDINGS**
The Respondent.	

CHARGE: **Immigration and Nationality Act ("INA") § 212(a)(2)(A)(i)(I) (CIMT)**

APPLICATION: **Motion to Terminate Proceedings**

ON BEHALF OF RESPONDENT
Ryan Brewer, Esq.
The Bronx Defenders
360 East 161st Street
Bronx, NY 10451

ON BEHALF OF DHS
Kamephis Perez, Esq.
Assistant Chief Counsel
201 Varick Street, Room 1130
New York, New York 10014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Jacek Kaminski ("the Respondent") is a native and citizen of Poland. (Exhibits ("Exs.") 1; 2, Tabs A & B). On March 16, 1993, he was admitted to the United States ("U.S.") as a lawful permanent resident ("LPR"). Id. On December 18, 2003, he was convicted of criminal possession of a weapon in the fourth degree, in violation of New York Penal Law § 265.01, and sentenced to fifteen days in prison. (Exs. 1; 2, Tab C). On August 26, 2009, he was convicted of public lewdness, in violation of NYPL § 245.00, and sentenced to three days in prison. (Exs. 1; 2, Tab D).

On May 14, 2015, the Respondent returned from a trip abroad., applied for admission as a returning LPR at John F. Kennedy Airport, and was paroled into the U.S. for deferred inspection. (Exs. 1; 2, Tab B). On August 10, 2016, the Department of Homeland Security ("DHS") served him with a Notice to Appear ("NTA"), charging him with removability pursuant

to INA § 212(a)(2)(A)(i)(I), as alien who has been convicted of or admitted to committing the essential elements of a crime involving moral turpitude ("CIMT"). (Ex. 1).

On September 14, 2016, through counsel, the Respondent admitted the factual allegations contained in the NTA but denied removability as charged. On September 29, 2016, he filed a motion to terminate proceedings on the basis that DHS failed to meet its burden of establishing removability. See Respondent's Motion to Terminate ("Resp. Motion"). On October 17, 2016, DHS filed a brief in opposition. See DHS' Brief in Opposition ("DHS Opposition"). For the reasons that follow, the Respondent's motion will be granted.

II. LEGAL STANDARDS & ANALYSIS

A. Motion to Terminate

DHS bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the U.S. is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). An arriving alien bears the burden of proving that he is clearly and beyond a doubt entitled to be admitted to the U.S. and is not inadmissible as charged. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b). An LPR is not regarded as an applicant for admission into the U.S., and thus cannot be considered an arriving alien, unless certain specified grounds apply including, *inter alia*, the fact that he has committed a CIMT. INA § 101(a)(13)(C)(v). DHS bears the burden to prove by clear and convincing evidence that one or more of these statutory exceptions apply. Matter of Rivens, 25 I&N Dec. 623, 625 (BIA 2011); see also Matadin v. Mukasey, 546 F.3d 85, 90-91 (2d Cir. 2008). The Respondent has been charged with removability pursuant to INA § 212(a)(2)(A)(i)(I). In order to support this charge, DHS cites to the Respondent's convictions for public lewdness and criminal possession of a weapon in the fourth degree.

The term "moral turpitude" generally refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons, or the duties owed to society in general. Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001); Matter of Tran, 21 I&N Dec. 291, 292-93 (BIA 1996); Matter of Short, 20 I&N Dec. 136, 139 (BIA 1989). Because "[i]t is in the intent that moral turpitude inheres," the focus of the analysis is generally "on the mental state reflected" in the statute. Efstathiadis v. Holder, 752 F.3d 591, 595 (2d Cir. 2014) (citing Gill v. INS, 420 F.3d 82, 89 (2d Cir. 2005)); Mendez v. Mukasey, 547 F.3d 345, 347 (2d Cir. 2008) ("Whether a crime is one involving moral turpitude depends on the offender's evil intent or corruption of the mind.") (internal quotation marks omitted). Moral turpitude requires "reprehensible conduct and a culpable mental state." Matter of Hernandez, 26 I&N Dec. 397, 398 (BIA 2014); see also Matter of Silva-Trevino, 26 I&N Dec. 826, 828 n.2 (BIA 2016).

In determining whether an individual's state conviction constitutes a CIMT, the Court begins by employing a categorical approach whereby the Court examines "whether [the offense] categorically fits within the generic federal definition" of a CIMT. Florez v. Holder, 779 F.3d 207, 209 (2d Cir. 2015) (citing Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013)); see also Silva-Trevino, 26 I&N Dec. at 831. The categorical approach focuses on the "minimal conduct

criminalized by the state statute" that is necessary to sustain a conviction under that statute. Moncrieffe, 133 S. Ct. at 1685 (conviction "rested upon [nothing] more than the least of th[e] acts" criminalized) (citing Johnson v. United States, 559 U.S. 133, 137 (2010)); see Gertsenshteyn v. Mukasey, 544 F.3d 137, 143 (2d Cir. 2008) (citing Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001). Under the categorical approach, the Court must look only to the statutory elements without considering the facts underlying the conviction, therefore rending actual conduct "irrelevant" for this analysis. Moncrieffe, 133 S. Ct. at 1684 (citing Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007); see Gertsenshteyn, 544 F.3d at 143; Martinez v. Mukasey, 551 F.3d 113, 119 (2d Cir. 2008).

When evaluating divisibility, an IJ must follow the law of the circuit court of appeals in whose jurisdiction he or she sits. Matter of Chairez-Castrejon (II), 26 I&N Dec. 478 (BIA 2015). In the Second Circuit, divisibility analysis is governed by Descamps v. United States, 133 S. Ct. 2276, 2281-83 (2013). Flores v. Holder, 779 F.3d 159, 165 (2d Cir. 2015). If a statute is divisible, the categorical approach will necessarily be inconclusive, and the Court must proceed to the modified categorical approach. Flores, 779 F.3d at 165. A criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard. Descamps, 133 S. Ct. at 2281-83. Under the modified categorical approach, examination of "extra-statutory materials," such as the record of conviction, is permitted to elucidate the relevant elements comprising the conviction. Descamps, 133 S .Ct. at 2283-85; Moncrieffe, 133 S. Ct. at 1684.

a. The Respondent's NYPL § 245.00 conviction

Neither the BIA nor the Second Circuit has directly addressed whether NYPL § 245.00 constitutes a CIMT. In Matter of Cortes-Medina, the BIA found that for lewd intent to rise to the level of moral turpitude required under the INA, the offense must require an "intentional and lewd desire to corrupt or offend others, for the purposes of one's own sexual desires." 26 I&N Dec. 79, 83 (BIA 2013). In that case, the BIA applied the categorical approach to find that California Penal Code § 314 is a CIMT. The California statute renders a person guilty if he "willfully and lewdly either exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby." Cal. Pen. Code § 314.1. The BIA found this offense to constitute a CIMT because California courts had affirmed convictions under the statute because the "requisite obscene or indecent intent at the time of the offense" was present. Cortes-Medina, 26 I&N Dec. at 83 (citing In re Smith, 497 P.2d 807, 809, 810 (Cal. 1972)). The BIA concluded that for indecent exposure offenses to be considered CIMTs, the statute must require both "the willful exposure of private parts" and "a lewd intent." Id.

Unlike the California statute, NYPL § 245.00 is divisible because its two subsections require different levels of intent. Although the statute begins with language that applies to both subsections—"intentionally exposes the private or intimate parts of his body in a lewd manner or commits any other lewd act"—subsection (a) refers to "in a public place," while subsection (b)

states "in private premises under circumstances in which he may readily be observed...and *with intent that he be so observed.*" Id. (emphasis added). The additional language in subsection (b) requires an extra level of intent, i.e. an intent to be seen, that subsection (a) does not. As the state court explained, NYPL § 245.00 "subdivision (a)...requires that a person act 'intentionally.' However, it is subdivision (b) which requires that defendant in private premises act 'with intent to be observed.'" People v. Darryl M., 123 Misc. 2d 723 (N.Y. Crim. Ct. 1984). Because the statute of conviction is divisible, the Court proceeds to the modified categorical approach.

The Respondent's record of conviction contains the certificate of disposition for his NYPL § 245.00 conviction, which does not indicate under which subsection he was convicted. See (Ex. 2, Tab D). As the record of conviction is inconclusive, the Court reverts back to the categorical approach and compares the "crime of conviction to the generic offense." Descamps, 133 S. Ct. at 2285. Because the minimum conduct required under the New York statute is broader than the federal standard of lewd conduct, the Court concludes that the Respondent's conviction for NYPL § 245.00 is not a CIMT.

b. The Respondent's NYPL § 265.01 conviction

The parties agree that the Respondent's statute of conviction for criminal possession of a weapon in the fourth degree is divisible and that the Court should proceed to the modified categorical approach to determine the specific subsection under which he was convicted. See Resp. Motion at 15; DHS Opposition at 2.[1] DHS alleges that the record of conviction here consists of a certificate of disposition and a misdemeanor complaint. See (Ex. 2, Tab C). Although the certificate of disposition is silent as to which subsection the Respondent pled guilty, DHS argues that the Court should rely on the misdemeanor complaint because it is a valid charging document. See DHS Opposition at 2-3. The Respondent, however, argues that the Court should not rely on the complaint because DHS has not shown that the Respondent waived his right to prosecution by information under New York Criminal Procedure Law ("NYCPL") § 170.65(1), and that the complaint is unreliable and does not establish to what he actually pled guilty. See Resp. Motion at 20-23.

The Court need not decide whether the complaint is a valid accusatory instrument under NYCPL because of the unique circumstances of this case. Assuming, *arguendo*, that the Respondent's conviction constituted a CIMT, it would nonetheless fall under the petty offense exception in INA § 212(a)(2)(A)(ii)(II). Under this exception, a CIMT does not render a respondent inadmissible if: (1) he committed only one CIMT, (2) the maximum penalty possible for the crime did not exceed imprisonment for one year, and (3), the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed). INA § 212(a)(2)(A)(ii)(II). See Matter of Garcia-Hernandez, 23 I&N Dec.

[1] Specifically, subsections (2) and (8) include the phrase "intent to use the same unlawfully against another," while subsections (1) and (3) through (7) merely involve the possession of different types of weapons or instruments. See NYPL § 265.01. Under BIA precedent, carrying or possessing a weapon is only a CIMT if the intent to use it against another person is also established. See Matter of S-, 8 I&N Dec. 344, 346 (BIA 1959); Matter of Serna, 20 I&N Dec. 579, 584 (BIA 1992); see also Matter of Granados, 16 I&N Dec. 726, 728 (BIA 1979) (conviction for possession of a concealed shotgun is not a ground of excludability).

590, 594-95 (BIA 2003) ("An alien who has committed more than one petty offense is not ineligible for the 'petty offense' exception if 'only one crime' is a crime involving moral turpitude."). First, this would be the Respondent's only conviction for a CIMT. As previously discussed, his conviction under NYPL § 245.00 is not a CIMT, and DHS has not submitted a record of conviction indicating that he has been convicted of any other CIMTs. Second, the maximum sentence for criminal possession of a weapon in the fourth degree cannot "exceed one year." NYPL § 265.01 (indicating that the offense is a Class A misdemeanor); NYPL § 70.15(1) (indicating that the sentence for a Class A misdemeanor "shall not exceed one year"). Finally, the Respondent was not sentenced to a term of imprisonment in excess of six months. See (Ex. 2, Tab C) (indicating the Respondent was sentenced to a term of fifteen days). Thus, even if the Court were to find that the Respondent's conviction under NYPL 265.01 involved moral turpitude, the petty offense exception would apply, such that he would not have been convicted of a CIMT, as charged, under INA § 212(a)(2)(A)(i)(I).

Based on the foregoing, DHS has failed to establish by clear and convincing evidence that the Respondent has committed a an offense under INA § 212(a)(2) and should be regarded as an alien seeking admission under INA § 101(a)(13)(C)(v). Rivens, 25 I&N Dec. at 625. DHS did not submit any other evidence that the Respondent has committed a crime described in INA § 212(a)(2), nor any evidence indicating that he should be regarded as an alien seeking admission based upon any other exception in INA § 101(a)(13)(C)(i)-(vi). The Respondent is therefore not an applicant for admission, and the charge under INA § 212(a)(2)A)(I) cannot be sustained.

Accordingly, after a careful review of the record, the following Order is entered:

ORDER

IT IS HEREBY ORDERED that the Respondent's motion to terminate proceedings be **GRANTED.**

10/27/16
Date

Thomas J. Mulligan
Immigration Judge