U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: HUANG, HONGLI

A 061-700-071

Date of this notice: 4/15/2016

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:
Pauley, Roger

Userteam: Docket

File: A061 700 071 – San Francisco, CA Date: APR 15 2016

In re: HONGLI HUANG a.k.a. Hong Li Huang a.k.a. Huang Unknown

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marc Van Der Hout, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(S)) (sustained)

Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude (not sustained)

APPLICATION: Termination

The respondent appeals the December 8, 2015, decision of the Immigration Judge finding him removable and and ordering him removed to China. The Department of Homeland Security has not responded. The record is remanded to the Immigration Judge for further proceedings and the entry of a new decision.

We review findings of fact under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of China, has been a lawful permanent resident of the United States since 2012 (I.J. at 1; Exh. 1). In February 2014, the respondent sustained a conviction, pursuant to a *nolo contendere* plea, for a 2013 violation of CALIFORNIA PENAL CODE § 136.1(b)(1), intimidation of witnesses and victims (I.J. at 1; Exh. 2). For this offense, he was sentenced to a 3-year term of imprisonment and fees (I.J. at 1; Exh. 2). The issue on appeal is whether the Department of Homeland Security has carried its burden of proving that the foregoing conviction renders the respondent removable from the United States as an alien convicted of an aggravated felony, specifically, "an offense relating to obstruction of justice . . . for which the term of imprisonment is at least one year." Sections 101(a)(43)(S) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(S), 1227(a)(2)(A)(iii).

During the pendency of this appeal, the United States Court of Appeals for the Ninth Circuit issued *Valenzuela Gallardo v. Lynch*, No. 12-72326, 2016 WL 1253877 (9th Cir. Mar. 31, 2016), which overturned the Board decision in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 841 (BIA 2012) (holding that a crime relates to obstruction of justice within the

meaning of section 101(a)(43)(S) of the Act, irrespective of the existence of an ongoing criminal investigation or proceeding). The Ninth Circuit held that the Board's decision in *Matter of Valenzuela Gallardo*, *supra*, impermissibly departed from its prior interpretations of "obstruction of justice." Inasmuch as the Immigration Judge did not have the benefit of *Valenzuela Gallardo v. Lynch* decision, we will remand the record to the Immigration Judge to apply current law and to allow the parties to supplement the record with additional relevant evidence, if appropriate.

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

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of:	)	Date: December 8, 2015
	)	
Hongli HUANG	)	File Number: **A061 700 071**
	)	
Respondent	)	In Removal Proceedings
	)	

On Behalf of Respondent:
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On Behalf of the DHS:
Scott D. Gambill, Assistant Chief Counsel
Office of the Chief Counsel
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ORDER OF THE IMMIGRATION JUDGE

Respondent, a lawful permanent resident, is charged with removability under two subparagraphs of section 237(a)(2) of the Immigration and Nationality Act, as amended ("INA"), based on his criminal conviction of February 5, 2014. See Exhs. 1 and 2. Respondent pleaded guilty on that date to violating Cal. Penal Code § 136.1(b)(1) by "willfully and unlawfully attempt[ing] to prevent or dissuade Jingteng Situ, a victim and/or witness of a crime from making a report of such victimization" to a law enforcement or judicial official. While he does not dispute the existence of his criminal conviction, Respondent denies that it renders him removable as charged. The Department of Homeland Security therefore has the burden of proving removability by clear and convincing evidence. *See* 8 CFR § 1240.8(a).

I. Has Respondent Been Convicted of a CIMT?

With respect to the charge under INA § 237(a)(2)(A)(i), the sole question is whether Respondent's conviction was for a crime involving moral turpitude. A crime may involve moral turpitude either because it has an element of fraud, or because it is inherently base, vile, or depraved so as to shock the public conscience.

Cal. Penal Code § 136.1(b)(1) does not qualify as morally turpitudinous under the fraud line of analysis. In committing this offense, a perpetrator seeks to prevent or dissuade a victim or witness from reporting a crime, with the result that law enforcement authorities are deprived of information necessary to the performance of their public safety duties. But "[d]epriving the government of evidence or information does not . . . rise to the level of fraud." *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1077 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring for the majority, which concluded that harboring, aiding, or concealing a felon with the intent that he may escape from arrest, trial, conviction, or punishment, did not categorically involve moral turpitude). In this Circuit, even deliberate provision of false information to a police investigator under Cal. Penal Code § 148.9(a) lacks moral turpitude: "When the only 'benefit' the individual obtains is to impede the enforcement of the law, the crime does not involve moral turpitude." *Blanco v. Mukasey*, 518 F.3d 714, 719 (9th Cir. 2008).

This leaves the question of whether Cal. Penal Code § 136.1(b)(1) requires conduct that is inherently base, vile, or depraved, so as to shock the public conscience. DHS counsel argues that dissuading a witness or victim from reporting a crime "fundamentally undermines this nation's system of criminal justice," denies victims the assistance they are due, and leaves the perpetrator unaccountable for his conduct. This is also true to a large extent of harboring, aiding, or concealing a felon with the intent that he may escape from arrest, trial, conviction, or punishment, yet such a crime has been held not to categorically involve moral turpitude. *See Navarro-Lopez, supra.* DHS counsel has provided numerous examples of witness dissuasion cases with facts that clearly show base, vile, and depraved behavior that would shock the public conscience, and these may well be typical instances of this offense. However, as required by *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the Court must determine whether there is a "realistic probability" that at least some violations of § 136.1(b)(1) will be prosecuted and convicted despite falling short of such depravity. In that regard, it is noteworthy that the term "prevent or dissuade" used throughout § 136.1(a) and (b) has been interpreted to encompass merely making a request, devoid of any express or implied threat, that a victim/witness consider settling the matter privately between the two families. *See People v. Wahidi* (2013) 222 Cal.App.4th 802, 805 ("Wahidi never demanded that Khan refrain from testifying or threatened Khan with harm if he were to come to court."). It is therefore apparent that at least some California convictions for attempting to "prevent or dissuade" victims or witnesses from coming forward do not involve threats, demands, or other behavior that would shock the conscience. Accordingly, while many or most violations of § 136.1(b)(1) may well involve far more egregious circumstances, the offense cannot be said to categorically involve moral turpitude. Because the language of the complaint tracks the language of the statute, the analysis is the same under both the categorical and modified categorical approaches. Thus, the charge under INA § 237(a)(2)(A)(i) cannot be sustained on this record.

II. Has Respondent Been Convicted of "An Offense Relating to Obstruction of Justice"?

As to the charge under INA § 237(a)(2)(A)(iii), given Respondent's 3-year prison sentence, the question is whether § 136.1(b)(1) is "an offense relating to obstruction of justice" under INA § 101(a)(43)(S). In *Matter of Valenzuela-Gallardo*, 25 I&N Dec. 838, 841 (BIA 2012), the Board of Immigration Appeals reaffirmed that it is "the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice" which "demarcates the category of crimes constituting obstruction of justice." The same Board decision further noted that "the aggravated felony provision is described, not [as "obstruction of justice"], but rather in the broader terms of one "relating to" obstruction of justice." *Valenzuela-Gallardo*, 25 I&N Dec. at 843 (citing *Rodriguez-Valencia v. Holder*, 652 F.3d 1157, 1159 (9th Cir. 2011) ("When interpreting the Act, we construe the 'relating to' language broadly." (quotation omitted)).[1]

As an initial matter, it is clear that a given statute need not contain an explicit reference to "the process of justice" or "obstruction of justice" to qualify as an offense relating to obstruction of justice. For instance, 18 U.S.C. § 1512, which the Board has put forward as an example of such an offense, does not use the term "justice," nor do 18 USC § 3 or Cal. Penal Code § 32, both of which the Board has found to relate to obstruction of justice. *See Valenzuela-Gallardo, supra*, and cases cited therein. In these latter two instances, the Board found the requisite specific intent to interfere with the process of justice where an accessory had acted "in order to hinder or prevent the principal's apprehension, trial or

[1] Respondent cites the recent decision in *Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015), as holding that differences in scope between state and federal statutes doom any chance of a categorical match. That case, however, involved INA § 101(a)(43)(I), which limited the scope of the aggravated felony at issue to "an offense *described in* section 2251, 2251A, or 2252 of title 18, United States Code" (emphasis added). INA § 101(a)(43)(S), by contrast, refers more broadly to "an offense *relating to* obstruction of justice" (emphasis added).

punishment," 18 U.S.C. § 3, or "with the intent that the principal may avoid or escape from arrest, trial, conviction or punishment." Cal. Penal Code § 32. The Board "determined that the critical difference between the crimes of accessory after the fact in [18 U.S.C.] § 3 and misprision of a felony in [18 U.S.C.] § 4 was that nothing in § 4 references the specific purpose for which concealment must be undertaken," whereas "accessory after the fact references the specific purposes for the concealment, which are hindering or preventing the apprehension, trial or punishment of the principal offender." *Valenzuela-Gallardo*, 25 I&N Dec. at 840-41 (citations and quotations omitted).

The California offense of witness dissuasion likewise requires that the offender be motivated by a specific purpose: "To prove a violation of section 136.1, subdivision (b)(1), the prosecution must show (1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making a report to any peace officer or other designated officials. The prosecution must also establish that the defendant's acts or statements were intended to affect or influence a potential witness's or victim's testimony or acts. In other words, section 136.1 is a specific intent crime." *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1347 (citations and quotations omitted).

California courts have recognized that "efforts to change the nature of a witness's testimony are not as inherently threatening to the integrity of the judicial process as efforts to completely prevent that witness's participation in the case. A witness who appears in court is subject to cross-examination and may be impeached through prior inconsistent statements, even if he or she has been influenced by the defendant. The same cannot be said for a witness who does not testify at all. And in cases where a witness is dissuaded from making a report of criminal conduct or cooperating with the prosecution, there may not even be a case." *People v. Fernandez* (2003) 106 Cal.App.4th 943, 951 (agreeing with argument presented on appeal). The *Fernandez* panel examined the scope of 236.1(b)(1) as part of California's "detailed and comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate or threaten witnesses." *Id.* at 948:

> The Legislature has taken pains to distinguish the various methods of influencing a witness and to establish a range of punishment for those offenses that reflects different levels of culpability. Efforts to influence the contents of a witness's testimony are generally punishable as misdemeanors. (See § 133 [providing false information to witness for purpose of affecting testimony]; § 137, subd. (c) [inducing witness to give false testimony or withhold true testimony].) Efforts to prevent a defendant from reporting a crime or from appearing in court are punished more severely, either as wobbler offenses, alternatively punishable as misdemeanors or felonies, or as straight felonies. (§ 136.1, subd. (a) [dissuading or attempting to dissuade witness from attending trial or giving testimony is wobbler offense]; § 136.1, subd. (b) [efforts to dissuade witness from reporting a crime to the authorities, causing a charging document to issue or seeking an arrest of a defendant are wobbler offenses]; § 138, subd. (a) [bribery of witness to dissuade attendance at hearing or trial is punishable as felony].)
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> . . .
>
> [I]t is clear that, generally speaking, the Legislature views an attempt to alter what a witness says in court as less culpable than an attempt to prevent a witness from appearing at all or from taking steps that are predicate to the prosecution's filing of an action.

Id. at 950-51.

The Board has discussed a federal offense involving intentional interference with crime witnesses prior to the start of any investigation or prosecution, pointing out that "18 U.S.C. § 1512 covers a series of offenses involving actions performed with an intent to 'hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense.' Such offenses are classified in chapter 73 of the Federal criminal code as within the category of offenses described as 'Obstruction of Justice' and clearly involve conduct that significantly precedes the onset of any official proceeding, even of an investigative nature." *Valenzuela-Gallardo*, 25 I&N Dec. at 842-43 (citation omitted). The Board's observation here strongly suggests it would find that Cal. Penal Code § 136.1(b)(1), which prohibits criminal actions performed with the intent to prevent or dissuade a witness from reporting the commission of a crime to a law enforcement officer or judge, necessarily involves "an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice," and thus would find it to be an aggravated felony "offense relating to obstruction of justice" under INA § 101(a)(43)(S).

The Board's discussion of 18 U.S.C. § 1512 focused on its intent requirement, not the various means by which the witness is hindered, delayed, or prevented from communicating the commission of the offense to a law enforcement official. Nonetheless, because the Board cited § 1512 as a specific example of a federal statute relating to obstruction of justice, the Court will go on to compare that statute to Respondent's state offense, since it is the federal statute most closely analogous to Cal. Penal Code §136.1(b)(1). The federal offense is defined as "knowingly us[ing] intimidation, threaten[ing], or corruptly persuad[ing] another person, or attempt[ing] to do so, or engag[ing] in misleading conduct toward another person, with intent to . . . hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." 18 USC § 1512(b)(3). The state offense is defined as "attempt[ing] to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from . . . [m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge." Cal. Penal Code §136.1(b)(1).

For an offense to be committed under Cal. Penal Code § 136.1(b)(1), there must be reason to believe that a crime has been committed, and thereafter there must be an intentional attempt to prevent or dissuade "another person who has been the victim of a crime or who is witness to a crime from . . . [m]aking any report of that victimization" to any law enforcement or judicial official. *See also* Cal. Penal Code § 136(3) (defining the "victim" of a crime as "any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated"). This focus on interference in reporting where there is "reason to believe that any crime . . . is being or has been perpetrated or attempted to be perpetrated" comports well with the federal statute, which references interference in the communication of "information relating to the commission or possible commission" of an offense. 18 U.S.C. § 1512(b)(3).

In interpreting the language of § 1512(b), the Ninth Circuit has excluded from its scope persuasion which, though done with the intent to hinder communication to law enforcement, is limited to urging another to invoke a testimonial privilege lawfully available to them, such as the spousal privilege or Fifth Amendment right to silence. *See United States v. Doss*, 630 F.3d 1181, 1187-90 (9th Cir. 2011) (synthesizing and adopting approach taken in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), and *United States v. Farrell*, 126 F.3d 484 (3rd Cir. 1997)). Similarly, Cal. Penal Code § 136.1(b)(1) has a "focus on the mental state of the perpetrator and his or her intent to affect or influence a potential witness's or victim's report" and this focus "limits the statute's reach by distinguishing culpable conduct

from innocent conversation and restrains use of its provisions to inhibit protected speech." *Navarro*, supra, 212 Cal.App.4th at 1351. Moreover, in its explanation of why it was adopting the approach taken by the Third Circuit, the Ninth Circuit in *Doss* specifically noted the *Farrell* court's comment "that in 'the absence of a privilege, society has the right to the information of citizens regarding the commission of crime,' and thus persuasion of those without a privilege might well have the requisite degree of culpability or corruptness." *Doss*, 630 F.3d at 1188, citing *Farrell*, 126 F.3d at 489 n.3.

This court has located no California case law suggesting that there has ever been a conviction under 236.1(b)(1) for urging a crime victim or witness to invoke a lawfully available testimonial privilege.[2] Moreover, in rejecting a constitutional challenge based on overbreadth of this statute, a state appellate court recently rejected "conten[tions] that the law would preclude an attorney from 'advising a client to file a civil lawsuit for damages in response to a crime'; prohibit a store manager from 'direct[ing] employees to call the parents of first-time shoplifters under the age of 18 instead of reporting such incidents to the police'; and prevent citizens from 'express[ing] their opinion about which crimes warrant government intervention, and which do not,' 'attempt[ing] to prevent a friend from reporting a small theft to the police by expressing the opinion that it will be more trouble and paperwork than it's worth,' or 'suggesting that the problem [of criminal activity] be handled privately with an apology, with amends being made, or some other way.'" *Navarro, supra*, 212 Cal.App.4th at 1352.[3] The court went on to find, "There is no reason to believe persons engaged in conduct of the type appellant posits are in substantial danger of prosecution under the statute. The statute prohibits statements specifically intended to induce a witness or victim to withhold evidence of a crime from law enforcement officials." *Id.*

The *Navarro* court held that "there is no question that California has a strong governmental interest in supporting and protecting citizens who wish to report violations of its criminal laws. This fundamental principle is embodied in Penal Code section 136.1, which declares that it is a misdemeanor to dissuade or attempt to dissuade any victim of crime from reporting the crime to the police. It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. Section 136.1, subdivision (b) protects and supports persons seeking to report crimes. . . ." *Id.* at 1349 (citations and quotations omitted).

In exploring the genesis of Cal. Penal Code § 136.1 and related provisions, the courts have stated, "The American Bar Association's Section of Criminal Justice, Committee on Victims, in 1979 issued a report and recommendations, including a proposed model statute, for reducing victim and witness intimidation in criminal proceedings. In large part in response to that report the California Legislature repealed former section 136, and replaced it with sections 136, 136.1 and 136.2. . . ." *People v. Babalola* (2011) 192 Cal.App.4th 948, 956. The *Babalola* panel also noted, "The 1979 ABA report and recommendations described the 'two unique aspects' of the crime of victim and witness intimidation: 'It is the one crime in which only unsuccessful attempts are ever reported or discovered. It is also a crime which inherently thwarts the process of criminal justice itself.' (Reducing Victim/Witness Intimidation: A Package, at p. 1.) The adoption of sections 136.1 and 136.2 in 1980, encouraged by the ABA

[2] Indeed, California's "carefully calibrated system of punishment," *Fernandez, supra*, 106 Cal.App.4th at 951, specifically criminalizes "knowingly induc[ing] another person to . . . withhold true testimony *not privileged by law*." Cal. Penal Code § 137(c) (emphasis added).

[3] This rule differs when the dissuasion involves not a crime report, but rather a witness' prospective testimony once a court proceeding is already underway. *See Wahidi, supra*, 222 Cal.App.4th at 807 (addressing Cal. Penal Code § 236.1(a)(2) rather than (b)(1), and finding that even if done via non-coercive means, "preventing a witness from testifying always interferes in some manner 'with the orderly administration of justice'").

recommendations, was intended in part to protect victims and witnesses so they would report crimes. This purpose is evident in section 136, subdivision (3)'s definition of 'victim,' as 'any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state or any other state or of the United States is being or has been perpetrated or attempted to be perpetrated' and section 136.1, subdivision (b)(1)'s criminalization of any attempt to prevent or dissuade a victim of a crime from reporting that crime to the police." *Id.* at 960-61.

For the reasons set forth above, the court finds that Cal. Penal Code § 136.1(b)(1) has "the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice," *Valenzuela-Gallardo*, *supra*, 25 I&N Dec. at 841, and thus qualifies as an aggravated felony under INA § 101(a)(43)(S). Respondent is therefore removable under INA § 237(a)(2)(A)(iii). He is making no application for relief, and thus the court will enter an order of removal.

In light of the foregoing, the following order shall enter:

ORDER

IT IS HEREBY ORDERED that Respondent be REMOVED from the United States to the People's Republic of China.

Joren Lyons
Immigration Judge