U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - LVG
3373 Pepper Lane
Las Vegas, NV 89120

Name: MONTENEGRO-RUIZ, RUBEN **A041-095-571**

Date of this notice: 5/31/2011

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

File: A041 095 571 - Las Vegas, NV Date: MAY 31 2011

In re: RUBEN MONTENEGRO-RUIZ a.k.a. Ruben Ruiz Montenegro a.k.a. Ruben Montenegro Ruiz; Ruben Guiz a.k.a. Ruben Guizmontenegro a.k.a. Ruiz Ruben Montenegro a.k.a. Ruiz Montenegroruben a.k.a. Ruben Montenegro a.k.a. Rubin Montenegro a.k.a. Rubin R. Montenegro

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Brandon C. Jaroch
Assistant Chief Counsel

APPLICATION: Reconsideration

The Department of Homeland Security (DHS) has filed a timely motion to reconsider the Board's October 15, 2010, decision dismissing its appeal. 8 C.F.R. § 1003.2(b)(2).

A motion to reconsider shall specify "errors of fact or law in the prior Board decision and shall be supported by pertinent authority." 8 C.F.R. § 1003.2(b)(1). The DHS argues that the Board erred in finding that the respondent's June 2008 and November 2008 convictions for battery constituting domestic violence in violation of §§ 33.018, 200.481(1)(a), and 200.485 of the Nevada Revised Statutes did not constitute "crimes of violence" under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i). Specifically, the DHS asserts that the Board incorrectly found that the record did not contain any documents regarding the factual basis for the convictions to determine whether the offenses involved violence under the modified categorical approach.

As we previously found and DHS does not dispute, battery constituting domestic violence in violation of §§ 33.018, 200.481(1)(a), and 200.485 of the Nevada Revised Statutes encompasses conduct that is not a "crime of violence" as defined in 18 U.S.C. § 16(a). A "crime of violence" involves the use of physical force against the person of another, whereas battery constituting domestic violence in Nevada involves "any willful and unlawful use of force or violence upon the person of another." 18 U.S.C. § 16(a); NEV. REV. STAT. § 200.481(1)(a). The "force or violence" language in the Nevada statute necessarily contemplates that the use of non-violent force is sufficient to constitute an offense under the statute, and consequently, battery constituting domestic violence is not a categorical "crime of violence." *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016-18 (9th Cir. 2006) (examining identical "force or violence" language from California's battery statute and finding that nonviolent force could satisfy the force requirement of the statute).

When a state statute is broader than the federal definition of a predicate offense, we may consult a limited class of documents constituting the "record of conviction" to determine whether the alien pled guilty to conduct within the scope of the federal provision under the modified categorical approach. *Shepard v. United States*, 544 U.S. 13 (2005). Evidence that may be consulted for this purpose includes the charging document, plea agreement, transcript of the plea colloquy, or some comparable judicial record of this information. *Shepard*, *supra*, at 26.

Here, the DHS submitted criminal complaints and minute orders from the respondent's two convictions. The minute orders establish that the respondent pled nolo contendere to "Count 3 - Battery Constituting Domestic Violence" and guilty "per count" to "Count 1- Battery Constituting Domestic Violence" (*Motion*, Exh. 2). The conviction documents do not establish, however, that the respondent pled guilty "as charged." Because the minute order does not contain the critical phrase "as charged," there is insufficient evidence to establish the factual predicate for the conviction. *U.S. v. Vidal*, 504 F.3d 1072, 1087-1088 (9th Cir. 2007); *see also Young v. Holder*, 634 F.3d 1014, 1021-1023 (9th Cir. 2011). Therefore, we did not err in our prior decision when we found that the record was insufficient to establish the factual basis for the respondent's convictions to determine whether the offenses involved violence under the modified categorical approach

Accordingly, the following order will be entered.

ORDER: The motion to reconsider is denied.

FOR THE BOARD