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

Killen, Patrick M
McGowan Hood & Felder, LLC
28 North Main St.
Sumter, SC 29150

DHS/ICE Office of Chief Counsel - CHL
5701 Executive Ctr Dr., Ste 300
Charlotte, NC 28212

Name: R[redacted]-[redacted], J[redacted] G[redacted] **A [redacted]711**

Date of this notice: 10/25/2017

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:
O'Connor, Blair
Wendtland, Linda S.
Pauley, Roger

SmithKi
Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished BIA decisions, visit
www.irac.net/unpublished/index

File: [redacted] 711 – Charlotte, NC Date: OCT 25 2017

In re: J[redacted] G[redacted] R[redacted]-I[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patrick M. Killen, Esquire

ON BEHALF OF DHS: Scott D. Criss
Assistant Chief Counsel

APPLICATION: Cancellation of removal

This case was last before the Board on August 5, 2015, when we remanded the record to the Immigration Judge. On remand, the Immigration Judge issued a decision dated June 28, 2016, denying the respondent's application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The respondent, a native and citizen of Mexico, now appeals. The Department of Homeland Security opposes the appeal. The appeal will be sustained and the record remanded to the Immigration Judge.

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).

The respondent challenges the Immigration Judge's determination that his 2009 conviction for criminal domestic violence under South Carolina Code § 16-25-20(A) (hereinafter "section 16-25-20(A)") was for a crime of domestic violence under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), rendering him ineligible for cancellation of removal (IJ at 1, 4).[1] *See* section 240A(b)(1)(C) of the Act.

In order to constitute a crime of domestic violence within the meaning of section 237(a)(2)(E)(i) of the Act, an offense must qualify as a crime of violence under 18 U.S.C. § 16. *See* section 237(a)(2)(E)(i) of the Act (defining a crime of domestic violence as a crime of violence, as defined in 18 U.S.C. § 16, committed against a family or household member). That is, the offense must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a).[2] "Physical force" in this context means

[1] The respondent concedes that he was found guilty of criminal domestic violence under section 16-25-20(A) (Respondent's Br. at 5).

[2] As the parties do not assert that a violation of section 16-25-20(A) constitutes a felony under Federal law, we do not address the second portion of the crime of violence definition in

Immigrant & Refugee Appellate Center, LLC | www.irac.net

violent force capable of causing physical pain or injury. *See Matter of Velasquez*, 25 I&N Dec. at 283; *accord Matter of Guzman-Polanco*, 26 I&N Dec. 713, 715-16 (BIA 2016), *clarified by Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016).

We apply the categorical approach to determine whether the respondent's conviction is for a crime of violence. *See Karimi v. Holder*, 715 F.3d 561, 567 (4th Cir. 2013); *see also Hernandez-Zavala v. Lynch*, 806 F.3d 259, 266-68 (4th Cir. 2015) (holding that the domestic relationship requirement for a crime of domestic violence is subject to the circumstance-specific approach). In doing so, we focus on the minimum conduct that has a realistic probability of successful prosecution under the statute of conviction. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85, 1693 (2013); *see also United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016) (holding that North Carolina common law robbery is not a violent felony under the Armed Career Criminal Act because the minimum conduct necessary to sustain a conviction did not include the use, attempted use, or threatened use of force).

Section 16-25-20(A) renders it unlawful to (1) "cause physical harm or injury to a person's own household member" or (2) "offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A) (2009). Causing, or offering or attempting to cause, physical harm does not necessarily require the use, attempted use, or threatened use of violent force. *See United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (holding that an offense of causing physical injury to a child was not a crime of violence because the statute did not require the use of violent force to cause the physical injury); *Matter of Guzman-Polanco*, 26 I&N Dec. at 717-18 (holding that a statute that punished the infliction of bodily injury "through any means or form" did not require the use of violent force). Because force is not an element of the offense, a conviction under section 16-25-20(A) is not categorically for a crime of violence, and thus not for a crime of domestic violence.

Additionally, decisions from South Carolina's appellate courts confirm that the minimum conduct to which there is a realistic probability that South Carolina would apply section 16-25-20(A) does not include the use, attempted use, or threatened use of physical force against the person or property of another. South Carolina courts have noted that the actions criminalized under the second provision of section 16-25-20(A) and simple assault differ only with respect to the identity of the victim. *See State v. LaCoste*, 553 S.E.2d 464, 471-72 (S.C. App. Ct. 2001). Although simple assault "has been defined as an 'attempted battery' or an unlawful attempt or offer to commit a violent injury," *State v. Sutton*, 532 S.E.2d 283, 285 (S.C. 2000), the phrase "violent injury" is not applied literally and has been held to include a touching committed in a rude or angry manner. *See State v. Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (defining assault and battery as "any touching of the person of an individual in a rude or angry manner, without justification" (citation omitted)); *see also State v. Williams*, 185 S.E.2d 529 (S.C. 1971) (affirming an assault

---

18 U.S.C. § 16(b). *See generally* S.C. Code Ann. § 16-25-20(B)(1) (2009) (stating that where a person violates section 16-25-20(A), "for a first offense, the person is guilty of a misdemeanor and must be fined not less than one thousand dollars nor more than two thousand five hundred dollars or imprisoned not more than thirty days."). Because the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b). *See Matter of Velasquez*, 25 I&N Dec. 278, 280 (BIA 2010).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

and battery conviction in a case where the defendant put his hands through the open window of the victim's car and one of his hands rubbed the back of the victim's neck); *State v. DeBerry*, 157 S.E.2d 637, 640 (S.C. 1967) (noting that assault and battery does not require serious bodily harm to the victim and would be satisfied by "a stranger on the street embrac[ing] a young lady, or a large man improperly fondl[ing] a child," even though no actual bodily harm was done). Because assault in South Carolina encompasses offenses not involving violent force, it follows that a conviction under section 16-25-20(A) also encompasses such offenses.

Based on the foregoing, we conclude that the respondent's conviction under section 16-25-20(A) is not for a crime of domestic violence under section 237(a)(2)(E)(i) of the Act.[3] Therefore, we will sustain the appeal. The record will be remanded to the Immigration Judge to further evaluate, consistent with this order, the respondent's eligibility for cancellation of removal under section 240A(b)(1) of the Act. Consequently, we need not address the respondent's remaining appellate arguments. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976)). Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

Board Member Roger A. Pauley respectfully dissents. This is the second time we will have remanded this case without addressing the Immigration Judge's decision in 2014 denying cancellation of removal for lack of a showing of exceptional and extremely unusual hardship. There is no justification for such remands. Furthermore, I do not regard the hardship issue as even close and would affirm the Immigration Judge's denial of relief on that basis. *See* IJ (2014) at 6-7.

[3] In reaching the contrary conclusion that the respondent's conviction was for a crime of domestic violence, the Immigration Judge relied in part on *Caceres-Marroquin v. Lynch*, 633 F. App'x 147 (4th Cir. 2016) (unpublished) (IJ at 3-4). However, *Caceres-Marroquin* is limited to the reasons the Board provided in addressing the alien's argument that section 16-25-20(A) is not for a crime of domestic violence because it does not on its face require a specific mental state. As *Caceres-Marroquin* did not directly address whether section 16-25-20(A) requires "violent force" as defined in our subsequent decision in *Matter of Guzman-Polanco*, we conclude that its analysis is neither binding nor persuasive here.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
5701 EXECUTIVE CENTER DR. #400
CHARLOTTE, NC 28212

MCGOWAN, HOOD & FELDER, LLC
KILLEN, PATRICK M., ESQ.
28 NORTH MAIN STREET
SUMTER, SC 29150

IN THE MATTER OF FILE A [redacted]711 DATE: Jun 29, 2016
R[redacted]-I[redacted], J[redacted] G[redacted]

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X 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
5701 EXECUTIVE CENTER DR. #400
CHARLOTTE, NC 28212

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: CRISS, SCOTT D. ESQ
5701 EXECUTIVE CENTER DR. #300
CHARLOTTE, NC, 28212

Immigrant & Refugee Appellate Center, LLC | www.irac.net

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
5701 EXECUTIVE CENTER DR., SUITE#400
CHARLOTTE, NC 28212

In the Matter of:

[redacted], J[redacted]
Respondent

Case No.: [redacted]711

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 6/28/16
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to **MEXICO** or in the alternative to _____.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to **MEXICO** or in the alternative to _____.

[ ] Respondent's application for voluntary departure was granted until ____ upon posting a bond in the amount of $_____ with an alternative order of removal to_____.

Respondent's application for:
[ ] Asylum was( )granted ( )denied ( )withdrawn ( )other.
[ ] Withholding of removal was( )granted( )denied( )withdrawn ( ) other.
[ ] Respondent's application for [ ] withholding of removal
[ ] deferral of removal under Article III of the Convention Against Torture was ( )granted ( )denied ( )withdrawn ( )other.
[ ] A Waiver under section ____ was ( )granted( )denied( )withdrawn ( )other.
[ ] Cancellation of removal under section 240A(a)was ( )granted ( )denied ( )withdrawn ( )other.

Respondent's application for:
[X] Cancellation under section 240A(b)(1) was( )granted [X]denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Cancellation under section 240A(b)(2) was ( )granted ( )denied ( )withdrawn ( )other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Adjustment of Status under section _____ was ( )granted ( )denied ( ) withdrawn ( ) other. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's status was rescinded under section 246.
[ ] Respondent is admitted to the United States as a ____ until_____.
[ ] As a condition of admission, respondent is to post a $_____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[ ] Other See attached Miguet order

Date: 6/28/16

THERESA HOLMES-SIMMONS
Immigration Judge

Appeal: WAIVED/ RESERVED
Appeal due by: 7/28/16

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
R[redacted]-I[redacted], J[redacted] G[redacted]	)	File No: A[redacted]711
	)	
Respondent.	)	MINUTE ORDER
	)	
	)	June 28, 2016
	)	

COMES NOW the Court and renders its decision on Respondent's application for Cancellation of Removal for Certain Nonpermanent Residents ("cancellation of removal"). After review of the record of proceedings, the Court finds the following:

1. That on November 12, 2009, a South Carolina court convicted Respondent of criminal domestic violence in violation of South Carolina Code § 16-25-20(A) for an offense that occurred on October 29, 2009. DHS Argument, Tab A ("DHS Arg.") (March 1, 2016).

2. That on June 1, 2011, the Department of Homeland Security ("DHS") issued a Notice to Appear ("NTA") to Respondent charging him with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"). Exhibit 1.

3. That Respondent, through counsel, admitted the factual allegations and conceded the charge of removability during a master calendar hearing. The Court found by clear and convincing evidence that Respondent was removable to the designated country of Mexico.

4. That on July 13, 2011, Respondent filed an application for cancellation of removal. Form EOIR-42B (July 13, 2011).

5. That on January 7, 2014, the Court found that Respondent failed to demonstrate statutory eligibility for cancellation of removal as he could not "meet his burden of proof with regard to continuous physical presence in the United States for the requisite ten-year period." Written Order of the Immigration Judge at 5 (January 7, 2013). The Court further found that Respondent had "not been a person of good moral character for the requisite ten-year period" and that he failed to establish exceptional and extremely unusual hardship to his qualifying relative, his United States citizen wife, should he be removed from the United States. *Id.* at 6-7. Accordingly, the Court denied Respondent's application for cancelation of removal and ordered him removed to Mexico. *Id.* at 7-8.

6. That on January 30, 2014, Respondent, through counsel, filed an appeal of the Court's decision with the Board of Immigration Appeals ("BIA" or "Board"). Notice of Appeal

Immigrant & Refugee Appellate Center, LLC | www.irac.net

from a Decision of an Immigration Judge (February 3, 2014); *see also* Request for Acceptance of Appeal by Certification (February 12, 2014) (requesting the Board accept Respondent's appeal despite prior omission of the requisite filing fee).

7. That on August 5, 2015, the Board issued a decision in the Respondent's case, remanding the record to the Court to "reconsider the respondent's application, particularly with regard to the issue of continuous physical presence." J[redacted] G[redacted] R[redacted] I[redacted], A[redacted] 711 (BIA August 5, 2015) ("Board Decision").

8. That on October 6, 2015, the Court afforded the parties the opportunity to supplement the evidentiary record.

9. That on March 31, 2016, counsel for Respondent filed a brief in support of Respondent's eligibility for cancelation of removal, arguing that Respondent should not be barred from cancellation of removal based on unpublished decisions. Respondent's Argument ("Resp't Arg.") (March 31, 2016).

Cancellation of Removal

Section 240A(b)(1) of the Act provides that the Attorney General may cancel removal and adjust the status of an alien who is inadmissible or deportable from the United States to that of a lawful permanent resident if the alien can demonstrate that he or she: 1) has been continuously present in the U.S. for not less than ten years immediately preceding the date of such application; 2) has been a person of good moral character during that ten year period; 3) has not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act, except if a waiver is granted for a victim of domestic violence under section 237(a)(7) of the Act; and 4) establishes that his or her removal would result in exceptional and extremely unusual hardship to the alien's U.S. citizen or lawful permanent resident spouse, parent, or child.

A conviction of a crime of domestic violence renders an alien statutorily ineligible for cancellation of removal. INA §§ 240A(b)(1)(C); 237(a)(2)(E)(i). When there is evidence that an alien may be statutorily barred from relief, the alien has the burden to prove by a preponderance of the evidence that such bar does not apply. INA § 240(c)(4)(A); 8 C.F.R. § 1240.8(d); *Garcia v. Holder*, 732 F.3d 308, 313 (4th Cir. 2013) (citing *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011)). An Immigration Judge may pretermit those cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. 8 C.F.R. § 1240.21(c)(1).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

South Carolina Crime of Domestic Violence

The Lake City Municipal Court of Lake Hill, South Carolina found Respondent guilty of criminal domestic violence under South Carolina Code § 16-25-20 on November 11, 2009. DHS Arg., Tab A.[1] The Court now considers whether this conviction renders Respondent statutorily ineligible for cancellation of removal.[2]

The Board of Immigration Appeals and the United States Court of Appeals for the Fourth Circuit previously considered South Carolina convictions for criminal domestic violence finding that such a conviction is for a criminal offense described under INA § 237(a)(2)(A) that renders an alien inadmissible, and therefore ineligible for cancellation of removal. INA §§ 237(a)(2)(E), 240A(b)(1)(C); *see Manuel Caceres-Marroquin*, A 205 025 176 (BIA June 12, 2015), *petition denied per curiam*, *Caceres-Marroquin v. Lynch*, 633 F. App'x 147, 147 (4th Cir. 2016).

The Fourth Circuit determined in an unpublished decision that the "Board properly concluded that Caceres-Marroquin's South Carolina conviction constituted a crime of violence under 18 U.S.C. 16(a) (2012) that rendered him ineligible for cancellation of removal." *Caceres-Marroquin v. Lynch*, 633 F. App'x at 147 (citing 8 U.S.C. § 1227(a)(E)(1); 8 U.S.C. § 1229b(b)(1)(C) (2012)).

Similarly, the Board previously concluded,

> The use or threatened use of force sufficient to cause harm or injury is categorically present in South Carolina Code § 16-25-20. We therefore conclude that in South Carolina Code § 16-25-20 is categorically a crime of violence. As the statute also includes as an element that the victim be a member of the accused's household, we likewise conclude that the statute is categorically a crime of domestic violence within the meaning of section 237(a)(2)(E) of the Act.

---

[1] The relevant statute states:

> "(A) It is unlawful to: (1) *cause* physical harm or injury to a person's own household member; or (2) *offer or attempt to cause* physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril . . . (B) Except as otherwise provided in this section, a person who violates the provisions of subsection (A) is guilty of the offense of criminal domestic violence and, upon conviction, must be punished as follows: . . . (1) for a first offense, the person is guilty of a misdemeanor and must be fined not less than one thousand dollars nor more than two thousand five hundred dollars or imprisoned not more than thirty days."

S.C. Code § 16-25-20 (emphasis added).

[2] The Court fully considered the arguments presented in Respondent's brief. In light of the Board and the Fourth Circuit decisions however, that already determined a South Carolina conviction for criminal domestic violence is categorically a crime of violence, the Court does not find Respondent's arguments to the contrary persuasive. *See generally* Resp't Arg.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

Manuel Caceres-Marroquin, A205 025 176 at 2 (BIA June 12, 2015).[3]

Conclusion

Though the two decisions are not binding precedent on this Court, the Court finds that the decisions are persuasive in their reasoning such that pretermission of Respondent's application for cancellation of removal is appropriate. An Immigration Judge may pretermit those cancellation of removal applications in which the applicant has failed to establish statutory eligibility for relief. 8 C.F.R. § 1240.21(c)(1).

The Court finds that Respondent's criminal domestic violence conviction under South Carolina Code § 16-25-20 is for a criminal offense described under section 237(a)(2)(A) of the Act, thereby rendering him inadmissible and thus, ineligible for cancellation of removal. INA §§ 237(a)(2)(E), 240A(b)(1)(C); *see Caceres-Marroquin v. Lynch*, 633 F. App'x at 147; *Manuel Caceres-Marroquin*, A205 025 176 (BIA June 12, 2015).

As Respondent is ineligible for cancelation of removal, the Court need not address the question of Respondent's continuous physical presence. *See* Board Decision at 1.

Accordingly, the Court enters the following:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for Cancellation of Removal for Certain Nonpermanent Residents (Form EOIR-42B) is pretermitted and DENIED.

IT IS FURTHER ORDERED that Respondent shall be REMOVED from the United States to Mexico based on the charge contained in the Notice to Appear.

6/28/16
Date

Theresa Holmes-Simmons
United States Immigration Judge
Charlotte, North Carolina

[3] The Board also considered whether the South Carolina statute requires any specific mental state and concluded,

> [N]othing in South Carolina's jurisprudence supports the respondent's contention that this statute can be violated through reckless of negligent conduct which merely results in unintended harm or injury. South Carolina utilizes the general principle that "under statutes that do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by criminal intent." *State v. Ferguson*, 395 S.E.2d 182, 183 (S.C. 1990). We are unable to find any contrary instance in which this statute was held to criminalize merely negligent or reckless conduct.

Manuel Caceres-Marroquin, A205 025 176 at 2 (BIA June 12, 2015).

Immigrant & Refugee Appellate Center, LLC | www.irac.net