U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BLANCO PEREZ, ROBERTO JA...

A 092-981-108

Date of this notice: 5/14/2015

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:
Greer, Anne J.
Wendtland, Linda S.
O'Herron, Margaret M

Userteam: Docket

File: A092 981 108 - Oakdale, LA

Date: MAY 14 2015

In re: ROBERTO JAVIER BLANCO-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Lorraine L. Griffin
Assistant Chief Counsel

CHARGE:

Notice: 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 found)

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)(F)) (not found)

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)(U)) (not found)

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 14, 2013, decision concluding that the respondent is not removable as charged and terminating the instant proceedings. The appeal will be sustained, proceedings will be reinstated, and the record will be remanded to the Immigration Judge for further proceedings consistent with this decision.

We review factual findings, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The following facts are not in dispute. The respondent, a native and citizen of Mexico, entered the United States without inspection at an unknown place and time (I.J. at 1; Tr. at 7-8; Exh. 1). Thereafter, he adjusted his status to that of a lawful permanent resident on March 21, 1990 (I.J. at 1; Tr. at 8; Exh. 1). Then, on June 2, 1993, he was convicted of attempted kidnapping in violation of California Penal Code section 664/207(a) (I.J. at 2; Tr. at 8; Exhs. 1-2).

Based on the foregoing, the DHS charged the respondent with deportability under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), for having been convicted of committing a crime involving moral turpitude within 5 years of his admission to the United States, and section 212(a)(2)(A)(iii) of the Act, for having been convicted of an aggravated felony as defined in sections 101(a)(43)(F) and (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(F), (U) (Exh. 1).

In declining to find the respondent deportable as an aggravated felon, the Immigration Judge found that the respondent's attempted kidnapping conviction did not qualify as either a crime of violence or a conspiracy to commit a crime of violence (I.J. at 2-4; Exhs. 1-2). *See United States v. Najera-Mendoza*, 683 F.3d 627 (5th Cir. 2012). In declining to sustain the charge related to a conviction for a crime involving moral turpitude, the Immigration Judge concluded that the respondent was not deportable under section 237 of the Act because he had not previously been admitted to the United States, notwithstanding his adjustment of status in 1990 (I.J. at 2-3; Exhs. 1-2). In support of her analysis, the Immigration Judge relied on *Martinez v. Mukasey*, 519 F.3d 532, 542-46 (5th Cir. 2008), where the United States Court of Appeals for the Fifth Circuit discussed certain circumstances in which an adjustment of status does not qualify as an admission for purposes of section 212(h) of the Act, 8 U.S.C. § 1182(h) (I.J. at 2-3). Because the Immigration Judge did not sustain any of the charges contained on the Notice to Appear, she terminated the instant proceedings (I.J. at 4).

On appeal, the DHS does not challenge the Immigration Judge's findings with respect to the aggravated felony charges. Instead, the agency maintains that the Immigration Judge erred in applying *Martinez v. Mukasey*, *supra*, to evaluate whether the respondent is deportable under section 237(a)(2)(A)(i) of the Act. The DHS asserts that *Martinez v. Mukasey* is distinguishable because it is limited to a discussion of the meaning of the terms "admission" and "admitted" as used in section 212(h) of the Act, 8 U.S.C. § 1182(h) (DHS Brief at 3-8). As a result, the DHS argues the Fifth Circuit's finding that an alien who adjusted has not been admitted for purposes of section 212(h) of the Act is limited to that provision, and does not address the use of the term in section 237 of the Act (DHS Brief at 5, 7). Instead, the DHS maintains that *Matter of Espinosa Guillot*, 25 I&N Dec. 653 (BIA 2011) controls (DHS Brief at 6).

In *Matter of Espinosa Guillot*, *supra*, we held that an alien who entered without inspection and subsequently adjusted status to that of a lawful permanent resident has been admitted to the United States and is subject to charges of removability under section 237(a) of the Act. *See id.* In so doing, we found that adjustment of status generally constitutes an admission. *See id.* at 654. As a result, we concluded that a decision from the United States Court of Appeals for the Eleventh Circuit that employed a similar analysis to that contained in *Martinez v. Mukasey*, *supra*, was inapplicable under the circumstances, as the Eleventh Circuit case looks to the specific language of section 212(h) of the Act notwithstanding the fact that the decision considered such language in the context of the Act as a whole. *See Matter of Espinosa Guillot*, *supra*, at 655, *citing Lanier v. United States Attorney General*, 631 F.3d 1363 (11th Cir. 2011). Additionally, we explained in *Matter of Espinosa Guillot*, *supra*, that applying the definition of the term "admission" as set forth in cases like *Lanier v. United States Attorney General*, *supra*, beyond section 212(h) of the Act would create absurd results. *See Matter of Espinosa Guillot*, *supra*, at 655-56, *citing Matter of Alyazji*, 25 I&N Dec. 397, 399 & n.2 (BIA 2011), and *Matter of Rosas*, 22 I&N Dec. 616, 621, 623 (BIA 1999).

As a result, we disagree with the Immigration Judge's conclusion that the respondent may not be found deportable under section 237 of the Act because he entered without inspection and then adjusted his status. However, because the Immigration Judge did not consider whether (1) the respondent's conviction for attempted kidnapping qualifies as a crime involving moral turpitude and (2) the acts underlying the offense were committed within 5 years of the respondent's adjustment of status, we conclude that remand of the record is required in order to allow the Immigration Judge to further evaluate whether the charge under section 237(a)(2)(A)(i) of the Act can be sustained. Should the charge of deportability be sustained, the respondent will also have the opportunity to apply for any forms of relief from removal for which he may be eligible.

Accordingly, the following orders will be entered.

ORDER: The DHS appeal is sustained.

FURTHER ORDER: These proceedings are reinstated and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OAKDALE, LOUISIANA

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
	)	
Roberto Javier BLANCO PEREZ	)	**File No.: A092-981-108**
	)	
Respondent	)	
	)	

CHARGES: Section 237(a)(2)(A)(i) of the Immigration and Nationality Act, as an alien who has been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as an alien, who at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act, a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as an alien, who at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in section 101(a)(43) of the Act.

On Behalf of Respondent
Pro Se

On Behalf of the Department
Assistant Chief Counsel
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural and Factual History

The Respondent is a native and citizen of Mexico, who arrived in the United States at an unknown time and place. On November 21, 2012, the Department of Homeland Security ("DHS") initiated immigration proceedings by issuing a Notice to Appear ("NTA") which alleged that on March 21, 1990, Respondent adjusted status to lawful permanent resident. DHS

also alleged that on June 2, 1993, Respondent was convicted in the Superior Court at Santa Ana, California for the offense of Attempted Kidnapping, in violation of section 664/207(a) of the California Penal Code.[1] In addition, DHS alleged that on October 8, 2012, Respondent arrived at the San Ysidro Port of Entry, San Ysidro, California and applied for admission into the United States from Mexico as a lawful permanent resident. See Exh. 1. Based on these allegations, DHS charged the Respondent as removable pursuant to sections 237(a)(2)(A)(i) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act").

At the Initial Master Hearing on January 14, 2013, Respondent admitted the six factual allegations set forth in the NTA. The Court reviewed the conviction records, determined that Respondent was not removable as charged, and terminated proceedings. This decision addresses the Court's findings at the hearing.

II. Applicable Law and Analysis

A. Crime of Violence

The Immigration and Nationality Act ("Act") defines "aggravated felony" to include a "crime of violence" (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the term of imprisonment is at least one year. INA § 101(a)(43)(F). A "crime of violence" is:

> (a) an offense that has an element the use, attempted use, or threatened use of physical force against a person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

See 18 U.S.C. § 16.

In the Fifth Circuit, the "physical force" required in a crime of violence must be "destructive or violent force." United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995). It does not encompass indirect acts, such as luring an unsuspecting swimmer into a strong undertow. United States v. Villegas-Hernandez, 468 F.3d 874, 879 n.6 (5th Cir. 2006).

To determine whether a past conviction constitutes a crime of violence, the Fifth Circuit applies the categorical approach. Taylor v. United States, 495 U.S. 575, 600–602 (1990). In order to make a determination under the categorical approach, the first step is to look at the criminal statute that the Respondent violated to analyze whether the crime fits within the definition of "crime of violence." Larin-Ulloa v. Gonzales, 462 F.3d 456, 463 (5th Cir. 2006). The categorical approach calls for the trier of fact to examine the elements of the offense, rather

[1] The conviction records submitted indicate that a jury found Respondent guilty of Attempted Kidnapping on September 17, 1993.

than the facts underlying the conviction. United States v. Mendoza–Sanchez, 456 F.3d 479, 482 (5th Cir. 2006).

If the necessary element of "destructive or violent" force cannot be ascertained because the statute defines more than one offense, then the court may use the modified categorical approach. See Larin- Ulloa, 462 F.3d at 464. Under the modified categorical approach, the court may examine the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Omari v. Gonzales, 419 F.3d 303, 308 (5th Cir. 2005) (quoting Shepard v. United States, 544 U.S. 13, 20–21 (2005)).

The Respondent was convicted of Attempted Kidnapping in violation of California Penal Code section 664/207(a) which states that "every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." See CAL. PENAL CODE § 207(a) (West 1993). The Fifth Circuit has held that a conviction for kidnapping in Oklahoma was not a crime of violence, comparing the Oklahoma statute to section 207(a) of the California Penal Code. See United States v. Najera-Mendoza, 683 F.3d 627, 630 (5th Cir. 2012). In United States v. Moreno-Florean, the Fifth Circuit held that the California offense of kidnapping did not meet the "generic, contemporary definition" of kidnapping because the section could be violated without proof of two elements that are part of the definition:

> (1) substantial interference with the victim's liberty; and
>
> (2) circumstances exposing the victim to substantial risk of bodily injury or confinement as a condition of involuntary servitude.

542 F.3d 445, 452-456 (5th Cir. 2008).

Accordingly, in keeping with Fifth Circuit precedent, the Court finds Respondent's California conviction for attempted kidnapping in violation of section 207(a) is not a crime of violence.

B. Crime Involving Moral Turpitude

DHS also charged Respondent as removable pursuant to section 237(a)(2)(A)(i) of the Act, which states that any alien convicted of a crime involving moral turpitude committed within five years after the date of admission is deportable. The Fifth Circuit has held that an alien who adjusted status to lawful permanent resident was not *admitted* as a lawful permanent resident pursuant to the definition of "admitted" in section 101(a)(13) of the Act, which is defined as the lawful *entry* of the alien into the United States after inspection and authorization by an immigration officer. See Martinez, 519 F.3d 532, 543 (5th Cir. 2008); INA § 101(a)(13). As the Fifth Circuit has determined that adjustment of status is not an admission, Respondent was not convicted of a crime involving moral turpitude within five years after the date of admission, as required in section 237(a)(2)(A)(i) of the Act.

C. Conspiracy

With regard to the charge of removability under section 101(a)(43)(U), the Board of Immigration Appeals ("BIA") has determined that DHS must demonstrate by clear and convincing evidence that Respondent was convicted of engaging in a "conspiracy" within the meaning of section 101(a)(43)(U) of the Act. Thus, the proper analysis in a conspiracy case is whether the substantive crime that was the object of the conspiracy would have fit within the particular aggravated felony category had it been successfully completed. See Matter of Davis, 20 I&N Dec. 536, 544-45 (BIA 1992) (holding that a Maryland misdemeanor conviction for conspiracy to distribute a controlled substance was an aggravated felony because the felony distribution offense that was the object of the conspiracy would have been an aggravated felony had it been completed). In this case, Respondent was not charged with being part of a broader conspiracy. Accordingly, the Court finds Respondent's offense for attempted kidnapping does not constitute a conspiracy contemplated within the meaning of section 101(a)(43)(U).

III. Conclusion

Respondent is not removable for having committed a crime of violence or a conspiracy to commit an aggravated felony. The Fifth Circuit has determined that a conviction for attempted kidnapping in violation of section 207(a) of the California Penal Code is not a crime of violence and Respondent was not charged as being part of a broader conspiracy. Respondent is not removable pursuant to section 237(a)(2)(A)(i) of the Act because the conviction for attempted kidnapping did not occur within five years of a date of admission.

January 14, 2013
Date

Agnelis L. Reese
Immigration Judge