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

Stewart, Daniel
Law Office of Daniel Stewart, PLLC
PO Box 540096
Dallas, TX 75354

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: R[redacted] M[redacted], J[redacted] **A[redacted]954**

Date of this notice: 6/16/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
O'Connor, Blair
Pauley, Roger

Userteam: Docket

File: [redacted] 954 – Dallas, TX Date: JUN 16 2017

In re: J[redacted] R[redacted] M[redacted] [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Daniel Stewart, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Cancellation of removal under section 240A(b)(1) of the Act

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's March 30, 2016, decision finding that he had waived his opportunity to apply for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security ("DHS") has not responded to the appeal. The appeal will be sustained. The record will be remanded.

We review findings of fact, 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).

We reverse the Immigration Judge's holding that the respondent's application for cancellation of removal under section 240A(b)(1) of the Act was untimely and that the respondent did not demonstrate good cause sufficient to overcome a prior admission that no relief was available (I.J. at 2). We acknowledge that the respondent, through counsel, initially indicated that he would request a removal order if further negotiations with DHS for administrative closure were unsuccessful (I.J. at 2; Tr. at 7-8). At a subsequent hearing, the respondent noted that no relief was apparently available (I.J. at 2; Tr. at 10). However, the DHS counsel immediately then noted that another attorney (who apparently was not present at the hearing) indicated that the respondent may be eligible for cancellation of removal (Tr. at 10-11). The DHS counsel then "in an abundance of caution" requested that the Immigration Judge continue the case to determine if the respondent wished to apply for cancellation of removal (Tr. at 11). The respondent's counsel agreed (Tr. at 11).

At the next hearing, the respondent clearly stated that he wished to apply for cancellation of removal and filed an application purporting to demonstrate his prima facie eligibility for cancellation of removal (Tr. at 17; Exh. 4). When asked why the respondent previously indicated that no relief was available, the respondent's counsel answered that the Board had just decided *Matter of Garcia-Ramirez*, 26 I&N Dec. 674 (BIA 2015), a case addressing the requirement that

an alien have 10 years of continuous physical presence in the United States to be eligible for cancellation of removal, among other requirements (Tr. at 19). *See* section 240A(b)(1)(A) of the Act. The Immigration Judge disagreed, stating that the respondent needed to prove that there had been an intervening change in the law or facts, and that the respondent would need to show documentation related to all of the respondent's entries and absences from the United States (Tr. at 19). In his decision, the Immigration Judge found no good cause sufficient to allow the respondent to withdraw from his previous admission that no relief was available (I.J. at 2).

We disagree with this conclusion. The respondent's answer that no relief was available was immediately contradicted by the DHS counsel. The respondent then immediately concurred with the suggestion that the case be continued to research the possibility of his eligibility for cancellation of removal. Moreover, the respondent noted an intervening Board precedent that might be relevant to the issue of continuous physical presence (Tr. at 19). Under the totality of the circumstances, we find the respondent demonstrated good cause to overcome the previous admission that no relief was available. We will remand the case for further consideration of his eligibility for cancellation of removal.

We reach this decision cognizant of the Immigration Judge's alternate holding that the respondent's assault conviction under Texas Penal Code § 22.01(a)(1) was categorically a crime involving moral turpitude, thus precluding the respondent from being eligible for cancellation of removal. *See* section 240A(b)(1)(C) of the Act (setting forth the requirement that an applicant, among other requirements, not be convicted of certain offenses). The Immigration Judge concluded that, under the then-controlling law of the United States Court of Appeals for the Fifth Circuit, the respondent's statute of conviction for assault was a crime involving moral turpitude (I.J. at 3). *See Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012).

Subsequent to the Immigration Judge's decision, the Fifth Circuit recognized that the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), overruled *Esparza-Rodriguez v. Holder*, *supra*. *See Gomez–Perez v. Lynch*, 829 F.3d 323, 328 n.5 (5th Cir. 2016). In *Gomez-Perez v. Lynch*, *supra*, the Fifth Circuit held "Texas's assault statute can be committed by mere reckless conduct and thus does not qualify as a crime involving moral turpitude." *Id.* at 328. The Fifth Circuit also held that the statute is not divisible and the modified categorical approach does not apply. *Id.* Accordingly, the Immigration Judge's conclusion that the respondent is convicted of an offense that is categorically a crime involving moral turpitude is no longer controlling in light of the Fifth Circuit's subsequent decision.

We also disagree with the Immigration Judge's conclusion that the assault conviction is a crime involving moral turpitude because the case involves an affirmative finding of family violence (I.J. at 4; Exh. 3 at 1). In determining whether an offense is a crime involving moral turpitude, we apply the categorical and, if appropriate, the modified categorical approach. *See generally Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). The categorical approach applies to the elements of the offense and not the actual conduct. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (noting that the categorical approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior).

The issue, then, is whether a finding of family violence is an element of the offense. A finding of family violence is entered pursuant to Texas Code of Criminal Procedure article 42.013:

> In the trial of an offense under Title 5, Penal Code [offenses against the person], if the court determines that the offense involved family violence, as defined by Section 71.004, Family Code, the court shall make an affirmative finding of that fact and enter the affirmative finding in the judgment of the case.

Thus, under Texas law, a trial court makes a finding of family violence, rather than a jury. Such a finding cannot be an element of the offense because it is not submitted to the jury. *See Mathis v. United States*, *supra*, at 2248 (noting that elements "are what the jury must find beyond a reasonable doubt to convict the defendant"). Furthermore, Texas courts have held that a trial court's affirmative finding of family violence does not violate the Sixth Amendment right to a jury trial, as such a finding does not increase the authorized punishment in that case.[1] *See*, *e.g.*, *Henderson v. State*, 208 S.W.3d 593, 595 (Tex. App. 2006) (collecting cases). Thus, for purposes of the categorical approach, a finding of family violence is not an element of the offense, as it is not submitted to a jury. We are not convinced that an affirmative finding of family violence demonstrates that an offense is a crime involving moral turpitude.

In light of the above, we are not persuaded by the Immigration Judge's conclusion that the respondent's criminal convictions bar him from being eligible for cancellation of removal. We will remand the record for further proceedings. Given the remand, we need not address the respondent's appellate claim that the Immigration Judge erred by not granting him a continuance to pursue a U non-immigrant visa as defined at section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U), and available to certain victims of serious crimes (Respondent's Brief at 2-4). *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

On remand, the parties shall have the opportunity to update the record on any relevant issue. We express no opinion on the ultimate outcome of the case.

Accordingly the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded for the Immigration Judge to conduct further proceedings and for the entry of a new decision consistent with this order.

FOR THE BOARD

[1] A finding of family violence does have the possibility of raising the sentence in any subsequent prosecution for family violence assault. *See Henderson v. State*, *supra*, at 595. This situation is not present in the respondent's case.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: [redacted]954 March 30, 2016

In the Matter of

J[redacted] R[redacted] M[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 212(a)(6)(A)(i), present without admission.

APPLICATIONS: Cancellation of removal for a nonpermanent resident.

ON BEHALF OF RESPONDENT: DANIEL STEWART

ON BEHALF OF DHS: JOSHUA LEVY

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 39-year-old male native and citizen of Mexico, who entered the United States without inspection in 2009. A Notice to Appear was issued on November 4, 2014, charging the respondent with removability under the above cited section. During a master calendar hearing, the respondent admitted allegations 1, 2 and 4, and conceded the charge of 212(a)(6)(A)(i). Additionally, the Government introduced into the record a copy of the I-213, contained in Exhibit 2. Based on the admissions and concession and the information contained in the I-213, I find the charge is sustained by clear and convincing evidence.

The respondent was afforded an opportunity to seek relief. The respondent, through his attorney, indicated, however, that no relief was available. The respondent requested a continuance for the purpose of requesting prosecutorial discretion from the Government. That request was granted, and the case was continued for that purpose. The case was continued twice for that purpose. Ultimately, however, on December 1, the respondent indicated that the Government had declined the request for prosecutorial discretion. At that time, the respondent requested leave from the Court to amend the relief requested and to request cancellation of removal. However, I find that no good cause exists to allow the respondent to change the relief requested, and I will require the respondent to abide by the decision of the respondent's attorney articulated in court on August 5, 2015, that no relief is available in this case.

Notwithstanding that, the respondent's attorney has requested cancellation of removal; although that request was made on an untimely basis. Additionally, the respondent's attorney has requested a continuance for the purpose of submitting a U visa application to the Department of Homeland Security. Both of those requests were denied. The request for cancellation is denied because the respondent was given an opportunity to request relief and declined to request cancellation, stating that no relief was available, and the respondent's attorney later stated that she believed the respondent was not eligible for cancellation of removal. The respondent thereafter obtained a new attorney, who has renewed the request for cancellation of removal. However, the respondent's new attorney steps into the shoes of his prior attorney, and I decline to release the respondent from his counsel's statement that no relief was available in this case. Therefore, the request for cancellation of removal is denied and pretermitted.

If, on appeal, it should be determined that the respondent should have

been given an opportunity to seek cancellation, then, as an alternative, I find that the respondent is statutorily ineligible for cancellation of removal due to a conviction for a crime involving moral turpitude under the Board's holding in Matter of Cortez, 25 I&N Dec. 301 (BIA 2010). The respondent was convicted of assault family violence under the Texas Statute, which I'll come to presently, and as this was a class A misdemeanor, the offense was punishable by up to one year. Thus, under the Board's decision in Matter of Cortez, the respondent is statutorily ineligible for cancellation of removal.

In addition to Exhibit 1, the Notice to Appear, and Exhibit 2, the I-213, the following documents have been admitted. Exhibit 3 is the respondent's prima facie packet for cancellation of removal. Exhibit 4 is the application for cancellation. Exhibit 5 is the U visa certification. Exhibit 6 is the affidavit for arrest warrant. In addition to these documents, all of which are admitted into the record without objection from the parties, the respondent entered into a stipulation that he had been convicted under Texas Penal Code Section 22.01(a)(1). The respondent is not eligible for cancellation of removal based on the conviction. There are numerous reasons why he is not eligible, but I will list only two in this decision. The stipulation that the conviction is under 22.01(a)(1) necessarily means that the conviction is one which involves bodily injury. Under the decision of the Fifth Circuit in the case of Esparza-Rodriguez v. Holder, 699 F.3d 821 (5th Cir. 2012), 22.01(a)(1) is categorically a crime involving moral turpitude, because it involves bodily injury. The Fifth Circuit has not ever retreated from its position stated in the Esparza case, which has been and continues to be widely cited. That is the first reason.

The second reason that I find that this is a crime involving moral turpitude is because the face of the judgment indicates that the conviction was not only under 22.01, but also under the Texas Code of Criminal Procedure Article 42.013. This

section of the statute states that, if the Court determines that an offense involves family violence as defined in Section 71.004 Family Code, the Court shall make an affirmative finding of fact and enter that affirmative finding in the judgment of the case. In this case, in Exhibit 3, page 1, the judgment for the assault conviction shows that the court made an affirmative finding of family violence. Accordingly, under Texas law, this is as a matter of the conviction, not the sentence but the actual conviction, this is a conviction not simply for assault, but it is for assault family violence. Under Texas law, the designation of family violence carries consequences that an assault conviction in and of itself, without family violence, does not carry. That is under the state statute.

Because this is part of the judgment and not just the sentence, therefore, necessarily I conclude that this is a crime involving moral turpitude because, based on nothing more than the statute and the judgment, it is clear that this is an assault which exceeded mere touching and involves family violence. Therefore, because of this aggravated factor, I find that this is a crime involving moral turpitude based on the Board's decision in Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006). For these reasons, this conviction is a crime involving moral turpitude, which is a disqualifying factor because it carries a sentence up to a year. Therefore, the application for cancellation of removal must be pretermitted because of the respondent's statutory ineligibility.

The respondent's alternate request was for a continuance for the purpose of pursuing a U visa. The respondent's attorney indicated that the application for a U visa has not actually been filed, but that he intends to file it and that the certification has been obtained. That is contained in the record in Exhibit 5. The request for a continuance is untimely, as the alleged crime that the respondent was a victim of took place in May of 2015. The respondent has had four hearings since that date, in addition to today's hearing. The respondent did not request a continuance on any of the four

previous hearings on May 19, August 5, October 14, or December 1 of 2015. Thus, this request is not timely. Assuming arguendo that the request was timely, I would find that the respondent is not likely to prevail on his application for a U visa.

In accordance with the Board's decision in Matter of Sanchez Sosa, 25 I&N Dec. 807 (BIA 2012), the Immigration Judge must determine whether the application is prima facie approvable in order to grant a continuance. In this case, the respondent has not actually submitted a U visa application. However, based on the certification, it is apparent that the application is not prima facie approvable. 8 C.F.R. Section 214.14(c)(2~~1~~) requires that the certification must be signed by a certifying official within the six months preceding the filing of the Form 918. The certification must state that the person signing the certificate is the head of the certifying agency or any person in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency.

The certification that has been provided in Exhibit 5 does not meet this qualification because the portion of the form that is for this purpose contained on page 1 indicates that the title of the certifying official is "patrolman," and does not indicate that the certifying official is a supervisor as required by the regulation. I also take note that the certification is incorrectly filled out and is incomplete, because it does not list the head of the certifying agency on page 1. The actual certification appears on page 3. The certification does not state that the certifying official is a supervisor who is authorized to sign U visa applications on behalf of the agency. I will also take administrative notice that the city of Irving is a large city in the Dallas, Fort Worth area. The police force is a large police force with multiple stations, and the force is a large enough force that it is unlikely that a patrolman has been given the duties of a certifying in official. In any event, even if that had happened, this still would not qualify, because

the regulation requires two things: first, that the person be a supervisor, and, second, that the person have been designated by the head of the agency as having certifying authority on behalf of the agency. Even if it were true in this case, which is doubtful, that the purported certifying official actually has certifying authority, this still would not qualify him because the certifying official, as purported on this form, is not a supervisor and, more importantly than that, he has not certified that he is a supervisor as required by the regulation that I cited.

Because the certification is improper and the person does not indicate that he is a supervisor, either on page 1 or on page 3, this does not qualify, and, therefore, the respondent is not eligible for a U visa based on this certification. Accordingly, it is not necessary for the respondent to have a continuance for the purpose of submitting a U visa application based on this certification, and the request for a continuance will be denied. As the respondent has no relief and has not requested any relief, therefore, the following order will be entered:

ORDER

IT IS ORDERED that the respondent be removed from the United States to Mexico on the charges contained in the Notice to Appear.

Please see the next page for electronic signature

R. WAYNE KIMBALL
Immigration Judge

//s//

Immigration Judge R. WAYNE KIMBALL

kimballr on June 20, 2016 at 5:41 PM GMT