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

Wiesinger, Benjamin Todd
Pope & Associates
320 E. McDowell Rd.
Suite 220
Phoenix, AZ 85004

DHS/ICE Office of Chief Counsel - PHO
2035 N. Central Ave.
Phoenix, AZ 85004

Name: B[redacted] M[redacted], V[redacted]

A [redacted]-035

Date of this notice: 10/3/2019

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:
Adkins-Blanch, Charles K.
Kelly, Edward F.
Liebmann, Beth S.

Userteam: Docket

File: A[redacted]-035 – Phoenix, AZ

Date: OCT - 3 2019

In re: V[redacted] B[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin T. Wiesinger, Esquire

APPLICATION: Cancellation of removal

This matter was last before the Board on March 17, 2011, when we dismissed the Department of Homeland Security's (DHS) appeal from the Immigration Judge's September 29, 2009, decision that granted the respondent cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The case was remanded to allow the DHS to complete any necessary security investigations. On remand, the DHS informed the Immigration Judge that the respondent had been convicted for a battery offense under Florida Statutes section 784.03(1)(a) during the pendency of his appeal, and that he was also arrested for possession of marijuana for sale. The DHS argued that the new offenses barred the respondent from cancellation of removal under section 240A(b)(1)(C) of the Act as an alien convicted of a crime of domestic violence, and because there is reason to believe that the respondent is a drug trafficker. *See* sections 237(a)(2)(E)(i) and 237(a)(2)(C) of the Act, 8 U.S.C. §§ 1227(a)(2)(E)(i) and 1227(a)(2)(C). The Immigration Judge agreed with the DHS that the respondent was barred from relief as an alien convicted of a crime of domestic violence and entered an order denying cancellation of removal. The respondent appealed that decision. The appeal will be sustained, and the record will be remanded for further proceedings.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under a clearly erroneous standard, and all other issues de novo. *See* 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

As noted at page 3 of the Immigration Judge's decision, under Florida Statutes section 784.03(1)(a), the offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

The Immigration Judge reasoned that inasmuch as the respondent specifically pled guilty to violating subsection 2, the statute must be divisible (IJ at 4). The Immigration Judge then employed a "modified categorical" analysis to determine that Florida Stat. § 784.03(1)(a)(2) qualifies as a crime of violence, and that the respondent's victim was a person with whom he was in a domestic relationship, making the offense a crime of domestic violence that disqualifies the respondent for cancellation of removal.

We agree with Immigration Judge that Florida statute is divisible and subject to a modified categorical analysis because its subsections set forth the elements of two discrete crimes. *See Sosa-Martinez v. United States Att'y Gen.*, 420 F.3d 1338, 1341 (11th Cir. 2005 (setting forth the elements of simple battery under Florida Stat. § 784.03); *see also United States v. Braun*. 801 F.3d 1301, 1305 (11th Cir. 2015) (stating that Florida's aggravated battery statute is divisible because the underlying simple battery statute, Florida Stat. § 784.03, is divisible); *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (explaining divisibility analysis). Thus, the Immigration Judge properly looked to the record of conviction to determine that the respondent specifically pled guilty to Florida Stat. § 784.03(1)(a). However, the United States Supreme Court held in *Johnson v. United States*, 559 U.S. 133 (2010), that Florida Stat. § 784.03(1)(a) does not qualify as a crime of violence. Therefore, it is not a crime of domestic violence under section 237(a)(2)(E)(i) of the Act that would render the respondent ineligible for cancellation of removal.

The Immigration Judge found that there was insufficient evidence to determine that there is reason to believe that the respondent is a drug trafficker (IJ at 5). Therefore, he did not find a bar to cancellation of removal on that basis. Neither party has contested that finding (Respondent's Br. at 3, FN 1).

In light of the foregoing, we will sustain the appeal and return the record to the Immigration Judge to determine if the respondent is otherwise eligible for cancellation of removal, and whether he merits that relief in the exercise of discretion.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD