U.S. Department of Justice

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Name: A[redacted] R[redacted], J[redacted]

A[redacted]-246

Date of this notice: 7/8/2019

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:
Kendall Clark, Molly
Guendelsberger, John
Grant, Edward R.

Userteam: Docket

File: [redacted]-246 – San Francisco, CA Date: JUL - 8 2019

In re: J[redacted] A[redacted] R[redacted] a.k.a. [redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF APPLICANT: Linda Tam, Esquire

ON BEHALF OF DHS: Jonathan H. Yu
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

This case is before us pursuant to a November 5, 2018, order of the United States Court of Appeals for the Ninth Circuit. In the order, the Ninth Circuit denied the applicant's petition for review of our determination that his conviction for felony false imprisonment under California Penal Code § 236 constituted a particularly serious crime. The court further noted that it lacked jurisdiction to consider the applicant's new evidence regarding the recent change in the designation of the offense. The court stated that it is for the Board, in its discretion, to consider in the first instance whether the new evidence affects its particularly serious crime determination. *Aguilar Ruano v. Sessions*, 741 F. App'x 519, 520 (9th Cir. 2018). The Ninth Circuit granted the applicant's petition for review of our decision denying his application for protection under the Convention Against Torture and remanded the record for a new decision on this issue.

On remand, the applicant has filed a motion to remand supported by evidence that a California court now has designated his false imprisonment conviction a misdemeanor for all purposes. The applicant argues that this evidence alters the nature of his conviction and requires reconsideration of the particularly serious crime issue. The Department of Homeland Security (DHS) opposes the applicant's motion to reopen and remand and also filed a brief opposing the applicant's eligibility for protection under the Convention Against Torture. The applicant's motion to remand will be granted, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.

I. PARTICULARLY SERIOUS CRIME

The applicant is a native and citizen of El Salvador. When the DHS reinstated a prior order of removal against him, he claimed that he would be persecuted or tortured upon his return to El Salvador due to his sexual identity. The Immigration Judge, however, found him ineligible for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A), due to his conviction for felony false imprisonment under Cal. Penal Code § 236, an offense the Immigration Judge found to be a particularly serious crime (IJ at 4-7). *See* section 241(b)(3)(B)(ii) of the Act (stating that withholding of removal is not available to an

alien who, "having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States"). The applicant appealed from this ruling, but we upheld the Immigration Judge's finding in a June 9, 2017, decision dismissing the applicant's appeal.

The applicant now has submitted new and previously unavailable evidence showing that, on October 18, 2018, the California Superior Court of Alameda County reduced the applicant's felony false imprisonment conviction to a misdemeanor (Applicant's Mot. at Ex. 3). This reduction is valid for immigration purposes and binding in immigration proceedings. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 845-46 (9th Cir. 2003), *overruled on other grounds by Ceron v. Holder*, 747 F.3d 773, 778 (9th Cir. 2014);[1] *see also Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (stating that a state court's modification or reduction of a criminal sentence is valid for immigration purposes without regard to the state court's reason for the reduction or modification). Accordingly, the applicant's conviction is no longer for felony false imprisonment but for misdemeanor false imprisonment. *See* Ca. Penal Code §§ 236 and 237.

The applicant argues that this change affects the particularly serious crime analysis in his case, and we agree. The applicant, however, is not correct that a remand is required for this determination. A determination as to whether an individual has been convicted of a "particularly serious crime" for the purposes of section 241(b)(3)(B)(ii) of the Act is a legal determination. Further, the Immigration Judge has made sufficient factual findings regarding the circumstances of the applicant's offense and the other relevant factors to allow us to make this legal determination without remand.[2] *See* 8 C.F.R. § 1003.1(d)(ii) (stating that this Board reviews legal conclusions de novo).

A. Statutory Framework

Section 241(b)(3)(B)(ii) of the Act makes individuals who have been convicted of "particularly serious crimes" ineligible for withholding of removal. An individual who has been convicted of an aggravated felony (or felonies) and sentenced to an aggregate term of imprisonment of at least 5 years "shall be considered to have been convicted of a particularly serious crime." Section 241(b)(3)(B) of the Act.

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[1] In *Garcia-Lopez v. Ashcroft*, the Ninth Circuit held that a state court's designation of a "wobbler" offense as a misdemeanor pursuant to Ca. Penal Code § 17(b)(3) was binding on this Board for purposes of determining whether there had been a conviction under the Immigration and Nationality Act. *Garcia-Lopez v. Ashcroft*, 334 F.3d at 845-46. The applicant's offense also is a "wobbler" and the October 18, 2018, order of the California Superior Court of Alameda County reduced the offense to a misdemeanor pursuant to Ca. Penal Code § 17(b)(3). In *Ceron v. Holder*, the Ninth Circuit did not alter this portion of *Garcia-Lopez*. The court only overruled *Garcia-Lopez*'s interpretation of Ca. Penal Code § 19 and its statement regarding the maximum possible penalty for a misdemeanor under California law. *Ceron v. Holder*, 747 F.3d at 778.

[2] Both the Ninth Circuit and the DHS have indicated that they agree with this conclusion (DHS Opp. to Motion to Remand, at 2). *See Aguilar Ruano v. Sessions*, 741 F. Appx at 520.

If an offense does not meet these criteria, however, it still may qualify as a "particularly serious crime." *Matter of N-A-M-*, 24 I&N Dec. 336, 338-41 (BIA 2007). To decide whether one of these other offenses qualifies as a "particularly serious crime" for the purposes of section 241(b)(3)(B)(ii) of the Act, we first determine whether the elements of the offense potentially bring it within the category of particularly serious crimes. *Matter of N-A-M-*, 24 I&N Dec. at 342. If the elements do, we then consider all reliable information, including the conviction records, sentencing information and other information outside the record of conviction. *Id.*

The Ninth Circuit has not used this two-step process. The court instead has required a case-by-case analysis of all the relevant factors. *See Gomez-Sanchez v. Sessions*, 892 F.3d 985, 991-92 (9th Cir. 2018) (stating that the statute establishes but one category of "per se" particularly serious crimes and requires the agency to conduct a case-by-case analysis of convictions falling outside the category established by Congress); *Blandino-Medina v. Holder,* 712 F.3d 1338, 1345 (9th Cir. 2013).

Under either our two-part analysis or the Ninth Circuit's case-by-case analysis, however, the applicant's offense no longer qualifies as a particularly serious crime.

B. The Applicant's Offense

Misdemeanor false imprisonment under Ca. Penal Code § 236 is a lesser included offense of felony false imprisonment. *See People v. Babich*, 18 Cal. Rptr. 2d 60, 63 (Cal. Ct. App. 1993), *as modified* (Apr. 20, 1993). The three elements of felony false imprisonment in California are: (1) a person intentionally and unlawfully restrained, confined, or detained another person, compelling him to stay or go somewhere; (2) that other person did not consent; and (3) the restraint, confinement, or detention was accomplished by violence, menace, fraud or deceit. *See Turijan v. Holder*, 744 F.3d 617, 621 (9th Cir. 2014); *see also People v. Fernandez*, 31 Ca. Rptr. 2d 677, 681 (Cal. Ct. App. 1994). "Violence" means the use of physical force to restrain beyond the force necessary to effect the restraint; "menace" is the threat of harm express or implied by word or act. *Id; see also People v. Babich*, 18 Cal. Rptr. 2d at 63.

The elements of misdemeanor false imprisonment, on the other hand, are: (1) the violation of another's personal liberty and (2) the unlawfulness of that violation. *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010).

Both offenses are general intent crimes and neither requires an intent to harm the victim. *Id.* at 625-26. In addition, force is an element of both offenses. The California courts have stated that "[a]ny exercise of express or implied force which compels another person to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment." *People v. Dominguez*, 103 Cal. Rptr. 3d 864, 871 (Cal. Ct. App. 2010), *as modified* (Jan. 19, 2010).

Misdemeanor false imprisonment, however, becomes a felony when the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as "violence." *People v. Castro*, 41 Cal. Rptr. 3d 190, 192 (Cal. Ct. App. 2006).

Misdemeanor false imprisonment therefore involves less serious acts: confinement or restraint without the use of violence, menace, fraud, or deceit. The offense is still committed against another person, but the absence of violence, menace, fraud or deceit makes it significantly less serious than

felony false imprisonment. Further, the confinement or restraint can be brief and does not have to be in an enclosed space. *People v. Dominguez*, 103 Cal. Rptr. 3d at 869.

Given these facts, and the breadth of conduct covered by Cal. Penal Code § 236, an individual convicted of misdemeanor false imprisonment is not necessarily a danger to the community. *See Gomez-Sanchez v. Sessions*, 892 F.3d at 991 (indicating that dangerousness is the "essential key" to determining whether an offense is a particularly serious crime); *see, e.g., Saavedra-Figueroa v. Holder*, 625 F.3d at 625 (indicating that the conduct involved in a misdemeanor false imprisonment offense could include "the simple act of announcing without probable cause the making of a citizen's arrest, the natural consequence of which is to cause the police to take the victim into custody").

In addition, misdemeanors, by their nature, are less serious offenses than felonies. Black's Law Dictionary defines "misdemeanor" as "a crime that is less serious than a felony" and as a "minor crime" or "summary offense." *Black's Law Dictionary* (10th ed. 2014).

In *Matter of Juarez*, 19 I&N Dec. 664 (BIA 1988), we held that, except possibly in unusual circumstances, we would not find a single conviction for a misdemeanor offense to be a particularly serious crime. In that case, we were considering whether an offense qualified as a particularly serious crime for the purposes of former section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253(h)(2)(B) (1982), but the analysis is similar enough that the ruling remains applicable to section 241(b)(3)(B)(ii) of the Act.[3] A misdemeanor generally will not be serious enough to qualify as a "particularly serious crime."

Given these facts, misdemeanor false imprisonment, as defined in Ca Penal Code § 236, does not involve the type of conduct that generally would place an offense within the category of crimes that are potentially particularly serious. The offense does not require the use of violence or threats against another, it does not require physical harm or the fear of imminent physical harm, and it is classified as a misdemeanor. We therefore conclude that the elements of this offense do not bring it within the category of "particularly serious crimes." *Matter of N-A-M-*, 24 I&N Dec. at 342.

In addition, the underlying facts and circumstances of the applicant's offense and the sentence he received do not alter our conclusion. *See Gomez-Sanchez v. Sessions*, 892 F.3d at 991-92 (discussing factors to consider in particularly serious crime determination). The applicant was sentenced to 1 day imprisonment and 5 years' probation (Ex. 8). Further, the Immigration Judge noted the conflicting information in the record regarding exactly what transpired on the date of the alleged offense (IJ at 4-7). The Immigration Judge did not reach any final conclusion regarding exactly what the applicant did that day. The Immigration Judge instead concluded that "we do not know with any reasonable degree of certainty exactly what transpired at the apartment" (IJ at 6). The Immigration Judge nevertheless determined that, because the applicant pled nolo contendere to the offense of felony imprisonment and because a judge accepted this plea and entered a conviction for the offense, the applicant necessarily had confined someone in the apartment while it was burning (IJ at 5-6).

[3] Former section 243(h)(2)(B) of the Act stated that withholding of removal was not available to an alien if "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." Section 243(h)(2)(B) of the Act (1982).

The applicant, however, no longer stands convicted of felony false imprisonment. His conviction is for misdemeanor false imprisonment. Moreover, the applicant testified that he pled guilty because he had been detained for 9 months (IJ at 4). The Immigration Judge did not find this testimony incredible or discount it (IJ at 4).

Considering all of these facts, and the other facts discussed by the Immigration Judge regarding the circumstances of the applicant's offense, we conclude that the applicant has not been convicted of a particularly serious crime for the purposes of section 241(b)(3)(B)(ii) of the Act. *See Gomez-Sanchez v. Sessions*, 892 F.3d at 991-92; *Matter of N-A-M-*, 24 I&N Dec. at 342. The applicant therefore is not barred from applying for withholding of removal under section 241(b)(3)(A) of the Act.

II. CONCLUSION

Due to his particularly serious crime finding, the Immigration Judge did not address whether the applicant meets the statutory or regulatory requirements for withholding of removal under the Act. Accordingly, we remand the record to the Immigration Judge to determine, in the first instance, if the applicant has met his burden of establishing that he qualifies for this form of relief.[4]

Because we remand for consideration of the applicant's eligibility for withholding of removal under the Act, we need not reach the issue of his eligibility for protection under the Convention Against Torture at this time. Nevertheless, if the Immigration Judge determines that the applicant is not eligible for withholding of removal under the Act, he should reconsider the applicant's eligibility for protection under the Convention Against Torture consistent with the decision of the Ninth Circuit.

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 Edward R. Grant concurs that the issue of particularly serious crime should be reassessed but would remand for the Immigration Judge to do so in the first instance, as the determination requires further findings of fact.

[4] A determination regarding the applicant's eligibility for withholding of removal involves fact-finding, including a determination regarding the likelihood of future harm. We therefore must remand the record to allow the Immigration Judge to make the necessary factual findings and to determine whether the applicant qualifies for this form of relief. *See* 8 C.F.R. § 1003.1(d)(iv) (stating that the Board cannot engage in fact-finding in deciding appeals).