U.S. Department of Justice

Executive Office for Immigration Review

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Name: DE FRIAS DE SOUSA, VICTOR ... **A 019-180-918**

Date of this notice: 5/2/2019

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:
Baird, Michael P.
Malphrus, Garry D.
Mullane, Hugh G.

Userteam: Docket

File: A019-180-918 – San Francisco, CA Date: MAY - 2 2019

In re: Victor Manuel DE FRIAS DE SOUSA a.k.a. Victor Clemente Sousa
a.k.a. Victor C. Sousa

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jennifer T. Friedman, Esquire

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

APPLICATION: Termination; relief under former section 212(c) of the Act

The respondent appeals from the Immigration Judge's August 14, 2018, decision denying his motion to terminate and his application for relief under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1988). The Department of Homeland Security ("DHS") did not respond to the initial appeal. Both parties responded to the Board's request for supplemental briefing. The appeal will be sustained, the Immigration Judge's decision will be vacated, and these proceedings will be terminated.

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 DHS charged the respondent with removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct (Exh. 7). This charge is based on the respondent's 1983 conviction for kidnapping to commit robbery, in violation of section 209(b) of the California Penal Code (Exhs. 7, 8), and his 1988 conviction for possession of a prohibited substance or alcohol in a prison setting, in violation of section 4573.6(a) of the California Penal Code (Exhs. 1, 3). The DHS further charged the respondent with removability under sections 237(a)(2)(B)(i) and 237(a)(2)(B)(ii) of the Act, for having been convicted of a violation of a law relating to a controlled substance and for being or having been, at any time after admission, a drug abuser or addict, respectively (Exhs. 1, 18). The Immigration Judge concluded that the respondent was only removable under section 237(a)(2)(A)(ii) of the Act, and did not sustain the other charges.

The respondent challenges the Immigration Judge's determination that he has been convicted of two crimes involving moral turpitude. We consider first the respondent's conviction under section 4573.6(a) of the California Penal Code. At the time of the respondent's 1988 conviction, section 4573.6(a) made it unlawful for a person to "knowingly [have] in his or her possession in . . . any place or institution[] where prisoners or inmates are being held . . . any controlled substances,

[] drugs . . . , paraphernalia . . . , or alcoholic beverage, without being authorized to possess the same." Cal. Penal Code § 4573.6(a) (1987). The minimum conduct criminalized under the statute is the knowing possession for personal use of a drug—including non-narcotic pain relievers or antibiotics—or alcohol without authorization. Cal. Penal Code § 4573.6(a); *see People v. Oritiz*, 19 Cal. Rptr. 211, 212-15 (Cal. Ct. App. 1962) (discussing what is encompassed under the word "drug" and upholding a conviction for possession of a non-narcotic pain reliever and antibiotic).

A crime involving moral turpitude is an act that is "vile, base, or depraved" and "violates accepted moral standards." *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1304 (9th Cir. 2017) (citing *Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc)). Generally, non-fraudulent crimes involving moral turpitude involve either an intent to injure, an actual injury, or a protected class of victims. *See Turijan v. Holder*, 744 F.3d 617, 621 n.2 (9th Cir. 2014). The Immigration Judge, however, determined that the possession of drugs or alcohol in a penal institution involves moral turpitude because it exposes the prison population to a risk of violence or disruption (IJ at 5-6, July 31, 2018; DHS's Br. at 6-8).

The DHS argues that possession of a prohibited item in prison is a crime involving moral turpitude because it reflects an offender's contempt for lawful authority and accepted societal rules (DHS's Br. at 6-8). The Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that neither the seriousness of an offense nor abstract dangerousness concerns are sufficient to find that an offense involves moral turpitude. *See Ramirez-Contreras v. Sessions*, 858 F.3d at 1304 ("Although fleeing police while committing [vehicle registration infractions] would be a serious offense, we have never held that merely serious conduct rises to the level of moral turpitude; instead we have required [for an offense to be classified as a crime involving moral turpitude on dangerousness grounds] conduct posing 'a substantial, actual risk of imminent death to another person.'" (quoting *Leal v. Holder*, 771 F.3d 1140, 1146 (9th Cir. 2014))); *see also Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 797, 808 (9th Cir. 2015) (holding that possession of a billy club, which does not involve moral turpitude, does not become turpitudinous merely because it is committed to promote, further, or assist criminal activity of gang members). The Ninth Circuit has similarly observed that the unique safety concerns of a location are generally not enough to transform an act of mere possession into a crime involving moral turpitude. *See Hernandez-Gonzalez v. Holder*, 778 F.3d at 808 (finding a statute that applied to the "possession of a box cutter on school grounds" to not involve moral turpitude). Based on the foregoing, we conclude that the respondent's conviction under section 4573.6(a) of the California Penal Code is not categorically a crime involving moral turpitude in this circuit.

To the extent the DHS argues that the respondent was convicted for possessing a controlled substance, rather than a non-controlled drug or alcohol, section 4573.6(a) of the California Penal Code is not divisible with respect to the identity of the prohibited item and thus the modified categorical approach does not apply (IJ at 4-5, July 31, 2018). *See Matter of Silva-Trevino*, 26 I&N Dec. 826, 833 (BIA 2016). Although the jury instructions for the current version of this statute—which does not criminalize possession of non-controlled drugs or alcohol—suggest that the identity of the specific controlled substance is an element of the offense, the jury instructions for the version of the statute under which the respondent was convicted do not appear to require the identification of the specific item possessed (Exh. 11, Tab A). *Compare* CALCRIM 2748 (2018), *with* CALJIC 12.00 (5th ed. 1988).

For these reasons, we conclude that the respondent's conviction under section 4573.6(a) of the California Penal Code is not for a crime involving moral turpitude. Thus, even assuming the 1983 kidnapping to commit robbery conviction is a crime involving moral turpitude, the respondent is not removable under section 237(a)(2)(A)(ii) of the Act for having been convicted of two such crimes.

The DHS argues for the first time in its brief following our request for supplemental briefing that the Immigration Judge erred in concluding that the respondent is not removable under sections 237(a)(2)(B)(i) and 237(a)(2)(B)(ii) of the Act (IJ at 4-5, July 31, 2018; IJ at 5-6, Aug. 14, 2018; DHS's Br. at 11-15). With respect to the former, the respondent's conviction under section 4573.6(a) of the California Penal Code encompasses possession of non-controlled drugs and alcohol, and, as discussed above, is not divisible with respect to the item possessed. Thus, his conviction is categorically not a controlled substance offense under section 237(a)(2)(B)(i) of the Act because it does not necessarily involve a controlled substance under Federal law. *See Melloui v. Lynch*, 135 S. Ct. 1980, 1990-91 (2015); *Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 644 (9th Cir. 2015).

As to the respondent's removability under section 237(a)(2)(B)(ii) of the Act, this issue is not properly before the Board. The DHS waived appeal of the Immigration Judge's decision and did not file a brief challenging the Immigration Judge's determination on this issue after the respondent appealed (Tr. at 173). Rather, the DHS raised this issue for the first time in its brief following our request for supplemental briefing (DHS's Br. at 14-15). Thus, we conclude that the DHS has waived its argument on this issue. *See, e.g., United States v. Perez-Silvan*, 861 F.3d 935, 938 (9th Cir. 2017) (noting that issues not raised by a party in its opening brief are deemed waived).

Because we conclude that the respondent is not removable as charged, we need not address his remaining argument regarding his eligibility for relief from removal under former section 212(c) of the Act. *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."). Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision is vacated and these proceedings are terminated.

FOR THE BOARD