U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: TEJEDA, MARIA SALOME

A 029-378-545

Date of this notice: 5/28/2020

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:
Creppy, Michael J.
Morris, Daniel
Liebowitz, Ellen C

Userteam: Docket

File: A029-378-545 – Miami, FL

Date: MAY 28 2020

In re: Maria Salome TEJEDA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark A. Prada, Esquire

APPLICATION: Termination

The respondent, a citizen and national of Cuba, appeals from the Immigration Judge's decision dated May 31, 2018, concluding that she is removable for having been convicted of a crime involving moral turpitude.[1] The Department of Homeland Security has not filed any response to the appeal. The appeal will be sustained.

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).[2]

The respondent was convicted of conspiracy to commit a violation of the anti-kickback statute, 42 U.S.C. § 1320a-7b, pursuant to 18 U.S.C. § 371, on July 7, 2004 (IJ at 1-2; Exh. 2). She argues on appeal that the Immigration Judge erred in determining that she is removable under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude committed within 5 years after the date of admission as a lawful permanent resident for which a sentence of 1-year or longer may be imposed (IJ at 2; Respondent's Br. at 13).

The phrase "crime involving moral turpitude" describes a class of offenses involving "reprehensible conduct" committed with some form of "scienter"—that is, with a culpable mental state, such as specific intent, deliberateness, willfulness, or recklessness. *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 849 (BIA 2016);

[1] The respondent does not challenge the Immigration Judge's decision granting her request for a waiver of inadmissibility under section 212(h)(1)(B) of the Act, 8 U.S.C. § 1182(h)(i)(B).

[2] We consider that the parties and the Board have been adequately apprised of the reasons for the Immigration Judge's denial of the respondent's motions to terminate. *Cf. Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994). We caution the Immigration Judge, however, that he is responsible for making clear and complete findings of fact that are supported by the record and are in compliance with controlling law. *See Matter of S-H-*, 23 I&N Dec. 462, 464 (BIA 2002). Simply adopting the position of a party generally will not suffice to provide us with a meaningful basis for appellate review and may well result in a remand for the entry of a more complete decision.

see also Cano v. U.S. Att'y Gen., 709 F.3d 1052, 1053 (11th Cir. 2013). To determine whether an offense is a crime involving moral turpitude, we employ the categorical approach, which requires us to focus on the elements of the crime, rather than the conduct of the respondent. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 849. When a conviction is for an inchoate offense such as conspiracy, we look at the substantive crime to determine whether the conviction is for a crime involving moral turpitude. *Matter of Vo*, 25 I&N Dec. 426, 426 (BIA 2011). Whether the respondent is removable for having a conviction for a crime of moral turpitude conviction is a legal question that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Because the respondent was convicted of conspiracy under 18 U.S.C. § 371, we must determine if the substantive crime, 42 U.S.C. § 1320a-7b, constitutes a crime involving moral turpitude. *Matter of Vo*, 25 I&N Dec. at 426. 42 U.S.C. § 1320a-7b is not a categorical match to the generic offense because it is overbroad as the statute describes some offenses that are crimes involving moral turpitude and some that are not. *Matter of Diaz-Lizarraga*, 26 I&N Dec. at 849.

The statute is divisible, and therefore we turn to the modified categorical approach where we may consult a limited class of documents to determine if the respondent was convicted under an alternative crime described in the statute that constitutes a crime involving moral turpitude. *Spaho v. U.S. Att'y Gen.*, 837 F.3d 1172, 1177 (11th Cir. 2016) (indicating that under the modified categorical approach we can "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the [respondent's] prior conviction"). The indictment states that the respondent and her co-defendants were charged under two sections of the anti-kickback statute, namely 42 U.S.C. §§ 1320a-7b(b)(1) and (b)(2) (Exh. 2). 42 U.S.C. § 1320a-7b(b)(1) criminalizes the receipt of remuneration, while 42 U.S.C. § 1320a-7b(b)(2) criminalizes the offering or paying of remuneration. 42 U.S.C. §§ 1320a-7b(b)(1), (b)(2). Based on the facts of the indictment, the respondent was convicted under 42 U.S.C. § 1320a-7b(b)(1) as it only alleges that she received remuneration, not that she offered or paid remuneration (Exh. 2; Respondent's Br. at 8).

At the time of the respondent's conviction, 42 U.S.C. § 1320a-7b(b)(1) provided:

> (b) Illegal remunerations
>
> (1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

We agree with the respondent that a conviction under 42 U.S.C. § 1320a-7b(b)(1) is not for a crime involving moral turpitude (Respondent's Br. at 11-13). Although 42 U.S.C. § 1320a-7b(b)(1) requires specific intent, it does not necessarily require reprehensible conduct. *See Matter of Diaz-Lizarraga*, 26 I&N Dec. at 849. This can be seen after comparing this statute to similar offenses that have been found to constitute crimes involving moral turpitude, namely theft and fraud. 42 U.S.C. § 1320a-7b(b)(1) does not require a taking, deceit, false statement, or dishonesty. *Matter of Jurado*, 24 I&N Dec. 29, 33 (BIA 2006) ("It is well settled that theft or larceny offenses involve moral turpitude"); *Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015) ("Generally, a crime involving dishonesty or false statement is considered to be one involving moral turpitude.") (internal citation omitted). Nor does it require any loss or harm to a person. Accordingly, the respondent's conviction is not for a crime involving moral turpitude.

Because the record does not reflect that the respondent was convicted of a crime involving moral turpitude, the Department of Homeland Security has not met its burden to establish that she is removable under section 237(a)(2)(A)(i) of the Act. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). We therefore reverse the Immigration Judge's decision that the respondent is removable.

Based on the foregoing, the following order will be entered:

ORDER: The appeal is sustained, the Immigration Judge's May 31, 2018, decision is vacated, and the respondent's removal proceedings are terminated.

FOR THE BOARD