



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: SANTAMARIA, VICTOR MANUEL A 089-713-036

Date of this notice: 12/30/2015

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:
Wendtland, Linda S.
Greer, Anne J.
Pauley, Roger

CHIEF

Userteam: Docket

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Falls Church, Virginia 22041

File: A089 713 036 - Fort Snelling, MN

Date:

DEC 30 2015

In re: VICTOR MANUEL SANTAMARIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bruce D. Nestor, 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

The respondent appeals the Immigration Judge's decision, dated December 4, 2014, denying his application for cancellation of removal. The appeal will be sustained.

The respondent admitted the factual allegations in the Notice to Appear and conceded removability (Tr. at 5; I.J. at 1). The issue on appeal is whether the respondent's 2007 Minnesota conviction for misdemeanor domestic assault was for a crime of domestic violence under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i), thus disqualifying him from cancellation of removal under section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C). The Immigration Judge found that the respondent's offense of conviction was categorically a crime of domestic violence (I.J. at 3). We disagree.

The respondent's statute of conviction—Minn. Stat. § 609.2242 subdiv. 1(1) (2006)—states as follows, in relevant part:

Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:

(1) commits an act with intent to cause fear in another of immediate bodily harm or death

A "crime of domestic violence" means any "crime of violence," as that term is defined in 18 U.S.C. § 16, that is committed by a specified person against one of a defined set of victims. *See* section 237(a)(2)(E)(i) of the Act. In turn, a crime of violence is defined at 18 U.S.C. § 16 as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The respondent's misdemeanor conviction can only qualify as a crime of violence under subsection (a).

Minnesota defines bodily harm as “physical pain or injury, illness, or any impairment of physical condition.” Minn. Rev. Stat. § 609.02 subdiv. 7. We have previously held “that the ‘physical force’ necessary to establish that an offense is a ‘crime of violence’ for purposes of the Act must be ‘violent’ force, that is, force capable of causing physical pain or injury to another person.” *Matter of Velasquez*, 25 I&N Dec. 278, 283 (BIA 2010). Minnesota's definition of bodily harm, which includes illness or any impairment of physical condition, appears categorically overbroad in light of our holding in *Matter of Velasquez*.

Furthermore, the respondent has established a realistic probability that the operative phrase “bodily harm” is in fact interpreted by the Minnesota courts to encompass some minimal harms inflicted by non-violent means. In *State v. Kelley*, 734 N.W.2d 689, 693 (Minn. Ct. App. 2007), the Minnesota Court of Appeals held that spitting “at or onto another can cause physical pain or injury, illness, or otherwise impair one's physical condition.”¹ In our view, spitting at someone does not categorically amount to the violent force necessary to establish a crime of violence.

In concluding that the respondent's offense is a crime of violence, the Immigration Judge relied on *United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011), which held that a municipal ordinance prohibiting “knowingly or purposely . . . making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to use physical force” (I.J. at 3). However, *Salido-Rosas* is distinguishable because the court there did not indicate that the meaning of “bodily harm” under the municipal ordinance involved in that case extends to the minimal harms, inflicted by non-violent means, that are encompassed by the Minnesota domestic assault statute at issue here. Thus, even though both the Minnesota domestic assault statute and the Omaha municipal provision in *Salido-Rosas* use the term bodily harm, in light of *Kelley*, there is a realistic probability that Minnesota would prosecute conduct not amounting to violent force under its domestic assault statute. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (courts must presume conviction rests on the least of the acts

¹ Although *Kelley* was not a domestic assault case, the Minnesota Court of Appeals squarely noted that “[i]ntentionally throwing or transferring bodily fluids . . . at or onto another person . . . satisfies the requirements of simple, fifth-degree assault.” *Kelley, supra*, at 693. The relevant domestic assault provision, with the exception of the required victim, uses the same “bodily harm” definition as fifth-degree assault. Compare Minn. Stat. § 609.2242 subdiv. 1(1) (domestic assault) with Minn. Stat. § 609.224, subd. 1 (fifth-degree assault).

criminalized). Given the state of Minnesota law, it follows that domestic assault under Minn. Stat. § 609.2242 subdiv. 1(1) (2006) is not a crime of violence under 18 U.S.C. § 16(a) or, by extension, a crime of domestic violence that renders the respondent ineligible for cancellation of removal.²

The following orders will be entered.

ORDER: The appeal is sustained.

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


FOR THE BOARD

² The Immigration Judge noted that she did not look to state law given her finding that domestic assault is categorically a crime of violence (I.J. at 3 n.1). However, we considered state law in the course of evaluating the respondent's claim, because much of the claim is predicated upon how Minnesota courts evaluate their criminal code.