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

Khan-Avila, Maleha N.
Law Offices of Zulu Ali
2900 Adams St.
Suite C 13
Riverside, CA 92504

DHS/ICE
606 S. Olive Street, 8th Floor
LOS ANGELES, CA 90014

Name: ROMERO, SINDY

A 072-244-653

Date of this notice: 1/10/2018

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:
Malphrus, Garry D.
Cole, Patricia A.
Liebowitz, Ellen C

Userteam: Docket

File: A072 244 653 – Los Angeles, CA Date: JAN 10 2018

In re: Sindy ROMERO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maleha Khan-Avila, Esquire

APPLICATION: Termination

On January 27, 2017, the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") granted the government's unopposed motion to remand for the Board to consider the respondent's removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (crime of violence under 18 U.S.C. § 16, with a term of imprisonment of at least 1 year), in light of *United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2015). The respondent filed a brief on remand, and the Department of Homeland Security ("DHS") has not responded. The respondent's removal proceedings will be terminated.

In our prior decision dated March 3, 2016, we deemed the issue of the respondent's removability waived because she did not challenge this issue on appeal (BIA at 1, n. 1). *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 (BIA 2007). We further affirmed the Immigration Judge's denial of the respondent's application for withholding of removal under section 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3)(A), and her request for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.17, 1208.18. We dismissed the respondent's appeal. Pursuant to the government's remand, we now revisit the issue of removability.

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).

In the respondent's brief on remand from the Ninth Circuit, she asserts she is not removable for having been convicted of an aggravated felony crime of violence in light of *United States v. Dixon*, which held that a conviction for "robbery" under California Penal Code section 211 (CPC § 211) is not categorically a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) and is not divisible (Resp.'s Br. at 4). We agree.

In *Dixon*, the Ninth Circuit employed the categorical approach to determine whether the defendant's prior convictions under CPC § 211 qualified as "violent felony" convictions under the Armed Career Criminal Act (ACCA) and concluded that they did not. *United States v. Dixon,* 805 F.3d at 1195-97. In concluding the convictions were not violent felonies, the Ninth Circuit

noted that, under the categorical approach, a court determines whether the conviction qualifies as a "violent felony" conviction under the ACCA by looking only to the fact of the conviction and the statutory definition of the prior offense, not to the facts underlying the conviction. *United States v. Dixon,* 805 F.3d at 1195. It further noted that a violation of a state statute is categorically a "violent felony" under the ACCA only if the state statute's elements are the same as, or narrower than, those included in the ACCA's definition of "violent felony" and that the court compares the elements of the state statute with the elements of the generic crime in order to evaluate whether the state statute matches the offense enumerated in the ACCA. *United States v. Dixon,* 805 F.3d at 1195. Applying this law to the facts of the defendant's case, the Ninth Circuit held that the defendant's robbery convictions under CPC § 211 did not constitute "violent felonies" because the statute criminalized conduct, including accidental force, not included within the ACCA's definition of "violent felony." *United States v. Dixon,* 805 F.3d at 1196-97 (*citing People v. Anderson*, 51 Cal. 4th 989 (Cal. 2011) (ruling that § 211 does not require finding the defendant acted with the intent to use force against another, as long as the defendant did use force against another person with the intent to steal)). It further concluded that, since one can realistically violate CPC § 211 in a manner that is not covered by the ACCA's definition of "violent felony," a violation of CPC § 211 is not categorically a "violent felony" under the ACCA. *United States v. Dixon,* 805 F.3d at 1197-98. Finally, the Ninth Circuit determined that CPC § 211 is not divisible; thus, it did not apply the modified categorical approach. *United States v. Dixon,* 805 F.3d at 1198.

An offense is a crime of violence under section 237(a)(2)(A)(iii) of the Act if it is:

> (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.

18 U.S.C. § 16. The physical force contemplated by 18 U.S.C. § 16 is violent force capable of causing physical pain or injury to another person. *Johnson v. United States*, 559 U.S. 133 (2010) (construing similar language in 18 U.S.C. § 924(e)); *see also Leocal v. Ashcraft*, 543 U.S. 1 (2004). The Supreme Court has held that the phrase "use of force" in the definition of a crime of violence requires proof of active employment of force and cannot be satisfied by negligent or accidental conduct. *Leocal v. Ashcraft*, 543 U.S. at 9-11. Extending this holding, the Ninth Circuit stated, "[N]either recklessness nor gross negligence is a sufficient mens rea to establish that a conviction is for a crime of violence." *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc); *but see Matter of Kim*, 26 I&N Dec. 912, 917 n.4 (BIA 2017).

Under CPC § 211, "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Pen. Code § 211 (2014).

In applying *United States v. Dixon* to the respondent's case, we conclude the respondent's conviction for "robbery" under CPC § 211 is not an aggravated felony crime of violence. Since the phrase "use of force" in the definition of a crime of violence cannot be satisfied by negligent

or accidental conduct and one can violate CPC § 211 "by accidentally using force," it follows that one can violate CPC § 211 in a manner that is not included within 8 U.S.C. § 1101(a)(43)(F)'s definition of "crime of violence." *See Leocal v. Ashcraft*, 543 U.S. at 9-11; *see also United States v. Dixon,* 805 F.3d at 1197. In reaching this conclusion, we note the statute can violated by accidental conduct, which is even less than reckless conduct. Thus, a violation of CPC § 211 is not categorically a "crime of violence" under section 101(a)(43)(F) of the Act. Finally, since CPC § 211 is not divisible, we cannot apply the modified categorical approach. *See United States v. Dixon,* 805 F.3d at 1198; *see also Matter of Chairez*, 26 I&N Dec. at 821 (stating that *Johnson* and *Leocal* control our interpretation of 16(a)).

Since the respondent's conviction for "robbery" under CPC § 211 is not an aggravated felony crime of violence, the respondent is not removable as charged. Accordingly, the following order will be entered.

ORDER: The respondent's removal proceedings are terminated.

FOR THE BOARD