U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SHABAN, DARIA

A 036-553-979

Date of this notice: 5/1/2018

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:
Pauley, Roger

Userteam: Docket

File: A036 553 979 – Fort Snelling, MN Date: MAY - 1 2018

In re: Daria SHABAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Megan M. Galasso, Esquire

ON BEHALF OF DHS: Courtney Campbell
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") timely appeals from the Immigration Judge's December 5, 2017, decision finding that the respondent was not removable as charged and terminating proceedings. The respondent argues on appeal that the Immigration Judge's decision is correct and should be affirmed. The appeal will be dismissed.

The respondent, a native and citizen of Iran and a lawful permanent resident of the United States since 1979, sustained a 1996 conviction for theft in violation of California Penal Code section 487(c) and a 2017 conviction for stalking, second or subsequent violation in 10 years, under section 609.749.4(a) of the Minnesota Statutes (IJ at 1; Exh. 4; Exh. 1). The Immigration Judge did not sustain the charges of removability under section 237(a)(2)(E)(i) (crime of stalking) and 237(a)(2)(A)(ii) (two crimes involving moral turpitude) and, thus, granted the respondent's motion to terminate.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). On appeal, the DHS argues that removability was established by clear and convincing evidence. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A).

We have reviewed the arguments raised by the DHS on appeal and find them unpersuasive. First, the DHS argues that the Immigration Judge erred in terminating proceedings because the respondent's stalking conviction constitutes a crime involving moral turpitude. The Immigration Judge found that the respondent's conviction for stalking did not constitute a crime involving moral turpitude because it did not contain the requisite level of intent (IJ at 3). *See generally Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (a crime involving moral turpitude is a crime that "involves both reprehensible conduct and some form of scienter"). "Stalking" under Minnesota law requires that the perpetrator "engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." *See* Minn. Stat. § 609.749(1) (providing general

description of actus reus). Although this statute at one time was interpreted as requiring specific intent, in 1997, the legislature amended the statute to provide that proof of specific intent was not required for a conviction. *See King v. State*, 649 N.W.2d 149, 159 (Minn. 2002). Specifically, the statute provides that "the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated, or except as otherwise provided in subdivision 3, paragraph (a), clause (4), or paragraph (b), that the actor intended to cause any other result." *See* Minn. Stat. § 609.749(1a). We find no reason to disturb the Immigration Judge's finding that a stalking conviction under Minnesota law is not a crime involving moral turpitude because it is overly broad and covers offenses where the perpetrator acted with reason to know that his or her actions would cause, and did cause, the recipient to feel frightened. *See Matter of Tavdidishvili,* 27 I&N Dec. 142 (BIA 2017).

The DHS additionally argues that the Immigration Judge erred in finding that the respondent's conviction for stalking under Minnesota law does not constitute a crime of stalking as defined under section 237(a)(2)(E)(i) of the Act (IJ at 2-3). The DHS specifically argues that this Board should reconsider our decision in *Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012), and redefine the generic definition of stalking to reflect contemporary views of society (DHS Brief at 7-10). This Board recently addressed that argument in *Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 260-61 (BIA 2018), and found that our interpretation of the statute must be based on the "generic, contemporary meaning" of the statutory words at the time the statute was enacted. *Matter of Sanchez-Lopez*, 27 I&N Dec. at 260-61. Thus, we find the DHS's argument unpersuasive. Inasmuch as the Immigration Judge correctly found that stalking as defined under Minnesota law is overly broad because it covers offenses that do not require that the victim fear bodily injury or death, we conclude that the respondent is not removable under section 237(a)(2)(E)(i) of the Act (IJ at 2-3). *Matter of Sanchez-Lopez*, 27 I&N Dec. at 258 (outlining crime of stalking elements, including an intent to cause the victim or a member of his or her immediate family to be placed in fear of bodily injury or death).

Based on the foregoing, we will dismiss the appeal.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File: A036-553-979 December 5, 2017

In the Matter of

DARIA SHABAN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(E)(i) and Section 237(a)(2)(A)(ii)

APPLICATION: Motion to terminate

ON BEHALF OF RESPONDENT: Megan Galasso

ON BEHALF OF DHS: Amy Zaske~~Vaskey~~

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Iran who was admitted to the United States at New York, New York, on or about March 9, 1979, as a lawful permanent resident. Respondent was, on May 31, 2017, convicted in a District Court in Hennepin County for the offense of stalking, ~~A~~a second or subsequent violation in 10 years in violation of Minnesota Statute 609.749, Subdivision 4(a). That offense was committed against MKS, the respondent's former spouse. On April 26, 1996, the respondent was convicted in the Municipal Court of California for San Diego for the offense of theft in violation of California Penal Code. The government claims that these

crimes did not arise out of a single scheme of criminal misconducts. The government has charged the respondent with being removable pursuant to the above two sections of the Immigration and Nationality Act. Respondent has been convicted of a crime of stalking, and the second charge is that he's been convicted of two crimes involving moral turpitude. The respondent's theft conviction records are contained in Exhibit 3, primarily, and also the stalking conviction records in Exhibit 4. The motion to terminate is in Exhibit 5, and the government's opposition to the motion is in Exhibit 6.

The court will first find that the respondent's conviction for stalking in violation of Minnesota Statute 609.749, Subdivision 4(a), does not constitute a crime of stalking under INA Section 237(a)(2)(E)(i). However, respondent has been convicted of stalking -- second or subsequent violation in 10 years in violation of Minnesota Statute 609.749, Subdivision 4(a). This statute defines "stalking" as engaging in "conduct which the actor knows or has to reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim regardless of the relationship between the actor and victim." Minnesota Statute 609.749.1. Respondent was convicted under the particular portion of the statute that states "a person is guilty of a felony who violates any provision of Subdivision 2 within 10 years of a previous qualified domestic violence-related offense, conviction, or adjudication of delinquency, and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both." Minnesota Statute 609.749, Subdivision 4(a). The BIA has defined stalking to include at least the following elements: (1) conduct that was engaged in on more than a single occasion; (2) which was directed at a specific individual; and (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death. Matter of Sanchez-Lopez, 26 I&N Dec. 71, 74

(BIA 2012). The statute of conviction, here, only requires that the respondent have caused the victim to feel "frightened, threatened, oppressed, persecuted, or intimidated." Minnesota Statute 607.749.2. None of these require that the victim feel fear of bodily injury or death to herself or her immediate family. Therefore, respondent's statute of conviction is not a categorical match to the definition of stalking, and the respondent is not removable under INA Section 237(a)(2)(E)(i).

The court will find that the respondent has been convicted of only one crime involving moral turpitude pertaining to the theft offense but not a second CIMT and therefore is not removable under Section 237(a)(2)(A)(ii). The court will find that the respondent's conviction for grand theft in violation of California Penal Code Section 487(c) is a crime involving moral turpitude. The respondent's conviction for stalking under the Minnesota statute is not a crime involving moral turpitude. The 8th Circuit ruled that threatening behavior is not enough to be a CIMT, but there also must be intent. Reyes-Morales v. Gonzales, 435 F.3d 937, 944 (8th Cir., 2006). In that case, the respondent was convicted of making harassing phone calls in violation of Minnesota Statute 609.749, which is the same overarching statute of conviction as respondent and has the same level of intent (know or should have known) that the 8th Circuit held was insufficient in Reyes-Morales. Therefore, the respondent has only been convicted one crime involving moral turpitude and is not removable under INA Section 237(a)(2)(A)(ii). Accordingly, both charges are not sustained, and the court will grant the respondent's motion to terminate proceedings. And the court enters the following order in this case.

ORDERS

It is hereby ordered that both charges contained in the Notice to Appear are not sustained.

It is further ordered that the respondent's motion to terminate proceedings is granted without prejudice.

December 5, 2017

Please see the next page for electronic signature

KRISTIN W. OLMANSON
Immigration Judge