U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MOO, EH

A 212-085-801

Date of this notice: 12/6/2017

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: A212 085 801 – Tacoma, WA

Date: DEC - 6 2017

In re: Eh MOO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Camila Maturana, Esquire

ON BEHALF OF DHS: Kathleen W. Patrick
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision dated June 13, 2017, granting the respondent's motion to terminate proceedings.[1] In that decision, the Immigration Judge determined the DHS did not meet its burden to show by clear and convincing evidence that the respondent's 2012 Washington assault in third degree conviction constitutes a crime involving moral turpitude under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i). The appeal will be dismissed.

The Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii) (2017).

On de novo review, we are not persuaded by the DHS's appellate arguments to disturb the Immigration Judge's decision to terminate these removal proceedings. We agree with the Immigration Judge's conclusion, as set forth in his well-reasoned decision, that applying the precedent decisions of the Board and the Ninth Circuit, the sexual motivation sentencing enhancement added to the respondent's conviction for the offense of assault in third degree in violation of RCW § 9A-36.031(1)(f) does not elevate a "categorically non-morally turpitudinous crime into a crime involving moral turpitude" (IJ at 9).

"Although the immigration statutes do not specifically define offenses constituting crimes involving moral turpitude, a crime involving moral turpitude is generally a crime that '(1) is vile, base, or depraved and (2) violates accepted moral standards" *Escobar v. Lynch*, 846 F.3d 1019, 1023 (9th Cir. 2017); *Hernandez-Gonzales v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015); *see also Matter of Silva-Trevino III*, 26 I&N Dec. 826, 834 (BIA 2016) ("To involve moral turpitude, a crime requires two essential elements: reprehensible conduct and a culpable mental

[1] We acknowledge and appreciate the briefs submitted by the parties and by the amicus curiae representing the Washington Defender Association.

state."). As noted by the Immigration Judge, the Board and the Ninth Circuit, "have consistently held that simple assault cannot be a crime involving moral turpitude because it does not require the requisite evil intent or vicious motive" (IJ at 5). *See Uppal v. Holder*, 605 F.3d 712, 716 (9th Cir. 2010); *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007).

In *Matter of Tavdidishvili*, 27 I&N Dec. 142 (BIA 2017), we acknowledged that "moral turpitude inheres in crimes involving serious misconduct committed with at least a culpable mental state of recklessness—that is, 'a conscious disregard of a substantial and unjustifiable risk.'" *Id.* at 143-44 (citing *Matter of Franklin*, 20 I&N Dec. 867, 870 (BIA 1994) (holding that recklessly causing the death of another person was a crime involving moral turpitude), aff'd *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995). However, we also noted that "[b]y contrast, crimes committed with 'criminal negligence' are generally not morally turpitudinous, because neither 'intent' nor a 'conscious disregard of a substantial and unjustifiable risk' is required for conviction—that is, no sufficiently culpable mental state is necessary to commit such an offense." *Matter of Tavdidishvili*, 27 I&N Dec. at 144 (citing cases).

As noted by the Immigration Judge "[o]utside of the simple assault context, assault statutes, are reviewed under a totality of the circumstances approach, including a consideration of the level consciousness, resulting harm to the victim, and any other aggravating factors" (IJ at 5). Therefore, as moral turpitude entails a reprehensible act committed with an appreciable level of consciousness or deliberation, we addressed in *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992), the Washington State offense of assault in third degree in violation of RCW § 9A-36.031(1)(f)—the respondent's statute of conviction in this case—and held "that an assault committed with 'criminal negligence' under Washington law, which occurs "when the perpetrator 'fails to be aware of a substantial risk that a wrongful act may occur,' does not involve moral turpitude." *Id.* at 619 (citing RCW § 9A-36.031(1)(f)).

Thus, the respondent's Washington State conviction for assault in the third degree, standing alone, is not categorically for a crime involving moral turpitude. *See id.* at 617-20. However, we are not persuaded by the DHS's appellate arguments that the added sentencing enhancement of sexual motivation serves to elevate the mens rea necessary for a conviction for assault in third degree, *i.e*, criminal negligence, to now provide the requisite scienter for the offense to constitute a crime involving moral turpitude.[2] As noted by the Immigration Judge, in *Matter of Solon*, the Board held that where, as in this case, "no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm" (IJ at 5). *See Matter of Solon,* 24 I&N Dec.at 242; *see also Ceron v. Holder*, 747 F.3d 773, 782-83 (9th Cir. 2014) (quoting and citing to the Board's reasoning in *Matter of Solon*).

"Sexual motivation," pursuant to the Washington State statutes, "means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification," *See* RCW § 9.94A.030(48). While it is undisputed that the inclusion of sexual

[2] Pursuant to the Washington State statutes, a person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation. *See* RCW § 9A.08.010(d).

motivation is an element for purposes of analyzing the sentencing for the respondent's conviction, the addition of the sentencing enhancement of sexual motivation does not add an element of sexual conduct, sexual contact, or actual harm to the respondent's conviction for assault in the third degree. The inclusion of the sexual motivation allegation only serves to increase the punishment and requires only that it constitutes one of the purposes—not the only, primary, or substantial factor to be proven as influencing the respondent's conduct when committing the offense. Rather, in order to establish sexual motivation, the prosecution must present evidence of "some identifiable conduct during the course of the event," which establishes proof of sexual motivation. *See State v. Halstien*, 857 P.2d 270 (Wash. 1993). However, there is no requirement of criminal sexual conduct for the prosecution to obtain a sentencing enhancement of sexual motivation. *See id.* at 277-78 (holding the statute makes sexual motivation manifested by the defendant's conduct in the course of committing the offense an aggravating factor in sentencing).

As noted by the Immigration Judge, "acting for the purpose of one's own sexual gratification [or acting with a sexual motivation under the Washington State statutes] is not itself categorically morally turpitudinous conduct" (IJ at 8). Even though the Washington State legislature elected to increase the punishment for the offense of assault in third degree under RCW § 9A-36.031(1)(f), where one of the purposes of the illegal conduct is sexual gratification, the DHS has presented no evidence of any case law from the State of Washington or the Ninth Circuit in support of its contention that the addition of the sentencing enhancement alters the meaning of criminal negligence under RCW § 9A.08.010(d), or otherwise raises the mens rea of the offense as a whole, to establish the requisite scienter for finding a crime involving moral turpitude. *See, e.g., Hernandez-Gonzales v. Holder*, 778 F.3d at 804 (the court reasoned that "[t]he gang [sentencing] enhancement does not provide a sufficient 'evil intent' to transform an otherwise non-turpitudinous crime into one involving moral turpitude").

Therefore, we agree with the Immigration Judge that the sentencing enhancement of sexual motivation which was added to the respondent's conviction for the offense of assault in third degree in violation of RCW § 9A-36.031(1)(f) does not elevate the "categorically non-morally turpitudinous crime into a crime involving moral turpitude" (IJ at 9). As the respondent is not subject to removal as charged under section 237(a)(2)(A)(i) of the Act on that basis, the DHS's appeal of the Immigration Judge's decision to terminate these removal proceedings will be dismissed.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NORTHWEST DETENTION CENTER
IMMIGRATION COURT
TACOMA, WASHINGTON

File No. A212 085 801 **In the Matter of:**	
Eh Moo **Respondent**	**In Removal Proceedings** **DETAINED**

Charges: INA § 237(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude within five years of admission for which a sentence of one year or longer may be imposed

Application: Motion to Terminate

On Behalf of the Respondent
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On Behalf of DHS
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Decision of the Immigration Judge

I. Introduction and Procedural History

Respondent is a native and citizen of Burma. Exh. 2 at 1. Respondent was admitted to the United States as a refugee on May 29, 2008, and adjusted his status to that of lawful permanent resident on July 25, 2009. Exh. 2 at 3. On October 10, 2012, Respondent was convicted of one count of assault in the third degree with a sexual motivation enhancement, in violation of Revised Code of Washington (RCW) §§ 9A.36.031(1)(f). Exh. 2 at 12. The Department of Homeland Security (DHS) initiated removal proceedings by filing a Notice to Appear (NTA), on April 10, 2017, charging Respondent as removable under Section 237(a)(2)(A)(i) of the

Immigration and Nationality Act (INA) as an alien convicted of a crime involving moral turpitude within five years after admission and for which a sentence of one year or more may be imposed. Exh. 1.

Respondent appeared with counsel at a master calendar hearing on May 10, 2017. Respondent admitted the factual allegations and denied the charge of removability in the NTA. Respondent then filed a motion to terminate these proceedings. Both parties filed briefings on the issue of removability.

II. Statement of the Law

1. Legal Framework

The court applies the categorical approach to determine whether a conviction constitutes a predicate offense in the INA. *See Mathis v. United States*, 136 S.Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013), *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014); *Taylor v. United States*, 495 U.S. 575 (1990); *see also Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2015) (en banc). Under the categorical approach, the court first identifies the elements of the statute of conviction and the elements of the federal generic definition of the crime. *Almanza-Arenas*, 815 F.3d at 475 (citing *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1208 (9th Cir. 2013)). Second, the court compares the elements of the statute of conviction with the federal generic definition of the relevant crime to determine if the statute of conviction categorically fits within the generic definition of the offense listed in the INA. *Mathis*, 136 S. Ct. at 2248. If the statute of conviction has the same elements as—or defines the crime more narrowly than—the generic offense, the conviction is a categorical match for immigration purposes. *Descamps*, 134 S. Ct. at 2283. If, on the other hand, the statute of conviction "sweeps more broadly than the

generic crime," the respondent's conviction may not categorically serve as a predicate offense. *Id.*

In a "narrow range of cases," the court may proceed to the modified categorical approach if a statute that is not a categorical match to the relevant crime is nevertheless divisible. *Id.* (citing *Taylor*, 495 U.S. at 602). A statute is divisible if it has "multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id.* at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). The Ninth Circuit has emphasized that an "element" is a substantive component of the statute on which the jury must unanimously agree, whereas a "means" is a fact or method of committing an offense on which a jury need not agree yet still convict. *See Almanza-Arenas v. Lynch*, 815 F.3d at 477 (explaining that "a single element must be part of a charged offense with which a jury necessarily found the defendant guilty"); *see also see also Mathis*, 136 S. Ct. at 2248 (distinguishing between "elements," which the prosecution must prove beyond a reasonable doubt to sustain a conviction and "brute facts" (means), which "need neither be found by a jury nor admitted by a defendant."). In order to determine whether a statute is made up of alternative elements or alternative means, the court reviews (1) the statutory language itself, (2) authoritative state court interpretations of the statute, and (3) the respondent's conviction records "if state law fails to provide clear answers." *Mathis*, 136 S. Ct. at 2256-57. If a statute is divisible, the court may consider certain reliable documents in the record beyond the statutory text to determine which elements of the statute of conviction formed the basis for the respondent's conviction. *See id.* at 2249; *Descamps*, 133 S. Ct. at 1083; *see also Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that the sentencing court may review "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to determine

whether defendant necessarily admitted the elements of the generic offense).

2. Application and Analysis

Respondent was convicted of one count of assault in the third degree, in violation of RCW § 9A.36.031(1)(f), which provides that "[a] person is guilty of assault in the third degree if he . . . , under circumstances not amounting to assault in the first or second degree: . . . [w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." Assault in the third degree is a Class C felony, which is punishable by up to five years in prison and/or a $10,000 fine. RCW § 9A.36.031(2). Respondent's assault offense was committed "with sexual motivation," a sentencing enhancement that allows for the imposition of an exceptional sentence. RCW § 9.94A.535(3)(f); RCW § 9.94A.533. Acting with a "sexual motivation" in Washington means that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." RCW § 9.94A.030(48). A sexual motivation enhancement must be proven beyond a reasonable doubt. RCW § 9.94A.835(2). The imposition of a sexual motivation sentence enhancement on a conviction for a class C felony like third degree assault adds an additional one year of incarceration to the standard sentence range. RCW § 9.94A.533(8)(a)(iii).

DHS accordingly charges that Respondent is removable under INA § 237(a)(2)(A)(i), which provides that "[a]ny alien who (1) is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and (2) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." INA § 237(A)(2)(a)(i); Exh. 1. DHS bears the burden of demonstrating that Respondent is removable as charged. 8 C.F.R. § 1240.8(a). Respondent's conviction clearly exceeds the necessary possible length of punishment under INA § 237(a)(2)(A)(i)(II), but the analysis of whether the conviction is a

crime involving moral turpitude under INA § 237(a)(2)(A)(i)(I) is less straightforward.

The term "crime involving moral turpitude" is not defined in the INA. *See, e.g.*, *Latter-Singh v. Holder*, 668 F.3d 1156, 1161 (9th Cir. 2012). The Court must consider on a case-by-case basis whether a particular crime involves moral turpitude. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011). Although the INA does not specifically define offenses constituting crimes involving moral turpitude, they are general crimes that are (1) vile, base, or depraved, and (2) violate accepted moral standards. *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 801 (9th Cir. 2015); *see also Ceron v. Holder*, 747 F.3d 773, 779-80 (9th Cir. 2014) (en banc). "Assault may or may not involve moral turpitude." *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007). For example, both the Ninth Circuit and the Board of Immigration Appeals have consistently held that simple assault cannot be a crime involving moral turpitude because it does not require the requisite evil intent or vicious motive. *Uppal v. Holder*, 605 F.3d 712, 716 (9th Cir. 2010); *Matter of Solon*, 24 I&N Dec. at 241. Outside the simple assault context, assault statutes are reviewed under a totality of the circumstances approach, including a consideration of the required level of consciousness, resulting harm to the victim, and any other aggravating factors. As the Board of Immigration Appeals has explained:

> [A] finding of moral turpitude involves an assessment of both the state of mind and the level of harm required to complete the offense. Thus, intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous. However, as the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude. Moreover, where no conscious behavior is required, there can be no finding of moral turpitude, regardless of the resulting harm.

Matter of Solon, 24 I&N Dec. at 242; *see also Ceron v. Holder*, 747 F.3d 773, 782-83 (9th Cir. 2014) (quoting and discussing the BIA's reasoning from *Solon*); *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996) ("In order for an assault . . . to be deemed a crime involving moral

turpitude, the element of a reckless state of mind must be coupled with an offense involving the infliction of serious bodily injury."). When considering an assault statute with a mens rea lower than intent, the courts focus on whether or not the statute nevertheless requires some degree of awareness or willful action. *See Matter of Medina*, 15 I&N Dec. 611, 613-14 (BIA 1976) (relying on the awareness requirement when finding that Illinois assault with a deadly weapon, involving a mens rea of recklessness, was a crime involving moral turpitude); *see also Ceron*, 747 F.3d at 784 (noting that CPC § 245(a)(1) required neither intentional conduct nor that the "offender actually perceive the risk created by his or her actions").

The basic offense underlying Respondent's conviction – assault in the third degree under RCW § 9A.36.031(1)(f) – standing alone is categorically not a crime involving moral turpitude. *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-20 (BIA 1992) (holding that a conviction under RCW § 9A.36.031(1)(f) is not a crime involving moral turpitude because it involves neither intentional nor reckless conduct); *see also* Washington Pattern Jury Instructions Criminal (WPIC) 35.24, Assault – Third Degree – Criminal Negligence and Suffering – Elements. Respondent, however, was convicted of assault in the third degree with sexual motivation and not basic statutory assault in the third degree under RCW § 9A.36.031(1)(f) standing alone. *See* Exh. 2. Thus, Respondent's conviction involves an additional element from the generic assault in the third degree under RCW § 9A.36.031(1)(f) previously considered by the Board of Immigration Appeals: that Respondent acted with sexual motivation, meaning with the purpose of causing Respondent sexual gratification. *See* Exh. 2 at 21 (Respondent's plea statement) (stating that Respondent "negligently and unlawfully caused bodily harm by touching T.K. . . . this created substantial pain that extended for a period sufficient to cause considerable suffering by sexual motivation").

The parties disagree on whether Respondent's assault in third degree conviction with the inclusion of the sexual motivation enhancement element would categorically be a crime involving moral turpitude. The Ninth Circuit discussed the effect a sentencing enhancement can have on the underlying conviction in *Hernandez-Gonzalez v. Holder*, 778 F.3d 793 (9th Cir. 2015). There, the court held that a conviction for possession of a billy club, in violation of California Penal Code (CPC) § 12020(a), together with a sentence enhancement under CPC § 186.22(b)(1), which provided that the defendant's felony was committed for the benefit of and with the specific intent to assist a criminal street gang, was not a conviction for a crime involving moral turpitude. *Id.* at 796. The court first noted that the underlying statute of conviction – unlawful possession of a weapon – is not a crime involving moral turpitude. *Id.* at 801. Then, the court explained that the sentencing enhancement did not categorically involve only conduct that constitutes a crime involving moral turpitude because it did not require "an intent to injure, actual injury, or a protected class of victims" and it could apply to "run-of-the-mill criminal conduct." *Id.* at 802. The court reasoned that "[t]he gang enhancement does not provide a sufficient 'evil intent' to transform an otherwise non-turpitudinous crime into one involving moral turpitude." *Id.* at 804.

This court finds that the sexual motivation enhancement is similarly insufficient to transform an otherwise non-morally turpitudinous assault into a crime involving moral turpitude. First, the court finds that the sexual motivation enhancement does not elevate the mens rea necessary for Respondent's assault conviction to include conduct that would constitute a crime involving moral turpitude. In order to prove the sexual motivation enhancement, Washington law requires the state to present "evidence of identifiable conduct by the defendant while committing the offense [that] proves beyond a reasonable doubt that the offense was committed for the

purpose of sexual gratification." *State v. Thompson*, 290 P.3d 996, 1018 (Wash. Ct. App. 2012) (quoting *State v. Halstien*, 857 P.2d 270, 277 (Wash. 1993) (en banc) (discussing a parallel juvenile offense sexual motivation provision)). However, the purposeful act that demonstrates a sexual motivation does not have to be the same conduct that constitutes the underlying offense. In other words, a defendant can engage in purposeful conduct that is undertaken for the purpose of his or her sexual gratification and, in the midst of that purposeful act, commit an act of negligence that leads to a conviction like Respondent's assault in the third degree offense; the assault can be tangential to the sexual motivation in order to sustain a conviction under the statute. The Washington court of appeals discussed a similar set of circumstances in *State v. Hudnall*, 108 Wash. App. 1052, 2001 WL 1301398 (Wash. Ct. App. 2001) (unpublished). There, the defendant was also convicted of assault in the third degree with sexual motivation, and the court of appeals explained that her conduct was sufficient to show both that she acted "for sexual gratification and with sexual motivation" and that she acted with criminal negligence. *Id.* at *7.

Second, acting for the purpose of one's own sexual gratification (i.e., acting with a sexual motivation) is not itself categorically morally turpitudinous conduct. The Ninth Circuit previously likened the offense of indecent exposure under CPC § 3145 for the sexual gratification of either oneself or of the viewer to the offense of annoying a child. *Nunez v. Holder*, 594 F.3d 1124, 1135 (9th Cir. 2010). The court explained that the offense was not categorically a crime involving moral turpitude because it could be "committed without any intention of harming anyone, . . . need not result in actual harm, and . . . does not necessarily involve a protected class of victim." *Id.* The same is true under the Washington sexual motivation provision. All that is required is that one act for the purpose of one's own sexual gratification, which does not necessarily require an intent to injure, actual injury, or a protected

class of victim. *See e.g.*, *Halstien*, 857 P.2d at 272-74 (finding that a juvenile committed burglary with a sexual motivation).

Thus, the court finds that the sexual motivation sentencing enhancement does not elevate Respondent's conviction for assault in the third degree in violation of RCW § 9A.36.031(1)(f) from a categorically non-morally turpitudinous crime into a categorical crime involving moral turpitude. Accordingly, the court finds that DHS has not met its burden to show by clear and convincing evidence that Respondent's conviction constitutes a crime involving moral turpitude under INA § 237(a)(2)(A)(i).

III. Orders

It is **ORDERED** that the charge of removability under INA § 237(a)(2)(A)(i) is not sustained.

It is **FURTHER ORDERED** that Respondent's Motion to Terminate is granted.

6/13/17
Date

John C. Odell
Immigration Judge

Appeal date: 7-13-17