U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: S[redacted], F[redacted] **A [redacted]-285**

Date of this notice: 4/28/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

File: A[redacted]285 – Fort Snelling, MN

Date: APR 28 2017

In re: F[redacted] S[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joseph M. Dallas, Law Student
Katherine Evans, Faculty Supervisor

ON BEHALF OF DHS: Kenneth R. Knapp
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

APPLICATION: Termination of proceedings

The Department of Homeland Security ("DHS") appeals the Immigration Judge's December 8, 2016, decision finding that the DHS did not establish the respondent's removability and terminating the proceedings. Incorporating her December 1, 2016, written legal memorandum into her decision, the Immigration Judge concluded that the respondent's simple assault domestic violence convictions under N.D. Cent. Code § 12.1-17.01(2)(b), did not constitute aggravated felonies, crimes involving moral turpitude ("CIMT"), or crimes of domestic violence under sections 237(a)(2)(A)(ii), (a)(2)(A)(iii), or (a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii), (a)(2)(A)(iii), or (a)(2)(E)(i), respectively (Exh. 25). The respondent has submitted a brief seeking affirmance of the Immigration Judge's decision. The appeal will be dismissed.

We review the factual findings, including the Immigration Judge's credibility determination, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

With the following discussion, we adopt and affirm the Immigration Judge's decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The Immigration Judge correctly determined that the respondent's simple assault domestic violence convictions are not

categorically aggravated felony crimes of violence, as the minimum culpable conduct under the statute does not involve the requisite violence under 18 U.S.C. § 16(a)-(b). *See Alonzo v. Lynch*, 821 F.3d 951, 960 (8th Cir. 2016) (discussing the categorical approach in evaluating whether a state domestic violence statute fits within the applicable generic federal offense); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (recognizing that only the criminal statute's least culpable acts may be considered, not the alien's actual misconduct); *Mathis v. United States*, 136 S. Ct. 2243 (2016). As discussed below, the Supreme Court of North Dakota's recent interpretation of N.D. Cent. Code §§ 12.1-17.01(1)(a), (2)(b), is dispositive. *See State v. Hannah*, 873 N.W.2d 668 (2016).

The respondent's simple assault domestic violence convictions involve willfully causing bodily injury to a member of one's family or household (Exh. 25 at 2). N.D. Cent. Code §§ 12.1-17.01(1)(a), (2)(b). The criminal statute defines "bodily injury" as "*any impairment of physical condition*, including physical pain" (Exh. 25 at 3). N.D. Cent. Code § 12.1-01-04 (emphasis added). The state's highest court clarified the term's meaning, noting that the infliction of pain is "not necessary" to prove bodily injury under N.D. Cent. Code §§ 12.1-17.01(1)(a), (2)(b). *See State v. Hannah*, *supra*, at 671. Given the Supreme Court of North Dakota's binding interpretation of the respondent's section 12.1-17.01(2)(b) offense, we agree with the Immigration Judge that "bodily injury" – including any impairment of physical condition irrespective of pain – is overbroad and does not match 18 U.S.C. § 16(a)-(b)'s crime of violence definition. *See* section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F); *Matter of Guzman-Polanco*, 26 I&N Dec. 806, 807 (BIA 2016) (holding that a crime of violence offense under 18 U.S.C. § 16(a) is predicated on violent force). Nor may we apply the modified categorical approach, as the term "bodily injury" is not divisible. As such, neither of the respondent's simple assault domestic violence convictions constitutes an aggravated felony or a domestic violence crime under sections 237 (a)(2)(A)(iii) or (a)(2)(E)(i) of the Act.

We further agree with the Immigration Judge that the respondent's convictions are not categorically CIMTs. *See Alonzo v. Lynch*, *supra*, at 960 (recognizing that the categorical analysis ends if the criminal statute categorically includes conduct that is not morally turpitudinous); *Villatoro v. Holder*, 760 F.3d 872, 876 (8th Cir. 2014). Notwithstanding the aggravating domestic relationship involved in the respondent's offense, the least culpable conduct includes slight physical impairment without pain infliction. *See Matter of Sanudo*, 23 I&N Dec. 968, 972-73 (BIA 2006) (finding that a domestic relationship between the perpetrator and the victim is insufficient to establish the morally turpitudinous nature of the crime absent admissible evidence reflecting that the respondent's offense occasioned actual or intended physical harm to the victim); *Matter of Sejas*, 24 I&N Dec. 236 (BIA 2007) (finding that domestic battery conviction was not a CIMT because, even though the offense required intent, it required only a minimal touching without proof of an actual injury). And as discussed above, we may not apply the modified categorical approach, given that the term "bodily injury" is indivisible.

Nor do we find that the Immigration Judge erred in concluding that there is a realistic probability that the state will successfully prosecute conduct that falls below the minimum necessary to sustain a federal crime of violence or CIMT. *See generally Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (requiring a realistic probability that the state would apply its statute to conduct outside of the relevant federal crime's generic definition); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1685 (2013). In particular, the Supreme Court of North

Dakota found that a section 12.1-17.01(2)(b) conviction can be sustained despite the absence of visible physical injury and pain infliction. *See State v. Hannah*, *supra*, at 671-72.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD