U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: CARDEAS CAZARES, FERNANDO **A 014-273-381**

Date of this notice: 1/27/2017

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:
Cole, Patricia A.
Guendelsberger, John
Liebowitz, Ellen C

Userteam: Docket

File: A014 273 381 – Las Vegas, NV Date: JAN 27 2017

In re: FERNANDO CARDEAS CAZARES a.k.a. Fernando Cardenas Cazares

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jeremiah Wolf Stuchiner, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (withdrawn)

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation (sustained)

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

APPLICATION: Remand

This case is before the Board pursuant to a May 26, 2016, order of the United States Court of Appeals for the Ninth Circuit, which granted the Government's unopposed motion to remand. The Government sought remand for the Board to consider whether the respondent is bound by previous counsel's concession of removability under section 237(a)(2)(E)(i) of the I&N Act, 8 U.S.C. 1227(a)(2)(E)(i). On remand, the respondent seeks to nullify counsel's concession and moves to remand the record to apply for relief. The Department of Homeland Security ("DHS") has not filed a response. The appeal will be sustained and the record will be remanded for further proceedings.

We review findings of fact for clear error, including credibility findings. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Mexico, was admitted as a lawful permanent resident of the United States in 1965. In 1986, a Nevada district court convicted the respondent of selling a controlled substance, heroin, under Nevada Revised Statute § 453.321, with a suspended 10-year sentence (I.J. at 2; Exh. 2). In 2005, the respondent was convicted of Battery Constituting Domestic Violence, pursuant to Nevada Revised Statute §§ 200.481 and 200.485, and sentenced to 2 days in jail, community service, and counseling (I.J. at 2; Exh. 2). The respondent, through his former counsel, admitted the allegations of fact concerning the drug offense and the domestic violence offense and conceded the charges of removability (Tr. at 5, 7).

Based on the respondent's August 16, 2011 concessions, the Immigration Judge found him subject to removal (I.J. at 2; Tr. at 5).

First, as an initial matter, the respondent asserts on remand that his 1986 conviction for drug trafficking may not be considered for any purpose because the DHS withdrew the aggravated felony charge (Respondent's Brief at 2-3). *See Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010) (holding that convictions occurring prior to November 18, 1988, may not serve as a basis for removal under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act). However, we affirm our previous determination that, for definitional purposes, an alien is an aggravated felon irrespective of the date of conviction. *See* section 101(a)(43) of the Act (undesignated closing paragraph); *see also Ledezma-Galicia v. Holder*, *supra*, at 1079 n.25. Thus, while the respondent's conviction for selling a controlled substance may not serve as a basis for deportability under section 237(a)(2)(A)(iii) of the Act, it remains an aggravated felony by definition for other purposes.

Second, turning to the respondent's concession of removability through counsel, an alien is bound by "a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity." *Matter of Velasquez*, 19 I&N Dec. 377, 382 (BIA 1986). Where an attorney's judicial admission is tactical, only egregious circumstances that are so unfair as to produce an unjust result will warrant setting aside its binding effect. *Id.* Such egregious circumstances include situations "where the propriety of an admission or concession has been undercut by an intervening change in law." *Santiago-Rodriguez v. Holder*, 657 F.3d 820, 831-32 (9th Cir. 2011); *see also Matter of Velasquez*, *supra*, at 382-83.

Upon review, we agree with the respondent that his prior attorney's concession is not binding with respect to the charge of removability under section 237(a)(2)(E)(i) of the Act, based on a crime of domestic violence. Specifically, the respondent contends that his conviction for battery domestic violence, in violation of section 200.485.1(a) of the Nevada Revised Statutes, does not qualify as a crime of domestic violence under section 237(a)(2)(E)(i) of the Act (I.J. at 2; Respondent's Brief at 2-3). Reviewing the question de novo, we agree. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

At the time of his offense, section 200.485.1 of the Nevada Revised Statutes proscribed, in relevant part, "a battery which constitutes domestic violence pursuant to NRS 33.018." Section 200.481.1(a) of the Nevada Revised Statutes, in turn, defined "battery" as the "willful and unlawful use of force *or* violence upon the person of another." (emphasis added.) Nevada case law establishes that, "at a minimum, battery is the intentional and unwanted exertion of force upon another, however slight." *Hobbs v. State*, 251 P.3d 177, 179-80 (Nev. 2011).

Because a "battery" under section 200.485.1 of the Nevada Revised Statutes may be committed using nonviolent force, we agree with the respondent that his conviction under this statute does not categorically qualify as a crime of violence, and therefore a crime of domestic violence, under section 237(a)(2)(E)(i) of the Act (I.J. at 2). *See Matter of Velasquez*, 25 I&N Dec. 278, 283 (BIA 2010) (concluding that the "physical force" necessary to establish that an offense is a "crime of domestic violence" for purposes of section 237(a)(2)(E)(i) of the Act must be "violent" force, that is, force capable of causing physical pain or injury to another person).

Furthermore, given the intervening case law, we agree that the respondent's statute of conviction is indivisible despite the disjunctive phrasing. *See Matter of Chairez* ("*Chairez III*"), 26 I&N Dec. 819 (BIA 2016) (holding that the concept of divisibility as embodied in *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), "applies in immigration proceedings to the same extent that it applies in criminal sentencing proceedings"). In *Mathis*, the Supreme Court clarified that "disjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent 'element' of the offense." *Chairez III*, *supra*, at 822 (citing *Mathis v. United States*, *supra*, at 2248); *see also Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014).

With regard to the statute's elements, "a state court decision definitively answers the question." *See Mathis v. United States*, *supra*, at 2256. The respondent's statute of conviction is indivisible because a Nevada jury need not agree on whether a defendant's violation of section 200.485.1 of the Nevada Revised Statutes involved "violent force." *See Byars v. State*, 336 P.3d 939, 949 (Nev. 2014) (finding that the prosecutor need only prove that "the defendant actually intend[ed] to commit a willful and unlawful use of force or violence upon the person of another" to establish that the defendant committed battery in violation of Nevada law).

Thus, insofar as the respondent's statute of conviction is overbroad and indivisible relative to the generic definition of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act, the respondent's prior counsel's concession of this charge of removability is no longer binding because it is undercut by current law. *Santiago-Rodriguez, supra.* (I.J. at 2). We therefore conclude that the respondent is permitted to withdraw his admissions to the factual allegations and his concession of the charge made pursuant to section 237(a)(2)(E)(i) of the Act. *See Matter of Velasquez*, *supra*, at 382-83.

Accordingly, we will remand for further proceedings. On remand, the parties may address the issues related to the respondent's removability as charged, or based on any other charge the DHS may lodge in the course of remanded proceedings. The Immigration Judge should also consider the respondent's eligibility for relief from removal as appropriate.[1] The parties should have the opportunity to submit additional evidence and arguments to assist the Immigration Judge in issuing a new decision.

The following orders will be entered.

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[1] With respect to his 1986 drug trafficking conviction, the Immigration Judge observed that although the respondent is eligible to apply for a waiver under former section 212(c), an alien cannot be granted both cancellation of removal and a waiver under section 212(c) in the same proceeding (I.J. at 3-4). *See* section 240A(c)(6) of the Act; *see also Garcia Jimenez v. Gonzales*, 488 F.3d 1082 (9th Cir. 2007). On remand, if the Immigration Judge determines that the domestic violence charge cannot be sustained, the need for relief on that point would be moot and the respondent would be free to seek a waiver under section 212(c).

ORDER: The respondent's 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