U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: GOMEZ ARGUETA, MAURICIO J... **A 091-261-217**

Date of this notice: 8/18/2015

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Herron, Margaret M

Userteam:

File: A091 261 217 - Dallas, TX

Date:

AUG 18 2015

In re: MAURICIO JOSE GOMEZ-ARGUETA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: Judson Davis
Assistant Chief Counsel

CHARGE:

Notice: 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 (not sustained)

APPLICATION: Termination

The Department of Homeland Security ("DHS") has appealed from an Immigration Judge's January 8, 2014, decision terminating proceedings because the DHS did not sustain the charges against the respondent.

During the pendency of the appeal, the DHS has also submitted a "Motion to Dismiss without Prejudice" in which it concedes that termination was appropriate because one of the respondent's convictions does not constitute a crime involving moral. The DHS argues, however, that the Immigration Judge erred in terminating proceedings "with prejudice" and requests that this Board instead terminate proceedings "without prejudice."

As a preliminary matter, the DHS has conceded that the respondent is not removable as charged and that proceedings were appropriately terminated. Therefore, we will affirm the Immigration Judge's decision to terminate proceedings.

As to the DHS's argument that proceedings should have been terminated "without prejudice," the Immigration Judge's designation of "with prejudice" does not preclude the DHS from initiating new proceedings in the future. Any arguments about whether such a charge is precluded are not foreclosed by the Immigration Judge's mere designation of "with prejudice" and are more appropriately addressed in any future proceedings.

[1] A motion for summary affirmance has been filed on the respondent's behalf by an attorney who neglected to submit a Form EOIR-27, as required by 8 C.F.R. § 1003.3(a)(2). Therefore, we must consider the respondent to be proceeding pro se. As a courtesy, however, we will send a copy of this decision to the attorney who submitted the motion.

Accordingly the following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion is denied.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: A091-261-217 January 8, 2014

In the Matter of

MAURICIO JOSE GOMEZ ARGUETA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended, in that at any time after admission, you have been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS:

ON BEHALF OF RESPONDENT: ROSALIND KELLY
8500 North Stemmons Freeway, Suite 2085
Dallas, Texas 75247

ON BEHALF OF DHS: DANIELLE FREEMAN, Esquire
Assistant Chief Counsel
Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a native and citizen of El Salvador. He adjusted his status to that of a lawful permanent resident on or about May 20, 1992, at or near Dallas, Texas. On March 14, 2011, he was convicted in the County Criminal Court, Number 1, Denton County, Texas, for the offense of assault, family violence, in violation of Section

22.01 of the Texas Penal Code. See Exhibits 1 and 3.

On that same date, he was convicted in the County Criminal Court, Number 1, at Denton County, Texas, for the offense of deadly conduct in violation of Section 22.05 of the Texas Penal Code. Exhibits 1 and 3.

On August 22, 2011, the respondent was personally served with a Notice to Appear, charging him with removal under Section 237(a)(2)(A) (ii) of the Immigration and Nationality Act (Act), in that after admission, he was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. Exhibit 1.

On October 20, 2011, the respondent appeared in court for a master calendar hearing. At that time, he admitted to the factual allegations 1 and 2 contained in the Notice to Appear, but denied allegations 3, 4, and 5 regarding his conviction, and that the crimes arose out of a single scheme of criminal misconduct.

The Court found that the Government had presented clear and convincing evidence of the convictions through submission of the respondent's conviction record. See 8 C.F.R. Section 1208.8(a). Respondent also denied the charge of removal under Section 237(a)(2)(A)(ii) of the Act (two crimes involving moral turpitude not arising out of a single scheme).

The issue now before the Court is whether respondent is removable as charged.

LEGAL FINDINGS AND ANALYSIS

The Government has the burden to prove removal by clear and convincing evidence. See 8 C.F.R. Section 1240.8(a). The Act does not define the term, crime involving moral turpitude. However, it has generally been defined as any crime that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the

duties owed between persons or to society in general. Matter of Olguin, 23 I&N Dec. 896 (BIA 2006).

Moreover, the Fifth Circuit has held that a crime involving moral turpitude is an act which shocks the public conscience, and that is so morally reprehensible and intrinsically wrong that it is the nature of the act itself and not the stature of prohibition of it which renders a crime one of moral turpitude. Garcia-Maldonado v. Gonzales, 491 F.3d 284, 285 (5th Cir. 2007). See also Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996).

Among the tests to determine whether a crime involves moral turpitude is whether the act is done willfully or with an evil state of mind. Matter of Khourn, 21 I&N Dec. 1041, 1046 (BIA 1997).

However, a crime involving moral turpitude does not necessarily require specific intent. Matter of Silva-Trevino, 24 I&N Dec. 689.

Instead, it requires some degree of scienter, including specific intent deliberateness, willfulness, or recklessness coupled with reprehensible conduct. Matter of Silva-Trevino.

In order to determine whether a conviction is for a crime involving moral turpitude, the Immigration Judge should first look to the statute of conviction under the categorical inquiry and determine whether there is a "realistic probability" that the State or Federal criminal statute would be applied to reach conduct that does not involve moral turpitude. Matter of Silva-Trevino, 689, 690.

Such an inquiry does not involve an examination of the specific facts of the alien's crime. Matter of Silva-Trevino, 696.

If a categorical inquiry does not resolve the question, the Immigration Judge should engage in a modified categorical approach, and examine the record of

conviction, including documents such as the indictment, judgment of conviction, jury instructions, a signed guilty plea, or plea transcripts. Matter of Silva-Trevino, 690.

Last, if the conviction is still inconclusive, the Immigration Judge may consider any additional evidence deemed necessary or appropriate to adequately resolve the moral turpitude question. Matter of Silva-Trevino.

Pursuant to the Matter of Silva-Trevino, the Attorney General, in redefining the categorical approach, directed Immigration Judges to engage in a categorical inquiry. That is, to apply a realistic probability approach, i.e., to ask whether, at the time of the alien's removal proceedings, any actual exists, and which relevant criminal statute was applied to conduct that did involve moral turpitude. Matter of Silva-Trevino, 697, 698.

Upon applying the realistic probability method, if the statute has not been so applied in any case, the Immigration Judge may reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude. Matter of Silva-Trevino.

However, should the language of the criminal statute encompass both conduct that involves moral turpitude and conduct that does not, and there is a case in which the relevant criminal statute has been applied to the latter category of conduct, the statute is divisible, and an Immigration Judge cannot categorically treat all convictions under the statute as convictions for crimes that involve moral turpitude. Matter of Silva-Trevino, 697.

The Board has indicated that assault may or may not involve moral turpitude. Matter of Solon, 24 I&N Dec. 239, 241 (BIA 2007); Matter of Sanudo, 23 I&N Dec. 968, 971 (2006).

Simple assaults are generally not considered to be crimes involving moral

turpitude. However, assault offenses may rise to the level of crimes involving moral turpitude if they involve aggravating factors. Matter of Sanudo, 23 I&N Dec. 971.

Aggravating factors may include the knowing or attempted use of deadly force, the intentional infliction of serious bodily injury, or assault offenses inflicted upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer. Matter of Sanudo, 971, 972.

Initially, the Court finds that the assault statute at issue in this case, Section 22.01 of the Texas Penal Code, is a divisible statute encompassing a range of conduct or harm from de minimis touching through physical contact causing bodily injury to a spouse. See Section 22.01(a) of the Texas Penal Code and (b). See also Esparza-Rodriguez v. Holder, 699 F.3d 821, 823 (5th Cir. 2012). See also Matter of Solon, 24 I&N Dec. 241.

Thus, a conviction under this statute cannot categorically be a crime involving moral turpitude because the full range of conduct prohibited in the statute does not support such a finding. Matter of Sanudo, 23 I&N Dec. 972.

Moreover, there are examples of actual cases applying the statute issued to conduct not involving moral turpitude. Matter of Guzman, 25 I&N Dec. 465 (BIA 2011). See also Matter of Garcia, 2007 WL 1180971 (BIA March 2007).

Because the statute is divisible, the Court will use a modified categorical approach, and examine the respondent's record of conviction to determine if the respondent's conviction is a crime involving moral turpitude. See Matter of Silva-Trevino, 24 I&N Dec. 698. See also Matter of Hamdan, 98 F.3d 188.

For the purpose of this analysis, it is appropriate to consider 22.01. A person commits an offense of assault if the person, one, intentionally, knowingly or recklessly causes bodily injury to another, including the person's spouse; two,

intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or, three, intentionally and knowingly causes physical contact with another when a person knows or should have reason to believe that the other will regard the contact as offensive or provocative. Section 22.01(a).

Bodily injury is defined as physical pain, illness, or any impairment of physical condition. See Section 1.07(a)(8) of the Texas Penal Code.

MODIFIED CATEGORICAL APPROACH

Under the modified categorical approach, the Immigration Judge examines the record of conviction, including indictments, judgment, and plea transcript. Matter of Silva-Trevino, 24 I&N Dec. 690.

Presently, the Court finds that there is some degree of ambiguity in the record of conviction regarding under which subsection of 22.01 the respondent was convicted. The respondent's judgment of conviction states that respondent was convicted of "the misdemeanor offense of assault family violence." Exhibit 3, page 2.

However, assault family violence is a third degree felony pursuant to Section 22.01(b)(2)(B). If respondent had been convicted of a third degree felony, the minimal sentence he would have received is two years imprisonment. See Section 12.34(a) of the Texas Penal Code.

However, the judgment of conviction states that the respondent was sentenced to 240 days in the county jail, and punishment consistent with a conviction for a Class A misdemeanor. See Section 12.21 of the Texas Penal Code (noting a punishment for Class A misdemeanor as confinement in jail for a term not to exceed one year).

The judgment of conviction is, therefore, ambiguous on its face. However, the Court may also look to other documents constituting part of the record of conviction,

which in this case includes the information. Exhibit 3, page 1. The language of information states in relevant part that on or about June 25, 2009, the respondent "did then and there intentionally, unknowingly, or recklessly cause bodily injury to Sari Tran, a member of the defendant's family, or a member of the defendant's household, or person with whom the defendant has or has had a dating relationship, as described in Section 71.003, or 71.005, or 71.0021 of the Family Code, by striking Sari Tran with the defendant's hand."

The elements charged in the information indicate that respondent was initially charged with assault family violence under Section 22.01(b)(2)(B) of the Texas Penal Code. However, without more information, it is difficult to determine under what statute respondent was convicted. If the specific provision under which an alien was convicted is indiscernible from the record, the conviction will be found to be a CIMT only if the full range of conduct prohibited by the statute supports such a finding. Matter of Solon, 24 I&N Dec. 241. As discussed above, this is not true of Section 22.01 of the Texas Penal Code, and as such, the modified categorical approach does not indicate that respondent's crime is a crime involving moral turpitude.

In addition, the Court cannot find that respondent has been convicted of a crime involving moral turpitude based only on the record of conviction because respondent's mental state and the degree of harm inflicted is unclear. The statute of conviction lists three culpable mental states (intentionally, knowingly, recklessly), in the disjunctive, meaning that any one of them would support a conviction. The Board stated in Matter of Solon that neither the offender's state of mind, nor the resulting level of harm alone is determinative of moral turpitude. Matter of Solon, 24 I&N Dec. 239, 241.

Rather, 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. Matter of Solon, 242. See also Esparza-Rodriguez, 699 F.3d 826 (finding that the BIA was not unreasonable in concluding that an intentional assault that is intended to and does not cause more than a diminutive level of harm is a CIMT).

If the respondent's mental state underlying in the conviction was reckless, rather than willful or intentional, respondent's crime might not have been a crime involving moral turpitude. Matter of Sanudo, 23 I&N Dec. 972. (Citing cases where crimes involving members of protected class are found to be crimes involving moral turpitude require proof of knowingly or willfully or intentional infliction of actual harm).

The Government argues that this conviction is a crime involving moral turpitude because it resulted in bodily injury. See Government's brief at page 6.

However, Texas courts have applied the term bodily injury as defined by the Texas Statute broadly, noting that the statutory definition of bodily injury appears to be purposely broad and seems to encompass even relatively minor physical contact so long as they constitute more than mere offensive touching. Henry v. State, 800 S.W.2.d 612 (Tex. App. 1990) (quoting Lane v. State, 763 S.W.2.d 785, 786 (Tex. Cr. App. 1989)).

Thus far, the bodily injury the respondent inflicted on the victim must have been something more than mere offensive touching. It may not have risen to the level of physical harm necessary for a finding of moral turpitude absent a sufficiently culpable mental state. Matter of Sanudo, 23 I&N Dec. 972, 973. See also Matter of Solon, 24 I&N Dec. 241.

The Court needs to understand the respondent's offense with great

specificity in order to resolve the moral turpitude inquiry. Since the modified categorical approach is inconclusive as to the moral turpitude question, the Court may proceed to the third prong of the Silva-Trevino analysis and examine any documents beyond the record of conviction that may resolve moral turpitude inquiry. Matter of Silva-Trevino, 24 I&N Dec. 690.

However, as the record contains no further evidence beyond the record of conviction, the Court cannot proceed to the third prong of Silva-Trevino analysis. As such, on the basis of the record as it stands now, respondent's conviction for assault family violence is not a crime involving moral turpitude as it fails the first and second prong of Silva-Trevino.

The next issue the Court will deal with is respondent's conviction for deadly conduct under Section 22.05.

CATEGORICAL APPROACH

In the present case, respondent was convicted under Section 22.05, which provides that:

a) a person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury;

b) a person commits an offense if he knowingly discharges a firearm at or in the direction of:

1) one or more individuals; or

2) a habitation, building, or vehicle, and is reckless as to whether the habitation, building, or vehicle is occupied;

c) recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm could be loaded;

d) for purposes of this section, building, habitation, and vehicle have the meaning assigned those terms by Section 30.01;

e) an offense under subsection (a) is a Class A misdemeanor, an offense under subsection (b) is a felony of the third degree.

As fully discussed above, under the categorical approach, the Court determines whether there is a realistic probability that the statute could be applied to which conduct that does not involve moral turpitude. Matter of Silva-Trevino.

If the language of the criminal statute encompasses both conduct that involves moral turpitude and conduct that is not, and there is a case in which the relevant criminal statute has been applied to the latter category of conduct, the statute is divisible, and an Immigration Judge cannot categorically treat all convictions under the statute as convictions for crimes that involve moral turpitude. Matter of Silva-Trevino, 697.

In respondent's case, there is a realistic probability that Section 22.05 would encompass conduct that does not qualify as a crime involving moral turpitude as the statute of language is considerably broad. For example, reckless conduct under Section 22.05(a) could realistically include such conduct as lighting of fireworks in a residential area, or driving a high rate of speed with a passenger in the car, neither of which would likely be considered turpitudinous, or inherently base, vile, or depraved. Matter of Olguin.

Thus, it would appear that Section 22.05 is a divisible statute in that it covers convictions for a wide range of conduct, both turpitudinous and non-turpitudinous. As such, the second prong of Silva-Trevino must be considered.

MODIFIED CATEGORICAL APPROACH

If the categorical analysis does not resolve the moral turpitude inquiry, the

Court will examine whether the alien's conviction shows a crime that, in fact, involves moral turpitude. Matter of Silva-Trevino.

Under the modified categorical approach, the Immigration Judge examines the record of conviction, including indictments, judgments, and plea transcripts. See Matter of Silva-Trevino.

The respondent's judgment conviction states that respondent was convicted of the misdemeanor offense of deadly conduct. See Exhibit 2, page 2.

Deadly conduct under Section 22.05(a) is a Class A misdemeanor, while the conviction of deadly conduct under Section 22.05(b) is a third degree felony. See Section 22.05(e) of the Texas Penal Code.

In addition, the language of the information tracks the statutory language under Section 22.05(a). Based on the fact that the judgment of conviction states that he was convicted of a misdemeanor, his sentence comports with the misdemeanor offense, and the language of the information tracks the statutory language of Section 22.05(a), the Court finds that respondent was convicted under Section 22.05(a) of the Texas Penal Code.

As noted above, given that Section 22.05(a) encompasses both turpitudinous and non-turpitudinous conduct, the Court again examines the record of conviction in order to determine if the conviction is a crime involving moral turpitude. The information states that respondent "recklessly engaged in conduct that placed Lee Inlam in imminent danger, or serious bodily injury by threatening Lee Inlam with a knife." A person acts recklessly under Texas law when he is aware of the conscious disregard, a substantial and unjustified risk. See Section 6.03(c) of the Texas Penal Code.

The Board has held that criminal reckless conduct can rise to the level of moral turpitudinous. Matter of Medina, 15 I&N Dec. 611 (BIA 1986).

However, because the mental state part of the statute is only recklessness, more serious resulting harm is required in order to define that the crime involves moral turpitude. Matter of Solon, 24 I&N Dec. 342. See Matter of Wojtkow, 18 I&N Dec. 111 (BIA 1981) (holding that manslaughter in the second degree under the New York Penal law, which requires a person to recklessly cause the death of another, is a crime involving moral turpitude.) See also Matter of Fualaau, 21 I&N Dec. 475 (holding that a third degree assault where criminal reckless state of mind under Hawaiian law is not a crime involving moral turpitude without infliction of serious bodily injury.)

Though respondent did use a knife in his commission of the crime, under the language of the statute, respondent's crime only involved a reckless threat and no resulting bodily injury and, as such, respondent's conviction does not rise to the level of a crime involving moral turpitude under the modified categorical approach.

The Government must prove removability by clear, and convincing, and unequivocal evidence. To prove removability under Section 237(a)(2)(A)(ii), the Government must establish that the two crimes did not arise out of a single scheme of criminal misconduct.

The Fifth Circuit has adopted the Board's formulation of single scheme as articulated in Matter of Adetiba, 20 I&N Dec. 506 (BIA 1986). See Animashaun v. INS, 990 F.2d 324 (5th Cir. 1993).

When an alien performs an act that in and of itself constitutes a complete individual and is a distinct crime, he is deportable when he again commits such a crime, even though one may closely follow the other, be similar in character, and even be part of the overall plan of criminal misconduct. Matter of Adetiba, 25 I&N Dec. 506.

A single scheme of criminal misconduct would exist when one crime

constitutes a lesser offense of another, or where two crimes flow from and are the natural consequence of a single act of criminal misconduct. Matter of Adetiba, 25 I&N Dec. 506, 509. (Single scheme possessing and uttering a counterfeit bill, or a person breaking and entering a store with an intent to commit larceny, and in connection with that crime also committing an assault with a deadly weapon.)

The single scheme must take place at one time allowing no substantial interruption that would allow the respondent to disassociate himself from the enterprise and reflect on what he has done.

The Board has held that the Government's introduction of two separate records of conviction detailing crimes committed against different victims establish a prima facie case of removability under Section 237(a)(2)(A)(ii). Matter of Putnik, 15 I&N Dec. 326.

The burden then shifts to respondent to present evidence to show that the crimes did not arise out of a single scheme of misconduct. (Finding that testimony before the Court indicating that the crimes were committed within a few minutes of each other and were the result of the same criminal impulse in the course of the same episode, was enough to rebut that the Government's prima facie case of removability based on two crimes involving moral turpitude arising out of a single scheme of criminal misconduct.) Matter of Putnik.

The record contains two informations and two judgments of convictions, Exhibits 2 and 3. Both are for separate and distinct crimes, namely assault family violence and deadly conduct. The information regarding the assault family violence charge indicates that the crime was committed on or about June 25, 2009, against Lee Inlam. Exhibit 3. The information detailing the crime of deadly conduct indicates that the crime was also committed on or about June 25, 2009, against Sari Tran. Exhibit 2.

While, as respondent points out, the crimes were committed on the same day, this is not dispositive of the issue. See Matter of Adetiba, 20 I&N Dec. 506.

The introduction of these records of conviction meets the Government's burden of proof to show prima facie removability on this issue. Respondent's counsel also states in his brief that both victims reside in the same household, and both victims were compiled in the same police report. Respondent's brief, page 4.

However, respondent's counsel's arguments are not evidence and, if unaccompanied by other evidence, do not carry respondent's burden of proof. Matter of S-M-, 22 I&N Dec. 491, 51 (BIA 1998). See also Matter of Ramirez-Sanchez.

Furthermore, both crimes in and of themselves constitute a complete individual and distinct crime. See Animashaun v. INS, 990 F.2d 324 (5th Cir. 1993).

Neither crime is a lesser offense of the other, nor is there any evidence in the record that one of the crimes is a natural consequence of the other. Matter of Adetiba, 25 I&N Dec. 509.

Without further evidence regarding the circumstances surrounding the crime, the Government has met its burden of proof to show removability on this issue that there are two separate offenses.

Finally, the Court notes that neither respondent nor the Government's brief was particularly helpful in discussing the relevant issues in this case. However, based on the foregoing, the Court finds the Government has not met its burden of proof to show that respondent is removable as charged by clear and convincing evidence for the reasons stated above.

Accordingly, the following orders shall be entered.

ORDER

IT IS HEREBY ORDERED the charge pursuant to Section 237(a)(2)(A)(ii)

is not sustained.

IT IS FINALLY AND FURTHER ORDERED that removal proceedings against the respondent be terminated with prejudice.

Date: January 8, 2014

DEITRICH H. SIMS
Immigration Judge