U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: BEA-CORDOBA, DANIEL

A092-312-277

Date of this notice: 1/25/2011

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:
Malphrus, Garry D.
Miller, Neil P.
Mullane, Hugh G.

File: A092 312 277 - Los Angeles, CA

Date: JAN 25 2011

In re: DANIEL BEA CORDOBA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jaime Jasso, Esquire

ON BEHALF OF DHS: James R. Board
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude (withdrawn)

Lodged: 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

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's February 17, 2009, decision terminating the removal proceedings on the grounds that the DHS failed to sustain its removability charge pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii). The respondent has filed an opposition. We will sustain the DHS's appeal and remand the record for further proceedings.

We review findings of fact made by the Immigration Judge, including the determination of credibility, 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).

We will sustain the DHS's appeal because the respondent's conviction for violating CAL. PENAL CODE § 647(b) (West 1995) is categorically a crime involving moral turpitude.

The statute of conviction provides that

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (a) . . .
>
> (b) Who solicits or who agrees to engage in or who engages in any act of prostitution. A person agrees to engage in an act of prostitution when, with specific intent to so engage, he or she manifests an acceptance of an offer or solicitation to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in prostitution. No agreement to engage in an act of prostitution shall constitute a violation of this subdivision unless some act, beside the agreement, be done within this state in furtherance of the commission of an act of prostitution by the person agreeing to engage in that act.

CAL. PENAL CODE § 647(b). The full range of conduct encompassed by the statute is both reprehensible and requires some form of scienter, whether specific intent, deliberateness, wilfulness, or recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 and n.5 (A.G. 2008).[1] Thus, the statute of conviction is categorically a crime involving moral turpitude. *See also Matter of Lambert*, 11 I&N Dec. 340, 342 (BIA 1965) (conviction for renting or letting rooms with knowledge that the rooms were to be used for lewdness, assignation, or prostitution is a crime involving moral turpitude).

The respondent fails to identify to any case where section 647(b) was applied to conduct that was not morally turpitudinous. *Matter of Silva-Trevino*, *supra*, at 703-04 n.4 (BIA 2008). The respondent concedes for purposes of his appeal that the acts of prostitution and agreeing to engage in prostitution under section 647(b) are categorically crimes involving moral turpitude (Respondent's Brief at 11-12). The respondent maintains, however, that solicitation under section 647(b) does not require a form of scienter, and therefore the statute of conviction is not categorically a crime involving moral turpitude (Respondent's Brief at 11-12, 15). On the contrary, the act of soliciting a prostitute under section 647(b) requires specific intent. *People v. Norris*, 152 Cal. Rptr. 134, 138 (Cal. App. Dep't Super. Ct. 1978).[2] Thus, the full range of conduct encompassed by the statute is morally turpitudinous.

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[1] We are without jurisdiction to address the respondent's argument that *Matter of Silva-Trevino*, *supra*, is unconstitutional. Respondent's Brief at 4-8; *Matter of Fuentes-Campos*, 21 I&N Dec. 905, 912 (BIA 1997).

[2] Contrary to the respondent's argument on appeal, the 1986 amendment to section 647(b) did not undermine or overrule the holding of *People v. Norris*, as is evident from the fact that California courts continue to cite the case for the proposition that solicitation under section 647(b) is a specific intent crime. *See People v. Gibson*, 108 Cal. Rptr.2d 809, 819 (Cal. Ct. App. 2001).

We likewise disagree with the respondent's contention that holding that solicitation of a prostitute is morally turpitudinous runs afoul of the federal definition of prostitution, and somehow equates solicitation with being a prostitute or running a house of prostitution (Respondent's Brief at 12-13). The respondent has not been charged under section 212(a)(2)(D) of the Act, 8 U.S.C. § 1182(a)(2)(D), and there is no issue here as to whether his conviction relates to prostitution and commercialized vice. Instead, the issue presented on appeal is whether his section 647(b) conviction is a crime involving moral turpitude. As discussed above, it categorically is.

As the respondent has been convicted of two crimes involving moral turpitude, the DHS has sustained its removability charge by clear and convincing evidence. Section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii).[3]

For these reasons, we will sustain the DHS's appeal and remand the record to allow the respondent to apply for any relief for which he may be eligible, including voluntary departure (Tr. at 6).

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD

[3] There is no dispute that the respondent's 1992 conviction for violating CAL. PENAL CODE § 484(a) is a crime involving moral turpitude (I.J. at 3, 7). *See also* Respondent's Brief at 3; DHS's Brief at 1- 2.

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U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Angeles, California

File A 092 312 277 February 17, 2009

In the Matter of

DANIEL BEA-CORDOBA,) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(2)(A)(ii).

APPLICATION:

ON BEHALF OF THE RESPONDENT:

Jaime Jasso, Esquire
527 East Wobling Street Suite 112
Covina, California 91723

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Ms. Lopian, Esquire

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

HISTORY

This matter began as an NTA at Exhibit 1 with the respondent being charged as an arriving alien. The respondent, through counsel, admitted the allegations 1 through 4, denied the two allegations and the one charge. Homeland Security presented, without objections, Exhibits 2 and 3.

During the processing of this particular case, and getting ready for the merits hearing, the Court gave certain tentative rulings. Afterwards, the case law intervened both on the issue of removability and on the ground of removability. As for the changes regarding removability, and the arriving alien

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concept, our Circuit issued a precedent decision commonly referred to as "Caymans". Basically, our Circuit concluded that where a respondent makes brief, casual, and innocent departures, he should not be considered an arriving alien. In light of the "Caymans" decision, the Department of Homeland Security amended the NTA at Exhibit 1A, and the respondent denied the charge.

The Court believed that the length of trip that the respondent took was relevant to the analysis of whether or not the Fluty Doctrine should apply, and under the Landon v. Plasencia, citation omitted, case, the Court determined after brief questioning from the respondent that his trip of less than two weeks in 2005 was brief, casual, and innocent. Homeland Security offered no resistance to that conclusion, nor did counsel for respondent. In the final analysis, based on the cases cited heretofore, the Court believes that the Department of Homeland Security was correct in withdrawing the charge under 212(a)(2) and proffering a charge under Section 237.

That being said, once they withdrew the original charge, the Court's tentative ruling evaporated. The Court also believes, based on additional case law cited to the Court, that that tentative decision of finding respondent's conviction under Section 647(b) of the California Penal Code was premature.

With the combination of admissions and criminal record, the only issue left on removability is whether the respondent is removable under the charge. Suffice it to say the charge was

amended by agreement to add the correct wording. Basically, the Court was left with two crimes. At Exhibit 3, the respondent was convicted of a 484 California Penal Code Section, and that is a theft crime. If it is the only CIMT, the petty offense exception would apply because of the sentence and the magnitude of the particular crime, and the respondent would not be removable.

At first blush, one might think that the petty offense exception applies, but it does not. It must be remembered that Homeland Security withdrew the Section 212(a)(2) charge, and with that, the Section 237 charge is a ground of removability which cannot be reached by the petty offense exception. Therefore, the Court concludes that the theft crime, albeit a misdemeanor, is still a crime of moral turpitude under case law that is intact and compelling.

Once finding the first crime is a CIMT, the remaining issue is whether or not the Section 647(b) crime is also a CIMT. Since respondent has already admitted that the respondent was admitted in 1989, we must have two crimes of moral turpitude for the charge to be sustained.

The respondent argues that the conviction under Section 647(b) of the California Penal Code is not a crime of moral turpitude. Respondent argues that under the categoric approach, the full range of conduct stated in Section 647(b) of the California Penal Code does not fall within the meaning of a crime of moral turpitude. See Cuevas-Gaspar v. Gonzales, 430 F.3d 1013

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1017 (9th Cir. 2005). The respondent is correct.

As a general rule, if a statute encompasses both acts that do and do not involve moral turpitude, removability cannot be sustained. Hernandez-Martinez v. Ashcroft, 329 F.3d 1117 (9th Cir. 2003, rehearing denied, 343 F.3d 1075 (9th Cir. 2003)),(finding that the Arizona law for aggravated drunk driving, precisely cited as a crime of moral turpitude, is not a crime of moral turpitude because the statute is divisible, and a person can be convicted for sitting in ones own driveway with the key in the ignition and a bottle of beer in his hand, and therefore does not commit an "inherently base, vile, or depraved act".

Furthermore, when a statute is divisible into several crimes, some of which may involve moral turpitude and some not, it is appropriate to examine the record of conviction to determine which part applies to the defendant. Carr v. Ashcroft, 395 F.3d 1081, 1084 (9th Cir. 2004).

In this case, California Penal Code Section 647(b) is divisible into several crimes (soliciting, agreeing to engage in, or engaging in any act to prostitution).

In this case, we have very limited criminal record. The Department of Homeland Security did not offer any further evidence other than other than the Municipal Court of Van Nuys Courthouse Judicial District order that basically says respondent pled guilty to count I, Section 647(b) disorderly conduct:

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prostitution. There were no other specifics within the conviction records. Furthermore, because the issue is one of removability, the respondent could not be compelled to testify and did not on this issue.

The Court must also look to cases that may suggest a solution. The Court recognizes the recent BIA decision June 25, 2008 in Matter of Oscar Gonzalez-Zoquipan, 24 I&N Dec. 549. In this case, the Board specifically found that respondent's conviction for disorderly conduct relating to prostitution in violation of Section 647(b) of the California Penal Code does not render him inadmissible under Section 212(a)(2)(D)(ii). Although this case is not directly on point, it is useful as far as suggesting that the Board has not made a final precedent decision regarding California Penal Code Section 647(b).

According to the decision at page 554, although the Immigration Judge did not address the issue, we note that there is a question whether the respondent's offense would constitute a crime involving moral turpitude under Section 212(a)(2)(A)(i)(I) of the Act which would render him statutorily ineligible for cancellation of removal. This open question then can be augmented by unpublished decisions, and the Court is aware of one decision that was published in 2008, In re: Vardkes Navasardyan, file number 71117437, August 29, 2008. Again, the Board was called upon to look at Section 647(b) of the California Penal Code, and in that case, they looked to Matter of Lambert, 11 I&N

Dec. 340 (BIA 1965) and stated that it is well settled that moral turpitude necessarily adheres in the offense of soliciting prostitution (offering to secure another for the purpose of prostitution, in violation of Section 796.07 of the Florida statute, is a crime of moral turpitude).

Other relevant case, in this Court's opinion, is an unpublished BIA decision out of the AAO dated September 26, 2008 on an application for a waiver of a grounds of inadmissibility under Section 212(h) of the Immigration and Nationality Act. In this unpublished decision by the AAO, they concluded that a violation of New York Penal Law Section 230.03 provides that a person who is guilty of patronizing a prostitute in the fourth degree, when he patronizes a prostitute, is not a crime of moral turpitude.

The Court looks to the case law and looks to the particular statute that the respondent was convicted of, and I do not believe, under the case law and the evidence in this ROP that is limited to that one criminal record, that this respondent's conduct can be established to be a crime of moral turpitude.

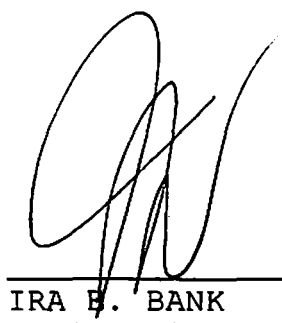
I am also considering the recent Attorney General's directive regarding crimes of moral turpitude. I use that case with the limitation that I do not believe it would be appropriate to ask the respondent questions as suggested by that decision because this is a ground of removability and our Circuit has directly prohibited Immigration Judge's from having respondent's

establish their own removability by questioning. Save and except this distinguishing feature, I have followed the Attorney General's directive, and I have looked at the statute and applied the modified approach, and I do not believe Homeland Security has presented sufficient evidence on a divisible statute that there is moral turpitude with the crime that the respondent is charged with.

Accordingly, the Court will find that the respondent has but one crime of moral turpitude since admission, and since the statute requires two crimes of moral turpitude to be removable, and he has denied the charge, I find that the denial is an appropriate denial and make the following order:

ORDER

Proceedings be terminated.



IRA B. BANK
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before IRA E. BANK in the matter of:

DANIEL BEA-CORDOBA

A 092 312 277

Los Angeles, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Ramona F. O'Neil

Ramona F. O'Neil (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

April 28, 2009
(Completion Date)