U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: D[redacted], R[redacted]... **A[redacted]-123**

Date of this notice: 3/8/2019

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:
Wendtland, Linda S.
O'Connor, Blair
Donovan, Teresa L.

Humadyl
Userteam: Docket

File: A[redacted]-123 – Omaha, NE Date: MAR - 8 2019

In re: R[redacted] D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nathan C. Dallon, Esquire

APPLICATION: Termination; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's October 3, 2018, decision, which incorporates by reference his August 13, 2018, decision, finding the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), and denying his application for deferral of removal under the Convention Against Torture. The Department of Homeland Security has not responded to the appeal. The respondent's appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States as a lawful permanent resident on May 18, 1990. As substantiated by conviction documents, the respondent was convicted upon guilty plea on August 5, 2016, of contributing to the delinquency of a minor in violation of COLO. REV. STAT. § 18-6-701, assault in the third degree in violation of COLO. REV. STAT. § 18-3-204(1)(a), unlawful sexual contact in violation of COLO. REV. STAT. § 18-3-404(1)(a), and criminal mischief in violation of COLO. REV. STAT. § 18-4-501(1), (4)(f), for which he was sentenced to a term of 24 months in prison (IJ at 1-2; Exh. 2). The Immigration Judge found the respondent removable on the charged ground as an alien convicted of an aggravated felony as defined under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), on the basis of his conviction for unlawful sexual contact (IJ at 2; Exh. 7). On appeal, the respondent argues, inter alia, that the Immigration Judge erred in finding that he has been convicted of an aggravated felony (Respondent's Br. at 3-11).

To determine whether a particular conviction constitutes an aggravated felony, we employ the categorical approach, which requires us to determine whether the minimum conduct that has a realistic probability of being prosecuted under that section corresponds to the requirements of the particular "aggravated felony" subsections at issue. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Under the categorical approach, we look to the "elements" of the offense rather than the facts underlying the respondent's particular prosecution. *See Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016); *see also Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015). Specifically, we consider whether "the state statute defining the crime of conviction categorically fits within the

'generic' federal definition of a corresponding aggravated felony." *Moncrieffe v. Holder*, 569 U.S. at 190 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). In other words, "we presume that the state conviction 'rested upon . . . the least of th[e] acts' criminalized by the statute, and then we determine whether that conduct would fall within the federal definition of the crime." *Id.* at 191 (focusing "on the minimum conduct criminalized by the state statute"). Thus, the state statute defines an aggravated felony under section 101(a)(43)(F) of the Act, only if the least of the acts criminalized by the state statute falls within the generic federal definition.

The Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), clarified the divisibility analysis set forth in *Descamps v. United States*, 570 U.S. 254 (2013), by focusing on the elements of a crime which are the "constituent parts" of a crime's legal definition. *See Mathis v. United States*, 136 S. Ct. at 2248.

An offense is a "crime of violence" under 18 U.S.C. § 16 if it is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[1]

For purposes of the "crime of violence" definition, the word "use" denotes volition, *see Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), while "the phrase 'physical force' means *violent* force - that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original); *see also Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016).

The respondent's statute of conviction at issue, COLO. REV. STAT. § 18-3-404(1)(a), provides that "[a]ny actor who knowingly subjects a victim to any sexual contact, commits unlawful sexual contact if . . . [t]he actor knows that the victim does not consent." The United States Court of Appeals for the Tenth Circuit has held that nonconsensual sexual contact in violation of COLO. REV. STAT. § 18-3-404(1), constitutes a forcible sex offense under the Federal Sentencing Guidelines. *United States v. Romero-Hernandez*, 505 F.3d 1082, 1087 (10th Cir. 2007). In so doing, the Tenth Circuit in *Romero-Hernandez* contrasted the term "forcible sex offense" with the language contained in 18 U.S.C. § 16(a) that requires the use of "physical force," stating that the word "'forcible' must mean more than physical compulsion." *Id.* at 1088. This finding strongly suggests that while sexual contact without consent does involve some level of force, it does not necessarily involve the "physical force" that a crime of violence requires under 18 U.S.C. § 16(a).

[1] The Supreme Court has held that the definition of "crime of violence" in 18 U.S.C. § 16(b) is unconstitutionally vague. *See Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Consequently, we will examine only 18 U.S.C. § 16(a) in determining whether the respondent has been convicted of a crime of violence.

Upon our de novo review, we conclude that COLO. REV. STAT. § 18-3-404(1)(a) is overbroad insofar as it does not require proof, as an element of the offense, of the use of physical force, which is required for purposes of a crime of violence under 18 U.S.C. § 16(a). Therefore, we conclude that the offense of unlawful sexual contact, in violation of COLO. REV. STAT. § 18-3-404(1)(a), is not categorically a crime of violence under 18 U.S.C. § 16(a). Accordingly, we vacate the Immigration Judge's contrary determination (IJ at 2; Exh. 7).

Therefore, we will sustain the respondent's appeal and the record will be remanded for further proceedings. On remand, the Immigration Judge should determine whether the respondent is removable for having been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct under section 237(a)(2)(A)(ii) of the Act, or whether he has been convicted of a crime of child abuse under section 237(a)(2)(E)(i) of the Act. *See Matter of Patel,* 16 I&N Dec. 600, 601 (BIA 1978) (stating that a "remand is effective for the stated purpose and for consideration of any and all matters which the [Immigration Judge] deems appropriate in the exercise of his administrative discretion"). We express no opinion regarding the ultimate outcome of the respondent's case.

Accordingly, the following order will be entered.

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

Linda S. Wendtland

FOR THE BOARD