U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: LOPEZ-MARTIN, EDGAR

A 076-615-668

Date of this notice: 4/30/2018

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:
Liebowitz, Ellen C
Mullane, Hugh G.
Geller, Joan B

Userteam: Docket

File: A076 615 668 - Lumpkin, GA

Date: APR 30 2018

In re: Edgar LOPEZ-MARTIN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kazuma Sonoda, Jr., Esquire

ON BEHALF OF DHS: Steven B. Fuller
Assistant Chief Counsel

APPLICATION: Termination of proceedings; cancellation of removal under section 240A(a)

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's July 6, 2017, decision ordering him removed to Mexico. The Department of Homeland Security ("DHS") has submitted a statement in opposition to the appeal. The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this decision.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in an appeal from the decision of an Immigration Judge, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent argues on appeal that he has not been convicted of an aggravated felony within the meaning of section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), and that he therefore is not removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). We agree.

The respondent has two convictions for simple battery under Georgia Code 16-5-23(a)(1) (Exh. 1). To categorically qualify as a crime of violence within the meaning of 18 U.S.C. § 16(a), and thus an aggravated felony crime of violence under section 101(a)(43)(F) of the Act, the minimum conduct must involve the use, attempted use, or threatened use of *violent* physical force.[1] *Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010) (extending the reasoning from *Johnson v. United States*, 559 U.S. 133 (2010), to the context of an aggravated felony crime of violence). However, a conviction under Georgia Code 16-5-23(a)(1) requires, at a minimum, insulting contact with the victim. *See, e.g.*, *Lyman v. State*, 374 S.E.2d 563, 565 (Ga. Ct. App. 1988).

[1] The United States Supreme Court has held that the alternative definition of "crime of violence" set forth at 18 U.S.C. § 16(b) is unconstitutionally vague. *Sessions v. Dimaya*, No. 151498, 2018 WL 1800371 (U.S. April 17, 2018). Consequently, we do not address whether the respondent's convictions would qualify as crimes of violence under 18 U.S.C. § 16(b).

There is no requirement that violent physical force be used, attempted, or threatened against the victim. *See, e.g.*, *Brown v. State*, 197 S.E. 82, 85 (Ga. Ct. App. 1938) (a conviction for simple assault may result where the perpetrator's actions "were offensive and harmful, *at least to the feelings and peace of mind*" of the victim). Moreover, we find no indication that the type of force underlying a simple assault conviction in Georgia is an element of the offense, and we thus may not consult the respondent's conviction record to assess whether he in fact used violent physical force against his victim. *See generally Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (providing that a state statute is "divisible" where the statute provides alternative elements, as opposed to alternative means of committing the crime, and further holding that in the case of a "divisible" statute, we may look to the conviction record to determine whether the conviction at issue qualifies as a conviction for a generic federal crime (citing *Mathis v. United States*, 136 S. Ct. 2243 (2016))). Consequently, the respondent's battery convictions categorically do not qualify as crimes of violence under section 101(a)(43)(F) of the Act, and the respondent is not removable under section 237(a)(2)(A)(iii) of the Act.[2]

We also agree with the respondent that his 2015 conviction for aggravated stalking under Georgia Code § 16-5-91 does not render him removable under section 237(a)(2)(E)(i) of the Act. To qualify as a crime of stalking under this section of the Act, an offense must involve, inter alia,

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[2] We recognize that the United States Court of Appeals for the Eleventh Circuit held in *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006), that the minimal force required in order for an offense to qualify as a misdemeanor crime of domestic violence under a sentencing provision did not need to be violent in nature. However, *Griffith* addressed a provision of law not at issue in the respondent's case, which the United States Supreme Court has since clarified involves a different definition of "crime of violence" than that which the Board applies in the context of an aggravated felony "crime of violence" under section 101(a)(43)(F) of the Act. *See United States v. Castleman*, 134 S. Ct. 1405, 1411 n.4 (2014); *see also Matter of Velasquez*, 25 I&N Dec. at 282. *Griffith* therefore does not control our analysis of whether the respondent has been convicted of a crime of violence within the meaning of section 101(a)(43)(F) of the Act.

We also acknowledge that the Eleventh Circuit has held that a conviction under Georgia Code 16-5-23(a)(2) categorically qualifies as a crime of violence within the meaning of section 101(a)(43)(F) of the Act. *Hernandez v. U.S. Att'y Gen.*, 513 F.3d 1336, 1339-40 (11th Cir. 2008). However, *Hernandez* likewise does not control our analysis herein, as the respondent was convicted under Georgia Code 16-5-23(a)(1), which, in contrast with Georgia Code 16-5-23(a)(2), does not require any injury to the victim. *Id.* at 1340; *see also, e.g.*, *Brown v. State*, 197 S.E. at 85.

In view of the foregoing, neither *Griffith* nor *Hernandez* undercuts our determination that the respondent's convictions for simple battery do not qualify as crimes of violence pursuant to Supreme Court and Board precedent. *See generally Johnson v. United States*, 559 U.S. at 133; *Matter of Velasquez*, 25 I&N Dec. at 278. Consequently, we need not reach the respondent's alternative argument that he was not sentenced to at least 1 year of imprisonment for either of his battery convictions, as required in order for a conviction to qualify as an aggravated felony under section 101(a)(43)(F) of the Act. *See generally Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (noting that it is unnecessary to address an alien's contentions where the case may be resolved on other grounds).

conduct carried out "with the intent to cause [the victim] or a member of his or her immediate family to be placed in fear of *bodily injury or death*." *See Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258 (BIA 2018) (emphasis in original) (internal quotation marks and citation omitted).

Similar to the action taken by the California Legislature in relation to the stalking statute at issue in *Sanchez-Lopez*, 27 I&N Dec. at 260, the Georgia General Assembly repealed and amended Georgia's stalking statutes in 1998. *See Daker v. Williams*, 621 S.E.2d 449, 450-51 (Ga. 2005). In order to establish that a perpetrator has violated a stalking statute in Georgia, it must be established, inter alia, that he or she has engaged in "harassing and intimidating" behavior.[3] However, as pertinent to the respondent's case, the General Assembly amended the definition of "harassing and intimidating" to remove the requirement that a victim be placed "in reasonable fear *of death or bodily harm* to himself or herself or to a member of his or her immediate family," and replaced it with the requirement that the victim be placed "in reasonable fear *for [his or her] safety or the safety of a member of his or her immediate family*." *Id.*; *see* Ga. Code §§ 16-5-90, 16-5-91; *see also, e.g.*, *Moran v. State*, 780 S.E.2d 529, 532 (Ga. Ct. App. 2015).

In light of this material amendment, the crime of stalking in Georgia reaches conduct beyond that which qualifies as a "stalking" offense within the meaning of section 237(a)(2)(E)(i) of the Act. *See Matter of Sanchez-Lopez*, 27 I&N Dec. at 260; *see generally Moran v. State*, 780 S.E.2d at 532 (reversing stalking conviction where "there was no evidence that [the victim] was placed in reasonable fear for her safety," due to the lack of evidence that she "was afraid or had any emotional distress"); *Crapps v. State*, 766 S.E.2d 178, 184 (Ga. Ct. App. 2014) (harassing and intimidating conduct established where victim was left "feeling 'unsafe' and 'vulnerable'"); *Slaughter v. State*, 760 S.E.2d 609, 611 (Ga. Ct. App. 2014) ("A defendant 'need not engage in unequivocally hostile conduct or make explicit threats in order to be convicted of stalking' or aggravated stalking.") (citation omitted); *Maskivish v. State*, 624 S.E.2d 160, 163 (Ga. Ct. App. 2005) (victim reasonably placed in fear for her safety based on two letters that perpetrator sent to her which were "not overtly threatening"). Consequently, the offense of which the respondent was convicted does not categorically qualify as a crime of stalking under section 237(a)(2)(E)(i) of the Act. *See generally Matter of Sanchez-Lopez*, 27 I&N Dec. at 260.

Moreover, there is no indication that the meaning of the term "safety" is divisible for purposes of Georgia's stalking statutes relative to the definition of a "crime of stalking" in section 237(a)(2)(E)(i) of the Act. *Id.*; *see also United States v. Howard*, 742 F.3d 1334, 1345-46 (11th Cir. 2014) (generally addressing the issue of divisibility); *see generally Moran v. State*, 780 S.E.2d at 532 (reversing stalking conviction where "there was no evidence that [the victim] was placed in reasonable fear for her safety, an essential element of stalking"). Thus, we may not look to the respondent's conviction records to determine whether his offense in fact involved an intent to place someone in fear of bodily harm or death. *See generally Matter of Chairez*, 26 I&N Dec. at 819; *see also Matter of Sanchez-Lopez*, 27 I&N Dec. at 260. In view of the foregoing, the DHS did not meet its burden of demonstrating that the respondent is removable under section 237(a)(2)(E)(i) of the Act.

[3] While the respondent was convicted of aggravated stalking under Georgia Code § 16-5-91, the definition of "harassing and intimidating" set forth in the general stalking statute, Georgia Code § 16-5-90, controls. *See generally Daker v. Williams*, 621 S.E.2d at 450-51.

In light of our disposition of the foregoing issues, we will remand the record for the parties to further address the respondent's removability.[4] If the Immigration Judge determines on remand that the respondent is removable from the United States, the Immigration Judge should then address the respondent's eligibility for cancellation of removal under section 240A(a) of the Act.[5] In view of the foregoing, the following orders will be entered.

ORDER: The 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

[4] We observe that the DHS retains the authority to lodge additional or substituted factual allegations and/or charges at any point during removal proceedings. *See* 8 C.F.R. § 1240.10(e).

We also note that we need not address the respondent's contention that his conviction for stalking does not qualify as a crime involving moral turpitude, as the Immigration Judge did not sustain the charge relating to convictions for crimes involving moral turpitude. *See generally Matter of J-G-*, 26 I&N Dec. at 170. Furthermore, in the event that the respondent is found to be removable on an alternative ground on remand, his eligibility for relief from removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), would not be impacted by a determination whether his stalking conviction qualifies as a crime involving moral turpitude. *See generally* section 240A(a) of the Act.

[5] We remind the Immigration Judge that where the respondent contests removability, or is denied relief from removal for which he or she has applied, a separate oral or written decision must be issued. 8 C.F.R. § 1240.12(b); *Matter of A-P-*, 22 I&N Dec. 468, 477 (BIA 1999); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (emphasizing the need for Immigration Judges to include in their decisions clear and complete findings and analysis that are in compliance with controlling law, in view of this Board's inability to conduct fact-finding on appeal).

IMMIGRATION COURT
146 CCA ROAD, PO BOX 248
LUMPKIN, GA 31815

In the Matter of

Case No.: A076-615-668

LOPEZ-MARTIN, EDGAR
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 7/6/17.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

(X) The respondent was ordered removed from the United States to MEXICO ~~or in the alternative to~~ .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: ~~Dec 19, 2016~~ JULY 6 2017

RANDALL DUNCAN
Immigration Judge

Appeal: Waived/Reserved RESERVED Appeal Due By: AUGUST 7, 2017