



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041

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880 Front St., Room 1234
San Diego, CA 92101-8834**

Name: CARDOSO, HUGO IVAN

A073-957-149

Date of this notice: 10/19/2011

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:
Pauley, Roger

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A073 957 149 - San Diego, CA

Date:

OCT 19 2011

In re: HUGO IVAN CARDOSO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: William Baker, Esquire

ON BEHALF OF DHS: Tracy J. Cody
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

APPLICATION: Termination

The respondent, a native and citizen of Mexico who is a returning lawful permanent resident, appeals the decision of the Immigration Judge dated May 26, 2011, finding the respondent inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and ordering the respondent's removal from the United States. The respondent's appeal will be dismissed.

We review Immigration Judges' findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

As the respondent is a lawful permanent resident, the Department of Homeland Security ("DHS") bears the burden of establishing that the respondent is inadmissible as charged. *See Matter of Huang*, 19 I&N Dec. 749, 754 (BIA 1988) (citing *Woodby v. INS*, 385 U.S. 276 (1966)). At issue is whether the respondent's 2010 conviction for assault with a firearm in violation of CAL. PENAL CODE § 245(a)(2) (2010), which resulted in a term of imprisonment of 365-days, constitutes a conviction for a crime involving moral turpitude which renders him inadmissible.¹

¹ CAL. PENAL CODE § 245(a)(2) states that "[a]ny person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars (\$10,000) and imprisonment." An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. CAL. PENAL CODE § 240.

Upon de novo review of the legal question presented, we conclude that a conviction for assault with a firearm is categorically a conviction for a crime involving moral turpitude. Simple assault or battery is generally not considered to involve moral turpitude. However, where an assault or battery necessarily involves some aggravating factor that indicates the perpetrator's moral depravity, such as the use of a deadly weapon or the infliction of serious injury on a person whom society views as deserving of special protection, such as children, domestic partners, or peace officers, such a crime is properly found to involve moral turpitude. See *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011). A holding that assault with a firearm involves moral turpitude is wholly consistent with the precedential decisions of this Board. See *Matter of Sanudo*, 23 I&N Dec. 968, 971 (BIA 2006) (“[A]ssault and battery with a deadly weapon has long been deemed a crime involving moral turpitude by both this Board and the Federal courts, because the knowing use or attempted use of deadly force is deemed to be an act of moral depravity that takes the offense outside the ‘simple assault and battery’ category.”); *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976); *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967); *Matter of G-R-*, 2 I&N Dec. 733 (BIA 1946; A.G. 1947)(involving California Penal Code section 245); see also *Gonzales v. Barber*, 207 F.2d 398 (9th Cir. 1953), *aff’d* 347 U.S. 637 (1954) (concluding that assault with a deadly weapon is a crime that involves moral turpitude). The statements contained on appeal do not persuade this Board that there exists a realistic probability that an individual could be convicted of assault with a firearm on the basis of conduct that does not involve both reprehensible conduct and some degree of scienter. See *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

We are unpersuaded by the respondent's reliance on the conclusory statement in *Carr v. INS*, 86 F.3d 949, 951 (9th Cir. 1996), that assault with a firearm “is not a crime of moral turpitude.” At issue in *Carr* was whether the former Immigration and Naturalization Service's practice of recognizing expungement for some crimes but not for others, such as a firearms conviction under CAL. PENAL CODE § 245(a)(2), was an equal protection violation under the due process clause of the Constitution. Reliance on language that was incidental or not necessary to the decision in *Carr* is not mandated. See *United States v. Johnson*, 256 F.3d 895, 920 (9th Cir. 2001) (en banc) (defining “dicta”). As such, we do not consider the statement in *Carr* to be binding on this Board.

As the respondent does not otherwise allege a basis to hold that assault with a firearm is not categorically a crime involving moral turpitude and does not seek a continuance to pursue post-conviction relief, we affirm the Immigration Judge's determination that the respondent is inadmissible as charged in the Notice to Appear. Accordingly, the following order is entered.

ORDER: The respondent's appeal is dismissed.


FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

San Diego, California

File A 73 957 149

Date: May 26, 2011

In the Matter of

HUGO IVAN CARDOSO

Respondent

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IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration
and Nationality Act

APPLICATION: Termination; continuance for adjudication of
State habeas corpus petition

APPEARANCES:

ON BEHALF OF RESPONDENT:

William Baker, Esquire
786 Third Avenue, Suite D-E
Chula Vista, CA 91910

ON BEHALF OF THE DEPARTMENT
OF HOMELAND SECURITY:

Tracy Cody, Esquire
Assistant Chief Counsel
Department of Homeland Security
San Diego, CA

ORAL DECISION OF THE IMMIGRATION JUDGE

The Respondent is a 24-year old male, unmarried, native
and citizen of Mexico. Respondent was alleged to have on May 5,
2010, made an application for admission into the United States

from Mexico at the San Ysidro, California port of entry as a returning resident alien by presenting his lawfully issued alien registration card. Respondent was paroled into the United States on May 29, 2010 by the United States Custom and Border Protection and for an outstanding felony warrant. Respondent was on June 5, 2010, convicted in the Superior Court of California, County of San Diego, for the offense assault with a firearm in violation of Section 245(a)(2) of the California Penal Code. Based on that violation, the government issued a charging document, the Notice to Appear, dated January 26, 2011, alleging the ^{above} ~~stated~~ facts and charging the Respondent as removable, pursuant to Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act.

On February 8, 2011, Respondent appeared with current counsel and through counsel, made a motion for continuance to prepare for meeting. At the rescheduled hearing on March 17, 2011, Respondent again, through counsel, motioned for continuance in order to file a habeas corpus petition in State court. On that day, Respondent through counsel admitted to all of the allegations in the Notice to Appear. Respondent nevertheless denied the charge of removability.

The government submitted the conviction record for the underlying offense, and it was admitted into the record without objection. At that hearing, Respondent through counsel also moved the Court to terminate these proceedings, arguing that the underlying offense does not form a crime involving moral turpitude

^{under} the categorical approach as set forth in the ^{Taylor} ~~Gala~~ case by the Supreme Court. The case was thereafter continued to allow the Respondent an opportunity to fully develop his theory of ^{con} testing ~~the~~ charged and to file his motion to terminate. Respondent did not file a motion to terminate this case.

At the rescheduled hearing on May 26, 2011, Respondent again through counsel moved to continue this case, indicating that a habeas corpus had just been filed approximately three days before this hearing. The Court does not find that the Respondent has presented a good cause for continuing this case any further. The Respondent has had ample opportunity to file the petition for habeas corpus but waited until three days prior to his hearing in order to do so. Furthermore, filing a collateral attack in State Court will not impact the finality of the Respondent's conviction for removal proceeding purposes.

The factual allegations have been admitted and have not been challenged by the Respondent. Accordingly, the remaining issue is whether or not the Respondent's conviction is one involving a crime of moral turpitude.

The United States Court of Appeals for the 9th Circuit ~~and its jurisdiction~~ has held that an offense will categorically qualify as a crime involving moral turpitude if it involves conduct that is inherently base, vile, or depraved and contrary to the private and social duties a man owes to his fellow men or society in general. See Placencia-Ayala v. Mukasey, 516 Fed. 3d.

738 (9th cir. 2008).

In order for this Court to make ^{that} ~~a~~ determination, the Court must consider the intrinsic or inherent nature of the crime. See Galeana-Mendoza v. Gonzales, 465 F. 3d. 1054 (9th Cir. 2006). In this case, Respondent was convicted of assault with a firearm in violation of Section 245(a)(2) of the California Penal Code. Notably, an assault in California is an inchoate battery. See People v. Colon, 7 California 4th, 206, 217 (Court of Appeals 1994). This is significant in that the 9th Circuit had concluded that all battery offenses categorically qualify as crimes involving moral turpitude.

In Galeana-Mendoza v. Gonzales supra, the 9th Circuit held that domestic battery violations Section 243(e)(1) of the California Penal Code does not categorically constitute a crime of moral turpitude. The Court notes that under a separate assault section, Section 245(a)(1) of the California Penal Code and Section 243(e)(1) do appear to be substantially similar to each other and in that both crimes involve the same level of intent and neither offense mandate proof of an injury to the victim. However, the Court finds that the conviction under Section 245(a)(1) of the California Penal Code to be distinguishable from 243(e)(1) of the California Penal Code due to the likelihood that force applied or intended to be applied during admission of this offense will result in great bodily injury. It is the risk of serious injury that renders a violation of Section 245(a)(1)

greater than a violation of Section 243(e) of the California Penal Code. The severity of the potential harm also explains the basis for the long-held belief that Section 245(a)(1) of the California Penal Code is a crime involving moral turpitude. See Gonzales v. Barber, 207, Fed. 2d. 398 (9th Cir. 1953).

In this case, Respondent was convicted of Section 245(a)(2) of the California Penal Code. The Court notes that in Carr v. INS, 86 Fed. 3d. 949 (9th Cir. 1996) the 9th Circuit simply stated, without any analysis, that convictions under California Penal Code Section 245(a)(2) were not crimes involving moral turpitude and cited through its prior decision in Komarenko v. INS, 35 Fed. 3d. 432 (9th Circuit 1994) as precedent on this matter. However, in Komarenko supra, the 9th Circuit briefly noted that where an alien conviction under California Penal Code Section 245(a)(2) could be a crime involving moral turpitude, possession of a firearm will not always be a crime involving moral turpitude, nor will crimes of moral turpitude necessarily involve firearms. Komarenko does not stand for the proposition that California Penal Code Section 245(a)(2) is not a crime involving moral turpitude. Instead, the 9th Circuit states that it could be a crime involving moral turpitude.

For the reasons set forth ^{hereinafter} ~~here and about~~, the Court concludes that the Respondent's ^{assault with a firearm} offense involved moral turpitude. Accordingly, the Court sustains the charge of removability and finds that the Respondent has failed to establish by evidence that

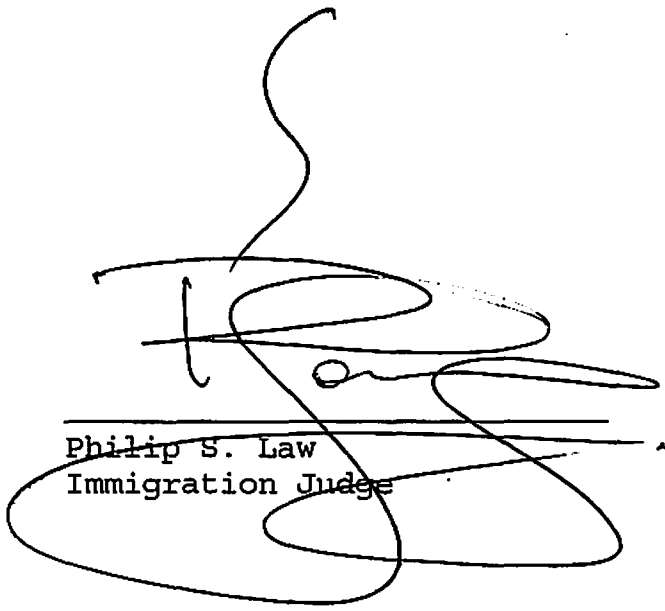
is clearly and beyond a doubt that he's not inadmissible under any parts of Section 212(a) of the Act.

Respondent designated Mexico as the country of removal should it become necessary. Other than terminating this case or continuing this case pending the habeas corpus petition, there is no relief applied for or otherwise established by the Respondent. In fact, counsel for the Respondent concedes that his conviction for assault with a firearm is one for a crime of violence. Because of ~~his~~ 365 days sentence, he would be ineligible for relief for having been convicted of an aggravated felony under Section 101(b)(43)(F) of the Act.

Through counsel, Respondent also advised the Court that he has no fear of persecution or torture if removed to Mexico. The record does not contain any relief applications on which the Court can adjudicate on the merits. Based on the foregoing, the Court has no alternative but to issue the following order. Based on the foregoing, the Court finds that the Respondent's motion to terminate this was without merits and was denied. Accordingly, the following order shall hereby be entered.

ORDER

It is hereby ORDERED that the Respondent be removed from the United States to Mexico on the charge contained in the Notice to Appear.



Philip S. Law
Immigration Judge

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CERTIFICATE PAGE

I hereby certify that the attached proceeding before
PHILIP S. LAW, in the matter of:

HUGO IVAN CARDOSO

A 73 957 149

San Diego, California

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

Karen Montgomery

Karen Montgomery, Transcriber

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July 19, 2011
Completion Date

gmm/jma