U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: REYES, LUIS A

A094-391-611

Date of this notice: 12/8/2011

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

File: A094 391 611 - New York, NY

Date: DEC 08 2011

In re: LUIS A. REYES a.k.a. Luis Alberto Molina Reyes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bruno J. Bembi, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

Lodged: 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: Special rule cancellation of removal; section 212(h) waiver of inadmissibility

The respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's September 13, 2010, decision denying his application for special rule cancellation of removal under section 203 of the Nicaraguan and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193, 2196 ("NACARA"), *amended by*, Pub. L. No. 105-139, 111 Stat. 2644, and his request for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(h). The appeal will be dismissed.

In her decision, the Immigration Judge found that the respondent's January 18, 1995, conviction for the offense of menacing in the second degree in violation of section 120.14(1) of the New York Penal Law constitutes a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (I.J. at 6-8; Exhs. 8, 16). Consequently, she concluded that the respondent was statutorily ineligible for special rule cancellation of removal under 8 C.F.R. § 1240.66(b), because his offense constitutes a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (I.J. at 6-8; Exhs. 8, 16). *See* 8 C.F.R. § 1240.66(b)(1). In addition, the Immigration Judge found that the respondent failed to establish eligibility for special rule cancellation of removal under 8 C.F.R. § 1240.66(c), because there is insufficient evidence to find that his removal will result in exceptional and extremely unusual hardship to himself or his United States citizen son, who was 9 years old at the time of the hearing (I.J. at 8-11; Exh. 6; Tr. at 52-58, 103-14). Finally, she concluded that the respondent was ineligible for a "stand-alone" waiver of inadmissibility under section 212(h) of the Act (I.J. at 11). On appeal, the respondent argues that the Immigration Judge erred in finding that his conviction constitutes a crime involving moral turpitude, and maintains that he is eligible for special rule cancellation of removal and a section 212(h) waiver of inadmissibility (Respondent's Brief).

We review findings of fact, including credibility determinations, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues under a *de novo* standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *see also Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General provided a framework for determining whether a particular offense constitutes a crime involving moral turpitude. *See id.* at 688-89, 696 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)). First, a categorical approach is to be employed under which the criminal statute at issue is to be examined to ascertain whether moral turpitude is intrinsic to all offenses that have a "realistic probability" of being prosecuted under that statute. *Id.* at 689-90, 696-97. Second, if the issue cannot be resolved under the categorical approach, a modified categorical approach is to be taken, which requires inspection of specific documents comprising the alien's record of conviction to discern the nature of the underlying conviction. *Id.* at 690, 698-99. Finally, if the record of conviction is inconclusive, the Attorney General has held that, because moral turpitude is not an element of the crime, evidence beyond the record of conviction may be considered when evaluating whether an alien's offense constituted a crime involving moral turpitude. *Id.* at 690, 699-701.

Moral turpitude is conduct that is per se morally reprehensible and intrinsically wrong or *malum in se*. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). It is conduct 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. *See Matter of Fualaau, supra*; *Matter of Franklin, supra*.

The respondent's statute of conviction, New York Penal Law § 120.14(1), provides that a person is guilty of menacing in the second degree when "(h)e or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon,[1] dangerous instrument[2] or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." We agree with the Immigration Judge that intentionally placing or attempting to place another person in reasonable fear of physical injury by displaying a dangerous weapon or what appears to be a dangerous weapon is the type of base and depraved behavior that involves morally turpitudinous conduct (I.J. at 6-8). Consequently, we conclude that the

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[1] The term "deadly weapon" is defined as "(1) any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged; or (2) a switchblade knife, gravity knife, pilum ballistic knife, metal knuckle knife, dagger, billy, blackjack, or metal knuckles." N.Y. Penal Law § 10.00(12).

[2] The term "dangerous instrument" is defined as "any instrument, article or substance, including a 'vehicle' . . ., which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury." N.Y. Penal Law § 10.00(13).

respondent's conviction under section 120.14(1) of the New York Penal Law categorically qualifies as a crime involving moral turpitude.

Among the requirements that must be satisfied to establish eligibility for special rule cancellation of removal under 8 C.F.R. § 1240.66(b) is that the alien "is not inadmissible under section 212(a)(2) or (3) or deportable under section 237(a)(2), (3) or (4) of the Act." *See* 8 C.F.R. § 1240.66(b)(1). The respondent has the burden of establishing that he is eligible for any requested form of relief, and, if the evidence indicates that one or more of the grounds of mandatory denial of the application for relief may apply, the respondent shall have the burden of proving by a preponderance of the evidence that such grounds do not apply. *See* 8 C.F.R. § 1240.8(d); *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (an alien seeking relief from removal has the burden to establish that he meets the applicable eligibility requirements and merits relief as a matter of discretion).

On appeal, the respondent maintains that the Immigration Judge erred in pretermitting his application for special rule cancellation of removal under 8 C.F.R. § 1240.66(b), because his offense falls within the "petty offense" exception set forth in section 212(a)(2)(A)(ii)(II) of the Act (I.J. at 6-8; Respondent's Brief at 5-6). He explained that the maximum sentence available for his January 1995 conviction was 1 year in jail, and that he was sentenced to 3 years of probation for the offense (Respondent's Brief at 6). Even assuming that the "petty offense" exception prevents the respondent from having a conviction "described under" 212(a)(2) of the Act, he is unable to meet his burden of establishing eligibility for special rule cancellation of removal because his offense constitutes a crime involving moral turpitude described under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), given that the maximum term of imprisonment for the offense is at least 1 year. *See* section 237(a)(2)(A)(i)(II) of the Act; 8 C.F.R. § 1240.66(b)(1); *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010). We note that the "petty offense" exception has no effect on convictions under section 237(a)(2) of the Act. Therefore, the Immigration Judge properly concluded that the respondent is ineligible for special rule cancellation of removal under 8 C.F.R. § 1240.66(b).

In addition, we agree with the Immigration Judge that the respondent did not meet his burden of establishing eligibility for special rule cancellation of removal under 8 C.F.R. § 1240.66(c) (I.J. at 8-11). *See* 8 C.F.R. § 1240.66(c)(4); *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). As the Immigration Judge explained, there is insufficient evidence to find that the respondent's removal will result in exceptional and extremely unusual hardship to himself or his United States citizen son (I.J. at 9-11; Exh. 6; Tr. at 52-58, 103-14). While the respondent notes on appeal that 8 C.F.R. § 1240.64(d) provides a rebuttable presumption of extreme hardship for certain NACARA applicants, there is no presumption of exceptional and extremely unusual hardship (Respondent's Brief at 9-11).

The respondent's wife testified that their son would experience emotional hardship as a result of family separation if he remains in the United States following his father's removal (I.J. at 9-10; Tr. at 104, 114). While family separation is a factor in assessing the degree of hardship to a qualifying relative, the potential of family separation alone is not generally sufficient to demonstrate the requisite hardship. *See, e.g., Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (hardship, in context of suspension of deportation, is not demonstrated by mere speculation and inferences drawn

from potential separation of family members). The respondent has not established that his son would suffer "exceptional and extremely unusual hardship" as a consequence of his separation from him.

In addition, the respondent's wife explained that she will experience difficulty paying bills and supporting their son if the respondent is removed to El Salvador (I.J. at 10; Tr. at 105, 108-14). Yet economic detriment does not constitute "exceptional and extremely unusual hardship" because it is likely to occur in most cases involving the removal of an alien to a relatively poor country. *See Matter of Andazola, supra,* at 323. Finally, she noted that her son would have fewer opportunities and be exposed to criminal activity if he returns with his father to El Salvador (I.J. at 10; Tr. at 105-06). We recognize that economic conditions in El Salvador are worse than those in the United States, and we do not wish to minimize the economic and emotional hardships the respondent and his son will likely experience as the respondent re-adapts to the difficult realities in his home country. However, the record does not reflect that these hardships will be so unusual or severe when compared with those experienced by other, similarly-situated, individuals that they may fairly be characterized as "exceptional and extremely unusual" in the sense intended by Congress. *See Matter of Monreal, supra,* at 65.

The respondent submitted a psychological evaluation report in support of his claim, which notes the impact his removal would have on his family (I.J. at 10; Exhs. 17, 19). We have no doubt that the respondent's removal from the United States will be highly disruptive to his family, yet there is nothing in the report which persuades us that he or his son will suffer hardship that is substantially different from, or beyond, that which would ordinarily be expected to result from deportation. *Id.* The hardship factors noted in the report are, unfortunately, common in these situations and are not exceptional or extremely unusual.

Finally, we turn to the respondent's claimed eligibility for a section 212(h) waiver. Like the Immigration Judge, we conclude that such relief is not available to the respondent (I.J. at 11). By its terms, section 212(h) permits the granting of a waiver only where "the Attorney General . . . has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status." Section 212(h)(2) of the Act. The respondent is not "applying or reapplying for a visa, for admission to the United States, or adjustment of status." On the contrary, he is seeking a "stand-alone" waiver in order to overcome a ground of removability under section 212(a)(2)(A)(i)(I) of the Act (I.J. at 11; Tr. at 115-16). This waiver does not waive inadmissibility where an alien such as the respondent is present without being admitted or paroled pursuant to section 212(a)(6)(A)(i) of the Act.

Accordingly, the following order shall be issued.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD