U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MERCADO, JOSE EDILIO

A 087-427-546

Date of this notice: 5/24/2019

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:
Malphrus, Garry D.
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: A087-427-546 – Houston, TX

Date: MAY 24 2019

In re: Jose Edilio MERCADO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: Rachel N. Silber
Associate Legal Advisor

APPLICATION: Cancellation of removal

The respondent, a native and citizen of El Salvador and lawful permanent resident of the United States, appeals from an Immigration Judge's decision dated June 29, 2018, finding him removable as charged, denying his application for a waiver of inadmissibility section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and denying his application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. On March 1, 2019, the Board requested supplemental briefing from the parties addressing the respondent's removability under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii) of the Act. Both parties filed supplemental briefs. The appeal will be sustained, and the proceedings terminated.

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 appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that the Immigration Judge erred in finding him removable under section 237(a)(2)(A)(ii) of the Act, for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct.[1] In support of this charge, the DHS submitted evidence establishing that the respondent sustained a conviction in 2014 for the offense of burglary with intent to commit a felony, theft, in violation of Tex. Pen. Code § 30.02 (Exh. 2, Tab D). The respondent was sentenced to 3 years' imprisonment, in addition to other penalties (*Id.*). In support of the removal charge, the DHS also submitted evidence showing that the

[1] The Immigration Judge also found the respondent removable under section 237(a)(2)(A)(i) of the Act (IJ at 2). However, the Department of Homeland Security ("DHS") substituted this removal charge with section 237(a)(2)(A)(ii) of the Act (Exh. 1A). In its supplemental brief, the DHS explained that the respondent's 2014 conviction under Tex. Pen. Code § 30.02 could not support a removal charge under section 237(a)(2)(A)(i) of the Act because an Immigration Judge previously waived that charge when the respondent was granted a waiver under section 209(c) of the Act, 8 U.S.C. 1159(c).

respondent sustained a conviction in 2016 for felony Credit/Debit card abuse in violation of Tex. Pen. Code § 32.31 (Exh. 2, Tab E). The respondent was sentenced to 2 years' imprisonment for this offense (*Id.*).

To determine if the respondent has been convicted of an offense which qualifies as a crime involving moral turpitude, we employ the categorical approach developed in *Taylor v. United States*, 495 U.S. 575 (1990) and subsequent cases. *See Matter of Silva-Trevino* ("*Silva-Trevino III*"), 26 I&N Dec. 826, 830-31 (BIA 2016). Under this approach, we determine whether the statute of conviction fits within the generic definition of a crime of moral turpitude, focusing on the "minimum conduct that has a realistic probability of being prosecuted" under the statute. *Silva-Trevino III*, 26 I&N Dec. at 831. If the minimum conduct prosecuted includes non-morally turpitudinous conduct, the statute of conviction is overbroad and is not a categorical crime involving moral turpitude. *Silva-Trevino III*, 26 I&N Dec. at 833; *see also Gomez-Perez v. Lynch*, 829 F.3d 323, 327 (5th Cir. 2016) (citation omitted); *Mercado v. Lynch*, 823 F.3d 276, 279-80 (5th Cir. 2016).

If the statute is divisible, i.e., it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of elements, and at least one, but not all, of the listed offenses or combinations is a categorical match to the generic offense, we may apply a modified categorical approach. *Silva-Trevino III*, 26 I&N Dec. at 833.

Turning to the respondent's 2014 burglary conviction, the statute of conviction provides, in pertinent part:

> (a) A person commits an offense if, without the effective consent of the owner, the person:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or
>
> (2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or
>
> (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

Tex. Pen. Code § 30.02(a) (West 2014).

The respondent appears to argue that his burglary conviction is not a crime involving moral turpitude because (1) the statute is overbroad as to the generic definition of burglary and (2) the statute is overbroad because the intended crimes underlying the statute do not all include turpitudinous conduct (Respondent's Supplemental Br. at 4-6). For support, the respondent cites to *United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), a case which neither party raised below.

In *United States v. Herrold*, the Fifth Circuit addressed Tex. Pen. Code § 30.02 in the context of whether such an offense qualifies for sentencing purposes as a predicate offense (under the "generic burglary" provision) of the Armed Career Criminal Act ("ACCA"). *United States v. Herrold*, 883 F.3d at 517 (overruling *United States v. Uribe*, 838 F.3d 667 (5th Cir. 2016)).

In *United States v. Herrold*, the en banc court concluded that Tex. Pen. Code § 30.02 is both indivisible and overbroad, with respect to the definition of generic burglary adopted by the United States Supreme Court in *Taylor v. United States*, 495 U.S. at 599 (1990) (defining "burglary" as "any crime, regardless of its exact definition or label, having the basic elements of an unlawful or unprivileged entry into, or remaining in, a building or its structure, with intent to commit a crime").

In reaching this conclusion, the court focused on subsections (a)(1) and (a)(3) of the statute, and found that these subsections were indivisible because they did not define "distinct offenses, but are rather separate means of committing one burglary offense." *United States v. Herrold*, 883 F.3d at 529. In finding that subsections 30.02(a)(1) and (a)(3) are indivisible, the court noted that it "must use the categorical approach to examine the viability of Herrold's two burglary convictions under the ACCA." *Id.* at 530-31. Applying the categorical approach, the court held that § 30.02(a)(3) is broader than generic burglary, "because it criminalizes entry and subsequent intent formation rather than entry with intent to commit a crime." *Id.* at 541. Accordingly, because subsections 30.02(a)(1) and (a)(3) are indivisible, the court held that a conviction under section 30.02(a) was broader than the definition of generic burglary adopted in *Taylor*. *Id.* In light of *Herrold*, we conclude that the DHS has not established by clear and convincing evidence that the respondent's burglary conviction is for a crime involving moral turpitude.

We also address the respondent's argument that the underlying crimes specified in section 30.02 are overbroad as to the generic definition of burglary because the statute includes assault which is not a crime involving moral turpitude (Respondent's Br. at 7-8; Respondent's Supplemental Br. at 5-6). Traditionally, a burglary offense constitutes a crime involving moral turpitude if the crime the perpetrator intended to commit after breaking and entering (i.e., the "target offense") is turpitudinous; in other words, if the target offense is a crime involving moral turpitude, then so too is the burglary. *See Matter of M-*, 2 I&N Dec. 721, 723 (BIA; A.G. 1946). Here, because the target offense for burglary under the statute is not an element, and includes assault, the respondent has not been convicted of a crime involving moral turpitude. *See Gomez-Perez v. Lynch*, 829 F.3d at 327-28 (finding that jury unanimity is not required for the mens rea for assault, and thus, the three culpable mental states are merely means of satisfying the intent element).

Therefore, we will reverse the Immigration Judge's determination that the respondent's burglary conviction is for a crime involving moral turpitude. Accordingly, the DHS has not established the respondent's removability under section 237(a)(2)(A)(ii) of the Act.[2]

As the respondent's removability has not been established, we deem it unnecessary to reach the Immigration Judge's denial of a waiver in conjunction with an application for adjustment of status.

[2] We affirm the Immigration Judge's determination that the respondent's felony credit card abuse conviction under section Tex. Pen. Code § 32.31 is a crime involving moral turpitude. However, the respondent is not presently removable under this conviction alone.

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, and the proceedings are terminated.

FOR THE BOARD