



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: O [REDACTED] H [REDACTED], D [REDACTED]... A [REDACTED]-888

Date of this notice: 5/4/2018

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:
Adkins-Blanch, Charles K.
Kelly, Edward F.
Mann, Ana

Userteam: Docket

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Falls Church, Virginia 22041

File: [REDACTED] 888 – Detroit, MI

Date: **MAY - 4 2018**

In re: Delmy Ruth ORELLANA HERNANDEZ a.k.a. Delmy Alvarez

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard G. Kessler, Esquire

ON BEHALF OF DHS: Theresa Bross
Assistant Chief Counsel

APPLICATION: Redetermination of custody status

The respondent has appealed from the Immigration Judge's January 17, 2018, order denying her request for a change in custody status. The Immigration Judge's order is accompanied by a February 13, 2018, bond memorandum. The respondent contests the Immigration Judge's conclusion that she is subject to mandatory detention under section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c). The appeal will be sustained and the record will be remanded for further proceedings.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

We will sustain the respondent's appeal of the Immigration Judge's determination that her burglary convictions under Cal. Penal Code § 459 constitute crimes involving moral turpitude. The Immigration Judge concluded that an offense under Cal. Penal Code § 459 does not categorically constitute a crime involving moral turpitude, *see Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. 2011), but applied the modified categorical approach to conclude that the respondent was convicted of an offense in which turpitude inheres (IJ at 2). However, the Supreme Court addressed Cal. Penal Code § 459 in *Descamps v. United States*, 570 U.S. 254 (2013), and concluded that the statute is not divisible and that an adjudicator therefore cannot employ the modified categorical approach to determine whether a defendant was convicted of a particular type of offense described under the broader statute. The Immigration Judge thus erred in concluding that the respondent was "convicted" of a particular type of offense described under Cal. Penal Code § 459 in which turpitude inheres. *See id.* at 264-65 (stating that the modified categorical approach is inapplicable to the California burglary offense because the statute is not discretely divisible). We will therefore sustain the respondent's appeal of the Immigration Judge's finding that the respondent's specific convictions constitute crimes involving moral turpitude that subject her to mandatory detention under section 236(c)(1)(B) of the Act.

In light of the foregoing, the record will be remanded for further custody proceedings. If necessary, additional testimony and evidence may be presented on remand. It remains the respondent's burden to demonstrate that she does not present a danger to the community or a flight risk in order to establish eligibility for bond. 8 C.F.R. § 1003.19(h)(3). The Immigration Judge may consider any relevant information. *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); 8 C.F.R. § 1003.19(d).

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded for further consideration of the respondent's request for a change in custody status and the entry of a new decision.



FOR THE BOARD