U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Z[redacted], M[redacted]

A [redacted]-502

Date of this notice: 11/1/2018

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:
Grant, Edward R.
Guendelsberger, John
Kendall Clark, Molly

Userteam: Docket

File: [redacted]-502 – Houston, TX Date: NOV - 1 2018

In re: M[redacted] Z[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ivan Neel, Esquire

APPLICATION: Termination of proceedings; Convention Against Torture

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's May 7, 2018, decision finding him removable based on his bail jumping and failure to appear conviction in Texas, and denying his application for protection under the Convention Against Torture, 8 C.F.R. §§ 1208.16-18.[1] The record before us does not contain a brief in opposition from the Department of Homeland Security. For the reasons set out below, the appeal will be sustained, in part, and the removal proceedings will be terminated without prejudice.

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

The respondent adjusted his status to that of a lawful permanent resident on August 27, 2004, before an Immigration Judge (IJ at 1; Exh. 1). On August 11, 2016, the respondent was convicted in the 63rd Judicial Court, Val Verde County, Texas, for the offense of bail jumping and failure to appear in violation of section 38.10(f) of the Texas Penal Code (IJ at 2-3; Exh. 2). The respondent was subsequently placed into removal proceedings and found removable as having been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (IJ at 2-3; Exhs. 1-2). The specific definition of aggravated felony for which the respondent was convicted was "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." Section 101(a)(43)(T) of the Act, 8 U.S.C. § 1101(a)(43)(T). The Immigration Judge sustained the section 101(a)(43)(T) aggravated felony charge in a brief section of the decision, without citing to or utilizing the framework set forth in *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016) (*see* IJ at 2-3).

To qualify as an aggravated felony under section 101(a) (43)(T) of the Act, "an offense must 'relate' to a generic 'failure to appear' crime that encompasses five discrete components." *Matter of Garza-Olivares*, 26 I&N Dec. at 739-40. The offense must involve (1) a failure to appear (2) before a court, (3) pursuant to a court order, (4) to answer to or dispose of a charge of a felony, (5) where the felony was one for which a sentence of 2 years' imprisonment or more may be

[1] Although dated May 7, 2018, the Immigration Judge's written decision was not served via mail until May 8, 2018.

imposed. *Id.* at 739. In *Matter of Garza-Olivares*, the Board concluded that the initial components of section 101(a)(43)(T), referencing a "failure to appear" that occurs "before a court," require a categorical inquiry because they refer to common elements of a generic "failure to appear" crime. Consequently, these components must be demonstrated by referring to "the statutory elements of a criminal offense, rather than by means of evidence beyond the record of conviction." *Id.* The three remaining components, in contrast, do not refer to formal elements of a generic "failure to appear" crime, and should instead be assessed under a "circumstance-specific" approach. *Id.* at 740.

The statue of conviction, bail jumping and failure to appear, provides as follows:

> (a) A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.
>
> (b) It is a defense to prosecution under this section that the appearance was incident to community supervision, parole, or an intermittent sentence.
>
> (c) It is a defense to prosecution under this section that the actor had a reasonable excuse for his failure to appear in accordance with the terms of his release.
>
> (d) Except as provided in Subsections (e) and (f), an offense under this section is a Class A misdemeanor.
>
> (e) An offense under this section is a Class C misdemeanor if the offense for which the actor's appearance was required is punishable by fine only.
>
> (f) An offense under this section is a felony of the third degree if the offense for which the actor's appearance was required is classified as a felony.

TEX. PENAL CODE § 38.10.

Upon our de novo review, we conclude that the respondent's conviction under section 38.10(a), (f) of the Texas Penal Code does not qualify as an aggravated felony offense under section 101(a)(43)(T) of the Act. As set forth above, we must begin our analysis with a categorical, i.e., elements based, inquiry into whether the statute of conviction requires (1) a failure to appear (2) before a court. *See Matter of Garza-Olivares*, 26 I&N Dec. at 739. Although subsection 38.10(a) of the Texas Penal Code requires a "failure to appear," it does not require that this "failure to appear" be "before a court." *See* TEX. PENAL CODE § 38.10(a). In fact, this subsection does not specify the place for the failure to appear, and subsection (b) suggests that a defendant may be required to be physically present at places other than a court. *See* TEX. PENAL CODE § 38.10(b) (stating it is a defense that "the appearance was incident to community supervision, parole, or an intermittent sentence."). Significantly, subsequent to the Immigration Judge's decision in this case, the Court of Appeals of Texas issued a decision which concluded, after lengthy analysis, that "appear" in section 38.10(a) of the Texas Penal Code can include "places, other than a courtroom, where a defendant may be required to report or be

physically present as required by the conditions of the defendant's release from custody." *Timmins v. State*, --- S.W.3d ---, No. 04-17-00187-CR, 2018 WL 3440729, at *7 (Tex. Ct. App. July 18, 2018). Consequently, section 38.10 of the Texas Penal Code is overbroad because it does not categorically require a "failure to appear before a court," as required under section 101(a)(43)(T) of the Act.[2] As a result, the respondent is no longer removable as charged and the proceedings will be terminated without prejudice.[3] Accordingly, the following orders are entered.

ORDER: The respondent's appeal is sustained with regard to his lack of removability.

FURTHER ORDER: The Immigration Judge's May 7, 2018, decision is vacated with regard to the finding that the respondent is removable as charged.

FURTHER ORDER: The proceedings are terminated without prejudice.

FOR THE BOARD

[2] We observe that if this case could not have been disposed of under the categorical approach for the first two components, the record would have been remanded to the Immigration Judge to conduct a "circumstance-specific" approach for the remaining components under section 101(a)(43)(T), including evidence of a court order, as set forth in *Matter of Garza-Olivares*, 26 I&N Dec. at 739.

[3] Given the terminated proceedings, we need not address the respondent's application for protection under the Convention Against Torture.