U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Garcia, Dawn A
Dawn A. Garcia, Attorney-at-Law
P.O. Box 682843
Franklin, TN 37068

DHS/ICE Office of Chief Counsel - MEM
80 Monroe Ave., Ste 502
Memphis, TN 38102

Name: J[redacted]-D[redacted], E[redacted]

A [redacted]-463

Date of this notice: 2/27/2018

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:
O'Connor, Blair
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

Immigrant & Refugee Appellate Center, LLC | www.irac.net

For more unpublished decisions, visit
www.irac.net/unpublished/index

File: [redacted] 463 – Memphis, TN

Date:

FEB 27 2018

In re: B[redacted] J[redacted]-D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dawn A. Garcia, Esquire

ON BEHALF OF DHS: William A. Lund
Assistant Chief Counsel

APPLICATION: Cancellation of removal for certain nonpermanent residents

The respondent, a native and citizen of Mexico, has appealed from the Immigration Judge's final decision dated December 23, 2015, and interlocutory decision dated November 6, 2015. In the final decision, the Immigration Judge determined that the respondent's November 1, 2011, class A misdemeanor conviction for stalking in violation of Tennessee Code Annotated § 39-17-315(a)(4), (b)(2) has rendered him ineligible for voluntary departure under section 240B(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b)(1)(B). In the interlocutory decision, the Immigration Judge determined that the respondent has not established by a preponderance of the evidence that his stalking conviction does *not* constitute a conviction for a crime of stalking pursuant to section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i) (Exh. 8 at 2-5). Hence, the Immigration Judge determined that the respondent has not established statutory eligibility for cancellation of removal for certain nonpermanent residents. *See* section 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C); *see also* 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). For the following reasons, the respondent's appeal will be sustained, and the record will be remanded for further proceedings and the entry of a new decision.

The main issue presented on appeal is whether the respondent's November 1, 2011, conviction for stalking in violation of Tennessee Code Annotated § 39-17-315(a)(4), (b)(2) constitutes a crime of stalking under section 237(a)(2)(E)(i) of the Act. We set out the governing standard for crimes of stalking in *Matter of Sanchez-Lopez*, 26 I&N Dec. 71 (BIA 2012). Under this standard, there are four requirements, which must be satisfied through the elements of § 39-17-315(a)(4), (b)(2), to be either admitted by the defendant in a plea or found beyond a reasonable doubt in a trial. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). The four elements are: (1) "conduct that was engaged in on more than a single occasion[;]" (2) that has been "directed at a specific individual[;]" (3) "with the intent to cause that individual or a member of his or her immediate

Immigrant & Refugee Appellate Center, LLC | www.irac.net

family to be placed in fear of bodily injury or death[;]" and (4) that places the victim in a subjective state of fear that is objectively reasonable.[1] *Matter of Sanchez-Lopez*, 26 I&N Dec. at 74.

On appeal, the respondent renews his argument that a conviction under § 39-17-315(a)(4), (b)(2) is not a crime of stalking because the statute does not require the perpetrator to intentionally place the victim in fear of bodily injury or death. Rather, the statute only requires "that he intentionally or willfully engage in the behavior that constitutes a course of conduct that is harassing" (Respondent's Br. at 12). Relatedly, the respondent argues that § 39-17-315(a)(4), (b)(2) "does not require that the victim have either an objective or subjective fear of bodily harm or death," and he points out that a "fear of death or bodily injury" is an element of the separate offense of aggravated stalking under § 39-17-315(c) (Respondent's Br. at 13).

The stalking and aggravated stalking statute provided at the time of the respondent's conviction:

> (a) As used in this section, unless the context otherwise requires:
>
> (1) "Course of conduct" means a pattern of conduct composed of a series of two (2) or more separate noncontinuous acts evidencing a continuity of purpose;
>
> (2) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;
>
> (3) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose;
>
> (4) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested;
>
> (5) "Unconsented contact" means any contact with another person that is initiated or continued without that person's consent, or in disregard of that person's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

[1] In regard to the fourth element, we reserved decision on the question whether the subjective fear must also be objectively reasonable. *Matter of Sanchez-Lopez*, 26 I&N Dec. at 74. We have no reason to address the objective reasonableness question in this case either.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

(A) Following or appearing within the sight of that person;

(B) Approaching or confronting that person in a public place or on private property;

(C) Appearing at that person's workplace or residence;

(D) Entering onto or remaining on property owned, leased, or occupied by that person;

(E) Contacting that person by telephone;

(F) Sending mail or electronic communications to that person; or

(G) Placing an object on, or delivering an object to, property owned, leased, or occupied by that person; and

(6) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(b)(1) A person commits an offense who intentionally engages in stalking.

(2) Stalking is a Class A misdemeanor.

(c)(1) A person commits aggravated stalking who commits the offense of stalking as prohibited by subsection (b), and:

(A) In the course and furtherance of stalking, displays a deadly weapon;

(B) The victim of the offense was less than eighteen (18) years of age at any time during the person's course of conduct, and the person is five (5) or more years older than the victim;

(C) Has previously been convicted of stalking within seven (7) years of the instant offense;

(D) Makes a credible threat to the victim, the victim's child, sibling, spouse, parent or dependents with the intent to place any such person in reasonable fear of death or bodily injury; or

(E) At the time of the offense, was prohibited from making contact with the victim under a restraining order or injunction for protection, an order of protection, or any other court-imposed prohibition of conduct toward the victim or the victim's property, and the person knowingly violates the injunction, order or court-imposed prohibition.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

(2) Aggravated stalking is a Class E felony.

TENN. CODE ANN. § 39-17-315 (2011).

On de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we agree with the respondent that the plain language of the statute indicates that a "fear of death or bodily injury" is only (potentially) an element of the offense of aggravated stalking, and is not an element of the offense of stalking under § 39-17-315(a)(4), (b)(2). *Compare* 7 TENN. PRAC. PATTERN JURY INSTR. T.P.I. – CRIM. 30.12(b) – Aggravated stalking (for offenses committed on or after July 1, 2005), *with* 7 TENN. PRAC. PATTERN JURY INSTR. T.P.I. – CRIM. 30.12(a) – Stalking (for offenses committed on or after July 1, 2005). Accordingly, this conviction has not rendered the respondent ineligible for cancellation of removal under section 240A(B)(1)(C) of the Act. On remand, the Immigration Judge should conduct further proceedings to determine whether the respondent is otherwise eligible for and deserving of cancellation of removal in the exercise of discretion. *See Matter of A-M-*, 25 I&N Dec. 66, 76 (BIA 2009) ("Cancellation of removal, like the relief available under former sections 212(c) and 244(a) of the Act, is a discretionary form of relief." (citations omitted)).

In the event that cancellation of removal is denied, the respondent may renew his application for voluntary departure. In regard to that application, we agree with the respondent that, despite his record of criminal misconduct, he remains eligible (Exh. 3). The respondent's class A misdemeanor stalking conviction categorically involves moral turpitude because it necessarily involved an intentional "unconsented contact" causing the victim to feel "terrorized, frightened, intimidated, threatened, harassed, or molested[.]" TENN. CODE ANN. § 39-17-315(a), (b)(1). We have long recognized that convictions necessarily involving an intentional threat of harm are turpitudinous. *See Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA 1999); *Matter of F-*, 3 I&N Dec. 361, 362, 363 (C.O. 1948, BIA 1949). However, the respondent's stalking conviction comes within the petty offense exception under section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (IJ at 2-3 (Dec. 23, 2015)). A class A misdemeanor is only punishable by up to 11 months and 29 days confinement, and the respondent was sentenced to serve 90 days in a workhouse (Exh. 3). TENN. CODE ANN. § 40-35-111(e)(1).

The Immigration Judge determined that the petty offense exception does not apply, however, because the respondent has multiple criminal convictions (IJ at 3; Exh. 3). However, none of the other convictions has been determined to involve moral turpitude. Inasmuch as we held in *Matter of Garcia-Hernandez*, 23 I&N Dec. 590, 592-93 (BIA 2003) that multiple convictions for nonturpitudinous crimes do not negate the application of the petty offense exception to a single crime involving moral turpitude in the context of the prohibition on a finding of good moral character under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3), the respondent's criminal record does not preclude a finding of good moral character. On remand, therefore, if the respondent renews the application for voluntary departure, the Immigration Judge must determine whether he has otherwise established good moral character within the preceding 5 years, and whether he deserves the privilege of voluntary departure as a matter of discretion. *See, e.g., Matter of Lemhammad*, 20 I&N Dec. 316, 325 (BIA 1991).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, and the record is remanded for further proceedings and the entry of a new decision.

FOR THE BOARD

Immigrant & Refugee Appellate Center, LLC | www.irac.net

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MEMPHIS, TENNESSEE

File: [redacted]463 December 23, 2015

In the Matter of

B[redacted] J[redacted]-D[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(6)(A)(i) - alien present without being admitted or paroled.

APPLICATIONS: Cancellation of removal; voluntary departure.

ON BEHALF OF RESPONDENT: DAWN ANN GARCIA

ON BEHALF OF DHS: RACHAEL FEUERHAMMER

ORAL DECISION AND ORDER

Respondent filed an application for cancellation of removal for non-permanent resident (EOIR-42B) before this Court at Exhibit 2. The Department moved to pretermit the application in light of respondent's conviction and the respondent replied. The Department's motion is at Exhibit 7; the Court stands corrected and renumbers its own order as Exhibit 8.

Respondent replied to the Department's motion at Exhibit 4 and submitted additional documents in support of the application at Exhibits 5 and 6. The Immigration Judge entered an order at Exhibit 8 granting the Government's motion for pretermission for the reasons stated therein. The Immigration Judge will not burden the record by

Immigrant & Refugee Appellate Center, LLC | www.irac.net

setting forth in detail the order now found at Exhibit 8 and sua sponte marked there as Exhibit 8.

The Immigration Judge in Exhibit 8 had continued the matter for the determination of eligibility for voluntary departure. The respondent, through counsel, argues that he is eligible for voluntary departure and the Government opposes voluntary departure. For the reasons set forth below, the Immigration Judge denies voluntary departure based upon statutory ineligibility.

ANALYSIS

The respondent is seeking post-completion voluntary departure. Accordingly, respondent must demonstrate that he has been a person of good moral character for a period of five years immediately preceding his application for voluntary departure. See Section 240B(b)(1)(B) of the Act.

Without burdening the record, the Immigration Judge did find in Exhibit 8 that respondent's conviction of the crime of stalking in violation of Tennessee Code Annotated Section 39-17-315 constituted a crime involving moral turpitude. Documents which the respondent had submitted at Exhibit 3 show that the respondent was convicted of this crime during the five year period and also committed the crime during the five year period.

Under Section 101(f)(3) of the Act, an applicant for any form of relief in which he must demonstrate good moral character cannot demonstrate such character if he has been convicted of certain enumerated crimes. The respondent argues under Section 212(a)(2)(A)(I)(i) of the Act, he does not fall within the group of persons described in Section 101(f), because he has been convicted of a petty offense where more accurately stated his sentence of 90 days is less than six months and, therefore, falls within the petty offense exception.

Immigrant & Refugee Appellate Center, LLC | www.irac.net

Respondent cites Matter of Urpi-Sancho, 13 I&N Dec. 641 (BIA 1970), for this proposition. Respondent argues that Urpi-Sancho answers the proposition that one conviction for a petty offense is sufficient to defeat the language in Section 101(f).

However, the statute found in Section 212(a)(2)(A)(ii) clearly states that the petty offense exception is not available to an alien who has committed more than one crime. Respondent has submitted documents inter alia but specifically at Exhibit 3, showing that he has been convicted of a number of crimes including driving without a license in 2009; driving without a license in 2011; stalking as previously noted; driving without a license in 2014; and lack of financial responsibility in 2014.

In light of those offenses, copies of the judgment conviction orders being found at Exhibit 3, the Immigration Judge concludes that the respondent has been convicted of more than one crime and, therefore, the petty offense exception does not apply. In light of the analysis set forth in Exhibit 8, the Immigration Judge concludes that respondent is not eligible for the privilege of voluntary departure.

Accordingly, the Immigration Judge will enter these orders:

ORDER

Respondent's application for voluntary departure is hereby denied;

Respondent's application for cancellation of removal is hereby pretermitted for the reasons set forth in the Exhibit 8.[1]

The respondent is hereby ordered removed to Mexico.

Please see the next page for electronic signature

CHARLES E. PAZAR

[1] The pretermission does not implicate the annual cap of cases for cancellation of removal. See 8 C.F.R. Section1240.26(c)(1).

Immigrant & Refugee Appellate Center, LLC | www.irac.net

Immigration Judge

Immigrant & Refugee Appellate Center, LLC | www.irac.net

//s//

Immigration Judge CHARLES E. PAZAR

pazarc on March 28, 2016 at 4:42 PM GMT

Immigrant & Refugee Appellate Center, LLC | www.irac.net