U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6)

Date: JUN 20 2012

In re: (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jeffrey J. Freeman, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Reconsideration

The respondent moves for reconsideration of the Board's October 26, 2011, decision remanding the record to the Immigration Court for further proceedings. The motion will be denied. The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7).

The respondent asserts that we erred in remanding the record for further proceedings. In our decision, we exercised our broad discretionary authority to sua sponte reopen and remand proceedings on our own motion. *See* 8 C.F.R. § 1003.2(a). Contrary to the respondent's assertions on appeal, the Board's sua sponte authority is not limited by the requirements set forth in 8 C.F.R. § 1003.2(c).[1] In our decision, we considered the totality of the record, and determined that a remand was appropriate. We acknowledged the protracted history of this case, and pointed out that unless the DHS submits new evidence which properly establishes under the modified categorical approach that the respondent's conviction is for an aggravated felony crime of violence, the Immigration Judge should terminate the proceedings. The respondent has not presented arguments which convince us to disturb our prior decision. The motion to reconsider will therefore be denied.

ORDER: The respondent's motion to reconsider is denied.

FOR THE BOARD

[1] This is supported by the plain language of 8 C.F.R. § 1003.2(a). In his motion, the respondent contends that the Board did grant the DHS motion to remand; however, we acted only upon our authority to "at any time, reopen or reconsider on [the Board's] own motion any case in which [the Board] has rendered a decision." 8 C.F.R. § 1003.2(a).

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) Date: OCT 26 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Wendy Netter Epstein, Esquire

ON BEHALF OF DHS: Cassie A. Thogerson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The case is presently before the Board pursuant to the (b) (6) decision of the United States Court of Appeals for the (b) (6) *v. Holder*, (b) (6) The (b) (6) held that the Board's analysis in its February 6, 2008, decision, in which the Board held that the respondent was removable as charged, was legally in error. *Id.* at (b) (6) The (b) (6) vacated the Board's February 6, 2008, decision, and remanded the case for further proceedings. *Id.* at (b) (6) The respondent and the Department of Homeland Security ("DHS") have filed briefs on remand before the Board. We will remand the record to the Immigration Judge for further proceedings and issuance of a new decision.

We review findings of fact made by the Immigration Judge, including determinations regarding credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burdens of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States on or about September 6, 1977, as a lawful permanent resident (Exh. 1). On February 7, 2000, the respondent was convicted, pursuant to a guilty plea, of attempted assault in the first degree in violation of (b) (6) and (b) (6) and was sentenced to a term of imprisonment of 4 years, and an order of protection for 1 year (Exh. 1; DHS's Reply to Motion to Terminate, Exh. A (Certificate of Disposition)).

(b) (6) provides in relevant part that:

(b) (6)

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

On April 18, 2005, the DHS served the respondent with a Notice to Appear ("NTA") that charged him as removable on the grounds that his (b) (6) conviction is a crime of violence under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), and therefore an aggravated felony. Section 237(a)(2)(A)(iii) of the Act; 8 U.S.C. § 1227(a)(2)(A)(iii).

At an October 25, 2005, hearing, the Immigration Judge sustained the removability charge, and continued the case until November 8, 2005, to allow the respondent an opportunity to apply for withholding of removal under the Act and protection under the Convention Against Torture ("CAT") (Tr. at 16-20). Section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 1208.16-.18. At the November 8, 2005, hearing, the respondent declined to apply for withholding of removal or CAT protection (Tr. at 22, 24). After determining that there was no other relief from the Immigration Court for which the respondent was eligible, the Immigration Judge found the respondent was removable as charged in the NTA, and ordered him removed to Jamaica (Tr. at 22-24; November 8, 2005, I.J. Dec.).

The respondent appealed the November 8, 2005, decision to the Board. The Board dismissed the respondent's appeal in a May 31, 2006, order. The respondent filed a petition for review in the United States Court of Appeals for the (b) (6) Before the (b) (6) the DHS sought a remand to allow it an opportunity to add conviction documents to the record which would specifically identify the subsection of (b) (6) that the respondent was convicted of violating. On (b) (6) the (b) (6) granted the DHS's motion to remand. On June 8, 2007, consistent with the order of the (b) (6) the Board remanded the record to the Immigration Court to allow for the submission and consideration of additional evidence regarding the respondent's conviction. The Board also vacated its May 31, 2006, order affirming the Immigration Judge's November 8, 2005, decision and order of removal.

(b) (6)

On remand, the DHS proffered three additional record of conviction documents - a certificate of disposition (signed October 28, 2005), a (b) (6) indictment filed in county court, and a (b) (6) district court felony complaint. The respondent objected to the admission of the proffered documents, and on August 29, 2007, moved to terminate his proceedings before the Immigration Judge (August 29, 2005, Tr. at 12-23). The DHS filed a reply brief on September 24, 2007, and attached the three documents as exhibits.

At an October 12, 2007, hearing, the respondent renewed his objection to the proffered documents (October 12, 2007, Tr. at 29-31). The DHS rested its removability case on the proffered documents, and declined to present any additional evidence (October 12, 2007, Tr. at 31-33). The Immigration Judge issued a decision that same day holding that the record of conviction, including the three documents proffered by the DHS on remand, established that the respondent's February 7, 2000, conviction was a crime of violence that rendered him removable as charged.

The respondent timely appealed to the Board. On February 6, 2008, the Board dismissed the respondent's appeal, holding that his (b) (6) conviction was a crime of violence. We applied a different analysis from that of the Immigration Judge, however, holding that, as a matter of law, the respondent must have pled guilty to attempted assault in the first degree in violation of either subsections (1) or (2) of (b) (6) first degree assault statute because it is a legal impossibility to be convicted of attempted assault in the first degree in violation of the remaining two subsections, which are reckless assault (subsection (3)), and felony assault (subsection (4)), the latter of which has no *mens rea* element.[1]

The respondent timely filed a petition for review to the United States Court of Appeals for the (b) (6) The (b) (6) held that our February 6, 2008, order was in error because although a defendant may not be tried and convicted under (b) (6) law of such hypothetical or legally impossible crimes as attempted reckless assault or attempted felony assault, (b) (6) courts nevertheless have accepted guilty pleas to such offenses. (b) (6) *v. Holder*, *supra*, at (b) (6) The reasoning behind this distinction is that with respect to a guilty plea, the defendant seeks and agrees to its terms, usually to avoid risking a conviction for a more serious crime. *Id.* Thus, under (b) (6) state law, a defendant may plead guilty to either subsection (3) or (4) of (b) (6) (b) (6) and the Board erred in holding otherwise. *Id.* at (b) (6) The (b) (6) remanded the record for further proceedings. *Id.* at (b) (6)

The DHS requests that we remand the record to the Immigration Court so that it may submit additional evidence, including the respondent's plea colloquy, and legal arguments regarding the (b) (6) statute of conviction to demonstrate that the respondent is removable as charged. The respondent opposes the DHS's motion on the grounds that the motion fails to satisfy the regulatory prerequisites for a remand. 8 C.F.R. § 1003.2(c). The respondent also seeks termination of his

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[1] There is no dispute that (b) (6) first degree assault statute is divisible, and that only the first two of its four subsections are crimes of violence, while the last two subsections, which require a reckless *mens rea* and no *mens rea* respectively, are not crimes of violence. (b) (6) (b) (6) *See* (b) (6) *v. Holder*, *supra*, at (b) (6) *See also Leocal v. Ashcroft*, 543 U.S. 1, 2-3 (2004) (offenses with no *mens rea* are not crimes of violence).

(b) (6)

proceedings on the grounds that the DHS has not met its burden of establishing that the respondent's February 7, 2000, conviction is an aggravated felony crime of violence.

Under the circumstances presented, we will exercise our discretion to remand the record to the Immigration Judge for further proceedings and issuance of a new decision regarding the respondent's removability. *See generally* 8 C.F.R. § 1003.2(a). Given the serious nature of the respondent's conviction, we consider it appropriate to allow the DHS one final opportunity to submit additional evidence and argument related to the (b) (6) statute of conviction to support its removability charge.[2] This case has a protracted history, however, and unless the DHS submits new evidence which properly establishes under the modified categorical approach that the respondent's conviction is a crime of violence, the Immigration Judge should terminate the proceedings. Section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229(c)(3)(A) (the DHS must establish removability by clear and convincing evidence).

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for entry of a new decision.

Ellen Rubowitz
FOR THE BOARD

[2] We are not bound to follow the unpublished Board opinion cited by the respondent. Respondent's Brief at 11 (*citing Matter of Tabrilla*, A036 780 711, 2009 WL 1653710 (BIA 2009) (unpublished)).

File: (b) (6) Date:

FEB - 6 2008

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Leo Jerome Lahey, Esquire

ON BEHALF OF DHS: Robert B. Weir
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

ORDER:

PER CURIAM. This case was last before us on June 8, 2007, when we remanded the record back to the Immigration Court for further proceedings pursuant to the (b) (6) remand order of the United States Court of Appeals for the (b) (6) [1] The respondent has now filed a timely appeal of an Immigration Judge's October 12, 2007, decision, finding the respondent removable as an alien convicted of an aggravated felony, as that term is defined under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F),[2] and determining that he was statutorily ineligible for relief from removal. The appeal will be dismissed.

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[1] The court's order was made in response to a government's motion to remand, "because the conviction documents in the record [did] not specify which of the four subsections of (b) (6) Petitioner was convicted under."

[2] Section 101(a)(43)(F) of the Act defines an aggravated felony as "a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." In turn, a crime of violence is defined at 18 U.S.C. § 16 as: "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

(b) (6)

The respondent is a native and citizen of Jamaica who was admitted to the United States as an immigrant on September 6, 1977. On (b) (6) he was convicted, upon a plea of guilty, in the County Court, County of (b) (6) , of the offense of attempt/assault in the first degree, in violation of (b) (6) for which he was sentenced to a term of imprisonment of 4 years.

The respondent does not dispute that he was convicted of said offense, but contends that the Immigration Judge erroneously found that his conviction was a crime of violence and an aggravated felony under the Act, because the statute in question should be considered to be "divisible," as criminalizing both conduct that does and conduct that does not qualify as an aggravated felony. *See Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996); *Andrade v. Gonzales*, 459 F.3d 538, 544-45 (5th Cir. 2006) (holding that Massachusetts's assault statute is not an aggravated felony *per se* because it is a divisible statute).

To determine whether an offense is a crime of violence under 18 U.S.C. §16(b), the United States Court of Appeals for the (b) (6) , in whose jurisdiction this case arises, employs a "categorical approach," which looks to the generic elements of the statutory offense and asks whether the criminal conduct required to violate the applicable statute is "by its nature" a crime of violence. *See, e.g., Larin-Ulloa v. Gonzales*, 462 F.3d 456, 463-65 (5th Cir. 2006). In other words, the pertinent question is whether the crime inherently involves a substantial risk that intentional physical force will be used in the commission of the crime. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004) (holding that 18 U.S.C. § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense"); *see also Larin-Ulloa v. Gonzales*, *supra*, at 465. Before we may consider whether the respondent's conviction so qualifies, we must first examine not only the statutory elements of (b) (6) first degree assault statute, but also consider whether the respondent's negotiated plea of guilty to the attempted commission of said offense affects that analysis.

At the outset, we note that (b) (6) is a divisible statute – that is, it encompasses offenses that both are and are not crimes of violence. *See generally Larin-Ulloa v. Gonzales*, *supra*, at 463-65; *see also Shepard v. United States*, 544 U.S. 13, 20- 21 (2005).

(b) (6) provides in relevant part that:

> A person is guilty of **assault** in the **first** degree when:
>
> 1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or

2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; or

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the **first** degree is a class B felony.

However, as urged by the respondent on appeal, the respondent pled guilty to the offense of *attempted* violation of (b) (6) first degree assault statute (emphasis added). Under (b) (6) law, "[a] person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime." (b) (6) (b) (6) This standard has been characterized as a specific intent standard. *See Gill v. I.N.S,* 420 F.3d 82, 90 (2d Cir. 2005) (citing *People v. Campbell*, 72 N.Y.2d 602, 605, 535 N.Y.S.2d 580, 581-82, 532 N.E.2d 86, 87-88 (1988)). The Court of Appeals of New York in *People v. Campbell*, 535 N.Y.S.2d 580, 605 (1988), looking at a conviction under a similar statute as in the case before us, *i.e.,* for attempted assault in the second degree in violation of NEW YORK PENAL LAW § 120.05, held that "[b]ecause the very essence of a criminal attempt is the defendant's intention to cause the proscribed result, it follows that there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended . . . . That element of intent relates not to the result proscribed by the statute . . . but to the circumstances which make that result one for which defendant is strictly liable." *Id.* at 605. Consequently, as the definition of an attempt to commit a crime under New York law requires in part that the defendant act with a specific intent to commit the completed crime, if a specific intent to commit the completed crime would be inconsistent with the required mental culpability of the completed crime, then there can be no attempt to commit that completed crime. *See, e.g., People v. Foster*, 278 N.Y.S.2d 603(1967) (one could not specifically intend to commit a crime which then required that the act be done without a specific intent); *People v. Acevedo*, 345 N.Y.S.2d 555(1973), and *People v. Terry*, 479 N.Y.S.2d 278 (1984)(there is no crime of attempted depraved indifference murder); *People v. Hendrix*, 391 N.Y.S.2d 186 (1977), *aff'd* on other grounds 405 N.Y.S.2d 31(1977) (there is no crime of attempted felony murder).

As the respondent pled guilty to the offense of attempt/assault in the first degree in violation of (b) (6) applying the (b) (6) of Appeals' rationale in *People v. Campbell*, *supra*, to the matter before us, the respondent can only be guilty of those elements of

the offense of assault in the first degree in violation of NEW YORK PENAL LAW § 120.10 which he specifically intended. Consequently, examining all the elements of the New York statute, we find the respondent's guilty plea in support of his conviction for the offense of attempt/assault in the first degree could only have been made with reference to a violation of either § 120.10(1) or § 120.10(2) of the statute, as a conviction for *attempted* assault could not be had on the basis of such a plea to under the other two subsections of the statute.[3] *See People v. Campbell*, *supra*, at 605.

Consequently, whether treated as a conviction for the offense of attempt/assault in the first degree in violation of either subsection (1) or subsection (2) of NEW YORK PENAL LAW § 120.10, we find the language of the statute necessarily and categorically involves a substantial risk that physical force may be used against the person or property of another in the commission of the offense"as described in 18 U.S.C. § 16(b). *See Perez-Munoz v. Keisler*, 507 F.3d 357(5th Cir. 2007).

Consequently, in view of the foregoing, we agree with the Immigration Judge's ultimate conclusion that the respondent was convicted of an aggravated felony, and a crime of violence as that term is defined under section 101(a)(43)(F) of the Act, and is subject to removal from the United States based on the respondent's record of conviction. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Moreover, because the respondent has previously been admitted to the United States as a lawful permanent resident, his conviction for an "aggravated felony" not only precludes his eligibility for cancellation of removal pursuant to section 240A(a)(3) of the Act, but also renders him ineligible for section 212(h) relief. *See Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998). Moreover, the respondent has failed to establish his eligibility for any other relief from removal.

Accordingly, the appeal is dismissed.

FOR THE BOARD

[3] As noted above, the statute in question contains four subsections, including the first two, requiring proof of intent to cause serious physical injury in order to secure a conviction, and two others, one containing a *mens rea* element of recklessness with respect to causing serious physical injury, and another which does not include a *mens rea* element with respect to causing serious physical injury.

IMMIGRATION COURT

(b) (6)

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 10/18/2007. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Jamaica or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Oct 12, 2007

JOHN A. DUCK, JR.
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: 11/13/07

File: (b) (6)

Date: JUN 0 8 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Nora E. Norman
Assistant Chief Counsel

APPLICATION: Termination of proceedings

Respondent

ORDER:

PER CURIAM. The respondent in this case is a lawful permanent resident who was found removable as an aggravated felon, as one who had been convicted of a crime of violence. The case is presently before us pursuant to the (b) (6) order of the United States Court of Appeals for the (b) (6) granting the government's motion to remand. The government sought a remand "because the conviction documents in the record do not specify which of the four subsections of (b) (6) Petitioner was convicted under," and the issue whether his conviction was a crime of violence should therefore be further considered. The court's order requires a remand, so that further evidence regarding the respondent's conviction may be offered and considered.

Accordingly, the decision of the Board in this case dated May 31, 2006, is vacated insofar as it upholds the Immigration Judge's finding of removability and the record is remanded to the Immigration Judge for further proceedings consistent with this decision and the court's order.

FOR THE BOARD