File: (b) (6)

Date: JUN 30 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Valerie Anne Zukin, Esquire

ON BEHALF OF DHS: Edward L. Dunlay
Deputy 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

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment (not sustained)

APPLICATION: Termination

In a decision dated February 26, 2009, an Immigration Judge ordered the respondent removed from the United States as an alien convicted of an aggravated felony. Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). This Board affirmed that removal order in a decision dated June 30, 2009. The respondent thereafter sought judicial review in the United States Court of Appeals for the (b) (6), which has now remanded the record to us for further review. (b) (6) *v. Holder*, (b) (6) The respondent and the Department of Homeland Security ("DHS") have filed briefs on remand. In light of the (b) (6) decision, we will sustain the respondent's appeal and terminate the removal proceedings.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. On September 26, 2008, the respondent was convicted of "coercion" in violation of section 11.41.530(a)(1) of the Alaska Statutes, a felony for which he was sentenced to a 4-year term of imprisonment (Exh. 2, at 3). When the respondent committed his offense, section 11.41.530(a)(1) provided that a person commits coercion

> if the person compels another to engage in conduct from which there is a legal right to abstain or abstain from conduct in which there is a legal right to engage, by means of instilling in the person who is compelled a fear that, if the demand is not complied

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with, the person who makes the demand or another may inflict physical injury on anyone . . . or commit any other crime[.]

The Immigration Judge concluded that this conviction was for an "aggravated felony" under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). In arriving at that conclusion, the Immigration Judge found that the respondent's crime did not qualify as a "categorical" aggravated felony (I.J. at 2), but that it did so qualify under the "modified categorical approach" (I.J. at 4-6).

The respondent appealed the Immigration Judge's removal order to this Board, and we affirmed that order in our decision of June 30, 2009. Unlike the Immigration Judge, however, we concluded that section 11.41.530(a)(1) of the Alaska Statutes defined a *categorical* aggravated felony, obviating the need to conduct a modified categorical inquiry. The (b) (6) disagreed with our conclusion that section 11.41.530(a)(1) defines a categorical aggravated felony, and remanded the record so that we "may address the modified categorical approach in the first instance." (b) (6) *v. Holder*, *supra*, at (b) (6)

To establish the respondent's removability under section 237(a)(2)(A)(iii) of the Act, the DHS must prove by clear and convincing evidence that his conviction under section 11.41.530(a)(1) of the Alaska Statutes was for a "crime of violence" under 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year. Section 101(a)(43)(F) of the Act. A "crime of violence" is defined as an offense that has "as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. § 16(a), or a felony 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." 18 U.S.C. § 16(b). The (b) (6) has already held that section 11.41.530(a)(1) of the Alaska Statutes does not define a categorical crime of violence under either subsection of 18 U.S.C. § 16, and thus the only issue remaining to be decided is whether the respondent's conviction was for a crime of violence under the modified categorical approach.

Under the modified categorical approach, the factfinder is permitted to conduct a limited examination of documents in the "record of conviction" to determine whether an alien was "necessarily convicted of all of the elements of the generic crime"; in this instance, a "crime of violence." *Hoang v. Holder*___ F.3___, 2011 WL 1885989, *6 (9th Cir., May 17, 2011) (citations omitted). Where the alien was convicted pursuant to a plea, as here, the examination of the record is "limited to the terms of the charging document, the terms of a plea agreement or transcript of [the plea] colloquy . . . or to some comparable judicial record" in which the petitioner confirmed the factual basis for the plea. *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

According to the Immigration Judge (I.J. at 4-5), the "conviction record" in this case consisted of four documents: (1) an "Information" charging the respondent with sexual abuse of a minor in the second degree in violation of section 11.41.436(a)(2) of the Alaska Statutes (Exh. 2, at 13-15); (2) a grand jury "Indictment," also charging the respondent with violating section 11.41.436(a)(2) (Exh 2, at 11-12); (3) an "Information Replacing Indictment" charging the respondent with coercion under section 11.41.530(a)(1) (Exh. 2, at 9-10); and (4) a "Judgment" reflecting the respondent's guilty plea to violating section 11.41.530(a)(1), as well as the imposition of sentence (Exh.2, at 3-8). Based on facts derived from the "Information" and "Indictment" charging the respondent with sexual abuse

of a minor, the Immigration Judge concluded that the respondent was convicted of coercion by compelling a 13-year-old girl to engage in non-consensual sexual contact with him by instilling in her a fear that he would inflict physical injury on someone or otherwise commit a crime if she did not comply (I.J. at 5-6). While the Immigration Judge may well have accurately characterized the respondent's *conduct*, (b) (6) law clearly precluded him from consulting the "Information" and "Indictment" as part of a modified categorical inquiry in this case.

The (b) (6) has held in several precedents that when an individual is charged with one crime but ultimately convicted of another, the complaint charging the first crime does not constitute part of the "conviction record" for the second crime. *E.g., Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392-93 (9th Cir. 2006); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005). The respondent's guilty plea to a charge of coercion does not establish that he necessarily admitted *any* of the acts alleged in support of the earlier sexual-abuse-of-a-minor charge. Instead, that earlier charge was dropped and superseded by an "Information Replacing Indictment" charging coercion. *That* document–which is the only document other than the Judgment which may be considered under the modified categorical approach–merely parroted the language of section 11.41.530(a)(1) and does not serve to pare down the elements of the respondent's offense. Thus, we conclude that there was insufficient evidence in the record to permit the Immigration Judge to find that the respondent was necessarily convicted of a crime of violence under 18 U.S.C. § 16.

In its brief on remand, the DHS argues that we should consider the victim's youth when evaluating whether the respondent's coercion offense was a crime of violence (DHS Remand Br. at 5-8). We understand the DHS's argument. Because the victim's youth is neither an element of the coercion offense nor a fact alleged in the "Information Replacing Indictment," however, it simply has no bearing on our legal analysis under applicabl(b) (6) standards. When conducting a modified categorical inquiry, we cannot consider the respondent's *actual* conduct, no matter how abhorrent; rather, we must confine ourselves to his *convicted* conduct.

In conclusion, the (b) (6) has held that coercion under section 11.41.530(a)(1) of the Alaska Statutes is not a categorical aggravated felony under section 101(a)(43)(F) of the Act. Furthermore, the respondent's "conviction record" does not establish that he was convicted of an aggravated felony under the modified categorical approach. Hence, the DHS has not proven the respondent's removability under section 237(a)(2)(A)(iii) of the Act by clear and convincing evidence. The DHS also does not contest the Immigration Judge's dismissal of the alternative charge of removability under section 237(a)(2)(E)(i) of the Act (I.J. at 2), and thus the following order shall be issued.

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

FOR THE BOARD