U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: **A**

Date of this notice: 12/31/2019

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:
Wendtland, Linda S.
Greer, Anne J.
O'Connor, Blair

MurielM
Userteam: Docket

File: – Edensburg, PA Date: DEC 3 1 2019

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip L. Torrey, Esquire

ON BEHALF OF DHS: Matthew H. Doll
Assistant Chief Counsel

APPLICATION: Termination; cancellation of removal

The respondent appeals from an Immigration Judge's July 31, 2019, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

The respondent is a native and citizen of Fiji and has been a lawful permanent resident of the United States since 1999. In 2008, the respondent was convicted of "child abuse" in violation of FLA. STAT. ANN. § 827.03, which provided as follows, in pertinent part:

> (1) "Child abuse" means:
>
> (a) Intentional infliction of physical or mental injury upon a child;
>
> (b) An intentional act that could reasonably be expected to result in physical or mental injury to a child; or
>
> (c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child.
>
> A person who knowingly or willfully abuses a child without causing great bodily harm, permanent disability, or permanent disfigurement to the child commits a felony of the third degree....

The threshold issue on appeal is whether the Immigration Judge properly determined that this conviction renders the respondent removable from the United States as an alien convicted of a "crime of child abuse" under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2012).

Whether FLA. STAT. ANN. § 827.03 defines a "crime of child abuse" is a question of law that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii) (2019). To answer that question, we employ the categorical approach, which requires us to disregard the respondent's offense conduct and to focus

instead on the elements of his offense and the minimum conduct that could result in a conviction. *Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 705-06 (BIA 2016). Applying this approach, we conclude that FLA. STAT. ANN. § 827.03 is categorically overbroad vis-à-vis the generic definition of a "crime of child abuse" because it encompasses "child endangerment" offenses in which the child victim is neither harmed nor exposed to a sufficiently high probability of harm.

We held in *Matter of Mendoza-Osorio* that N.Y. PENAL LAW § 260.10(1) defines a categorical crime of child abuse because its elements require the knowing commission of conduct that is "likely to be injurious" to a child's welfare. *Id.* at 711-12; *see also Matthews v. Barr*, 927 F.3d 606, 620-23 (2d Cir. 2019). In so holding, we emphasized that the "child abuse" concept should not be construed so broadly as to include "child endangerment" offenses requiring only "'the bare potential'" for harm to a child. *Id.* at 711 (quoting *Fregozo v. Holder*, 576 F.3d 1030, 1037-38 (9th Cir. 2009)); *see also Zhi Fei Liao v. U.S. Att'y Gen.*, 910 F.3d 714, 722-23 (3d Cir. 2018) (holding that endangering the welfare of a child under Pennsylvania law is not a crime of child abuse under *Mendoza-Osorio* where the Pennsylvania statute only requires proof of circumstances that "could threaten" the child's welfare, rather than a high risk of harm).

Paragraph (b) of FLA. STAT. ANN. § 827.03(a)(1) reaches any intentional act that "could reasonably be expected to result in physical or mental injury to a child," while paragraph (c) goes still further, criminalizing the "active encouragement" of another to commit any such act. Under these paragraphs, no injury to a child need be proven. *Burrows v. State*, 62 So.3d 1258, 1260 (Fla. Dist. Ct. App. 2011); *Zerbe v. State*, 944 So.2d 1189, 1193 (Fla. Dist. Ct. App. 2006); *Clines v. State*, 765 So.2d 947, 948 (Fla. Dist. Ct. App. 2000). Nor does the "reasonably be expected" standard require proof that a child faced a high probability of actual injury. *Clines v. State*, 765 So.2d at 948 (upholding a conviction under paragraph (b) where the accused pointed a loaded pistol at the ceiling of a room in which a child was sleeping).

Because FLA. STAT. ANN. § 827.03 reaches conduct that does not expose a child victim to a high risk of injury or harm, it more closely resembles the Pennsylvania statute at issue in *Zhi Fei Liao v. U.S. Att'y Gen.* than it does the New York statute at issue in *Matter of Mendoza-Osorio*. Accordingly, we conclude that the Florida statute is categorically overbroad vis-à-vis the generic definition of a "crime of child abuse" under section 237(a)(2)(E)(i) of the Act.

Because FLA. STAT. ANN. § 827.03 is categorically overbroad, the respondent's conviction under that statute cannot support his removal charge unless: (1) FLA. STAT. ANN. § 827.03 is "divisible" into multiple offenses, some of which define categorical "crimes of child abuse" and others of which do not; and (2) examination of the respondent's conviction record under the "modified categorical approach" establishes that he was convicted under a statutory alternative that includes all the elements of a generic crime of child abuse. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

In this instance, we need not decide whether FLA. STAT. ANN. § 827.03 is divisible because, even if it is, the respondent's conviction record does not narrow down his offense or establish that he was convicted of an offense with elements corresponding to those of a generic "crime of child abuse." The judgment of conviction specifies that he was convicted of "child abuse," but does not say whether he was convicted under paragraph (a), (b), or (c) (Exh. 2C, at 12). Further, the felony

information under which the respondent was charged is of no help because it charged him with an entirely different offense (Exh. 2C, at 11), and is not supplemented by a superseding information. *Evanson v. U.S. Att'y Gen.*, 550 F.3d 284, 293 (3d Cir. 2008) (holding that "a court applying the modified categorical approach may only consider the charging document to the extent that the petitioner was actually convicted of the charges" set forth therein).

In conclusion, the DHS has not carried its burden to establish the respondent's removability under section 237(a)(2)(E)(i) of the Act by clear and convincing evidence. Accordingly, that charge is dismissed and the Immigration Judge's decision sustaining it is vacated. No other removal charges have been lodged against the respondent, so the removal proceedings will be terminated. In view of this disposition, we find it unnecessary to address the respondent's other appellate arguments.

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

Blair O'Connor

FOR THE BOARD