NO. 15-2781 & 15-3068

United States Court of Appeals

FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,
Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals

PETITIONER'S OPENING BRIEF AND
APPENDIX VOLUME I OF II, p. 1A-26A

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No. 15-2781 & 15-3068

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,

A 059-303-967 (DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner.

PETITIONER'S OPENING BRIEF

INTRODUCTION

Petitioner, Jhonathan Victoria Javier (hereinafter referred to as "Petitioner"), is a native and citizen of the Dominican Republic. A lawful permanent resident since 2009, Petitioner was arrested in 2013 while in the City of Philadelphia. At the

time, he was carrying a firearm. Petitioner lawfully applied for and was granted a license to carry the firearm in the Commonwealth of Pennsylvania. Following a brief argument with a family member, officers with the City of Philadelphia Police Department were summoned. Upon arrival, Petitioner was found in possession of a firearm, which was always concealed and, again, properly licensed. As a result of the argument, he was charged with violating a Pennsylvania terroristic threats statute. He was also charged with possession of a firearm within boundaries of the City of Philadelphia.[1] Petitioner is convicted of both in 2014.

Months later, the Department of Homeland Security (the "Department") commenced removal proceedings against Petitioner, issued an arrest warrant, took him into custody and has since continued to detain Petitioner. Petitioner appeared before the Immigration Court at York, Pennsylvania (the "Immigration Court" or the "IC" or the "IJ"), where he contested the grounds of removability. Petitioner moved to terminate his proceedings. The Immigration Court denied his motion and ordered Petitioner removed to the Dominican Republic. The Board of Immigration Appeals

[1] Section 6108, Title 18 of the Pennsylvania Code creates an "exception" to the ability of residents of Pennsylvania to bear arms. Specifically, it makes it unlawful for one to carry any firearm, regardless of whether it is concealed or waving in the air and absent any consideration of the person's lawful licensure to carry that firearm anywhere else in the Commonwealth of Pennsylvania.

(the "Board") affirmed. Petitioner now seeks this Court's review and in support thereof, submits this Brief.

STATEMENT OF JURISDICTION

Petitioner seeks review of an unpublished decision of the Board on August 19, 2015. See Petitioner's Appendix at 23a – 26a.[2] The Board had jurisdiction over Petitioner's appeal from the Immigration Court's determination pursuant Sections 1003.1 and 1240.15, Title 8 of the Code of Federal Regulations (the "CFR"). This Court has jurisdiction over the Board's final order of removal under Section 1252(a)(1), Title 8 of the United States Code (the "USC"). See 8 U.S.C. § 1252(a)(1); see also 8 C.F.R. §§ 1003.1, 1240.15.

Petitioner timely petitioned this Court for review on August 26, 2015, within thirty days of the Board's August 19, 2015 decision. See 8a; see also 8 U.S.C. § 1252(b)(1). Venue is proper in this Court as Petitioner's proceedings before the Immigration Court were completed in York, Pennsylvania. See 17a; see also 8 U.S.C. § 1252(b)(2).

Petitioner concedes that the grounds that underlie his final order of removal are criminal offenses. Given this, this Court's review is statutorily limited to

[2] References to Petitioner's Appendix will be noted on with the respective page numbers, such as "1a – 20a."

"constitutional claims or questions of law . . . ." 8 U.S.C. § 1252(a)(2)(D); see Catwell v. Attorney General, 623 F.3d 199, 205 (3d Cir. 2010). Petitioner's review rests only in questions of law; this Court, therefore, is clearly within its jurisdiction in reviewing this Petition. See Catwell, 623 F.3d at 205 (noting limited jurisdiction to review removal orders based on aggravated felony convictions); see also Bautista v. Attorney General, 744 F.3d 54 (3d Cir. 2014) (same).

STATEMENT OF THE ISSUES

1. Whether the Immigration Court and the Board erred in finding that Section 2706, Title 18 of the Pennsylvania Code—the Commonwealth's Terroristic Threats Statute—is categorically a Crime Involving Moral Turpitude.

2. Whether the Immigration Court erred in holding that Section 6108, Title 18 of the Pennsylvania Code, which is the carrying of a concealed firearm within the geographic boundaries of the City of Philadelphia is categorically a "firearm offense," under Section 1227(a)(2)(C), Title 8 of the United States Code.

STATEMENT OF THE CASE

Petitioner seeks review of the Decision of the Board entered on August 26, 2015, dismissing Petitioner's appeal. See In re: Jhonathan Victoria Javier, No. A059 303 967 (BIA Aug. 26, 2015). Further, Petitioner seeks review of the April 2, 2015 Oral Decision of the Immigration Court at York, Pennsylvania. See Matter of Jhonathan Victoria Javier, No. A059 303 967 (Imm. Ct. Apr. 2, 2015).

FACTUAL AND PROCEDURAL HISTORY

Petitioner is a native and citizen and native of the Dominican Republic. See Transcripts at 1 (hereinafter referred to as "Tr."). He entered the United States as a Lawful Permanent Resident in 2009. 14a. On July 13, 2013, he was arrested in the County of Philadelphia, Pennsylvania and charged with violating, among other statutes, Sections 6108, Carry Firearms in Public in Philadelphia (the "FR Law") and 2706, Terroristic Threats with Intent to Terrorize Another (the "TT Law"), Title 18 of the Pennsylvania Code. Id. On March 7, 2014, he plead guilty to the TT and FR Law violations. Id. On that same date, Petitioner was sentenced to a strict term of probation, the maximum of which not exceeding 4 years to the FR Law violation and a term of confinement with a minimum of 7 months and a maximum period of 23 months at the Philadelphia County, Pennsylvania prison. 17a-18a. On May 12, 2014, the Department of Homeland Security (the "Department" or "DHS") issued a Form I-862, Notice to Appear (the "NTA"), which commenced removal proceedings before the Immigration Court at York, Pennsylvania. 17a. The NTA charged Petitioner as deportable pursuant to Sections 1227(a)(2)(C) and (a)(2)(A)(i), Title 8 of the United States Code. 8 U.S.C. § § 1227(a)(2)(A)(i); 1227(a)(2)(C); 17a-18a.

Petitioner admitted to the allegations in the NTA, but respectfully denied charges of removability. Id. Through prior-counsel, Petitioner moved to terminate proceedings, arguing that the Department failed to meet its burdens of proof with

respect to removability. Id. In an oral decision, the Immigration Court denied Petitioner's motion to terminate, sustained both charges of removability and, finding no relief available, ordered Petitioner removed to the Dominican Republic. 16a-18a. 7a. Petitioner timely appealed. 7a. The Department filed a Motion for Summary Affirmance (the "Motion"). Id.

On July 13, 2015, the Board issued a decision "summarily" dismissing Petitioner's appeal, stating that the statements do not "meaningfully apprise the Board of specific reasons underlying his challenge of removal from the United States." See In re: Jhonathan Victoria Javier, No. A059 303 967 (BIA Jul. 13, 2015) at 6a-7a. The Board's decision stated that, "[w]hile the [Petitioner] states that the issues of appeal are questions of law, the [Petitioner] raises no argument on appeal which meaningfully challenges any of the Immigration Judge's holdings." See id. A Petition for Review was timely filed with this Court. See Jhonathan Victoria Javier v. Attorney General, No. 15-2781 (3d Cir. 2015) at 1a. On August 26, 2015, the Board reconsidered its July 13, 2015, reopened Petitioner's proceedings and reviewed the merits of Petitioner's appeal. See In re: Jhonathan Victoria Javier, No. A059 303 967 (BIA Aug. 26, 2015) at 12a-16a. The Board, however, rendered a decision as to only one of the two questions of law for which Petitioner sought de novo review before the Board: whether the TT Law is a Crime Involving Moral

Turpitude. See id. The Board did not consider the Immigration Court's finding on the FR Law. Id.

This Petition for Review timely followed. 8a. On September 7, 2015, Petitioner moved that the Court stay his removal from the United States, pending review of his Petition. The Department filed a non-opposition to a stay of Petitioner's removal, pending this Court's review.

Petitioner remains detained and deportable and now submits this Brief in support of his Petition for Review.

SUMMARY OF ARGUMENT

The Board's finding that the Pennsylvania TT Law is categorically a crime involving moral turpitude is clearly incorrect and inconsistent with the TT Law as read alone and within the context of the all-encompassing statutory scheme in which the TT Law finds itself, as well as this Court's precedent.

Further, the Immigration Court erred in holding that Section 6108, Title 18 of the Pennsylvania Code, which is the carrying of a concealed firearm within the geographic boundaries of the City of Philadelphia, is categorically a "firearm offense," under Section 1227(a)(2)(C), Title 8 of the United States Code. The Commonwealth's FR Law contains a statutory exception that is under-inclusive, when compared to the exception recognized in the Immigration and Nationality Act (the "Act" or the "INA").

These errors are in matters of law and clearly necessitate this Court's review of the Petition.

ARGUMENT

I. SCOPE, STANDARD OF REVIEW AND BURDEN OF PROOF

The Court's review is not limited to that of the Board's Decision; rather, this Court has held that when the Board affirms the Immigration Court's Decision, and adopted the analysis as its own, both decisions are reviewed. See Sandie v. Att'y Gen., 562 F.3d 246, 250 (3d Cir. 2009) (holding that, when an immigration court's "discussion and determinations are affirmed and partially reiterated in the [Board's] decision, [the Court] review[s] them along with the [Board's] decision."). Here, the Board reviewed only the Immigration Court's decision on the TT Law; it did not reach the question of whether the FR Law is a removable offense. Given this, this Court's review is limited to the Board's decision, in part, and, to the Immigration Court's decision, in part.

Findings of fact must be supported by substantial evidence. See Camara v. Att'y Gen., 580 F.3d 196, 201 (3d Cir. 2009) (holding that the Court will "affirm any findings of fact supported by substantial evidence and [that it is] bound by the administrative findings of fact unless a reasonable adjudicator would be compelled to arrive at a contrary conclusion."). Legal determinations, however, are reviewed

de novo, subject to the principles of deference articulated in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) Toussaint v. Att'y Gen., 455 F.3d 409, 413 (3d Cir. 2006).

II. The Board and the Immigration Court Incorrectly Determined that the TT Law is Categorically a Crime Involving Moral Turpitude and, therefore, this Court Must Grant Review of this Petition.

The Board and the Immigration Court clearly erred in holding that the Pennsylvania TT Law is categorically a crime involving moral turpitude, thereby sustaining removability under Section 1227(a)(2)(A)(i), Title 8 of the United States Code, which was based on Petitioner's TT Law conviction. 8 U.S.C. § 1227(a)(2)(A)(i). This Court must, therefore, grant review of the Petition. Section 1227(a)(2)(A)(i), Title 8 of the Act provides, in relevant part, that any

> alien who . . . is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission, and . . . is convicted of a crime for which a sentence of one year or longer may be imposed . . . is deportable.

8 U.S.C. § 1227(a)(2)(A)(i). Here, Petitioner was convicted of violating the Commonwealth of Pennsylvania's TT Law. One violates the TT Law when he "communicates, either directly or indirectly, a threat to . . . commit any crime of

violence with intent to terrorize another . . . ." 18 Pa.C.S.A § 2706(a)(1).[3] A TT Law conviction is not always a Crime Involving Moral Turpitude (a "CIMT"), negating a categorical finding otherwise, which, when viewed in light of the entire record, necessitates a finding that the Department failed to meet its burden in establishing removability pursuant to the INA's CIMT removability clause. Id.; see also 8 U.S.C. § 1227(a)(2)(A)(i).

In "determining whether a state law conviction constitutes a [crime involving moral turpitude] . . . [the Third Circuit] ha[s] historically applied a categorical approach, focusing on the underlying criminal statute rather than the alien's specific act." Jean-Louis v. Att'y Gen., 582 F.3d 462, 465 (3d Cir. 2009). Under the categorical approach, one must "read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute." Partyka v. Att'y Gen., 417 F.3d 408, 411 (3d Cir. 2005). As a general rule, a criminal statute is determined to define a crime as categorically involving moral turpitude "only if all of the conduct [the statute] prohibits is turpitudinous." Id. If all of the conduct prohibited by the statute involves moral turpitude, then an alien's conviction under that statute was necessarily one for a CIMT and, with that, the analysis would ends.

[3] Petitioner concedes that a conviction under the Commonwealth of Pennsylvania's TT Law is a crime for which a sentence of one year or longer may be imposed. The only question before the Court is whether the TT Law is a Crime Involving Moral Turpitude. See 8 U.S.C. § 1227(a)(2)(A)(i)

See In re Ajami, 22 I. & N. Dec. 949 (BIA 1999). The analysis turns to the modified categorical approach when and only when "a statute covers both turpitudinous and non-turpitudinous acts," so as to allow a deciding court to "look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude." Partyka, 417 F.3d at 411. Here, the TT Law includes conduct that is both a CIMT and not a CIMT; the Immigration Court, therefore, erred in finding the TT Law to categorically be a CIMT.

When "considering whether a statute encompasses turpitudinous conduct, this Court "ha[s] held that the hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation. Id. at 414 (internal citations omitted). As this Court is well aware, the Act does not define "moral turpitude." Partyka, 417 F.3d at 413. Relying on Board precedent, however, this Court has held that a CIMT is found in "conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general." Knapik v. Ashcroft, 384 F.3d 84, 87 (3d Cir. 2004) (citing Matter of Franklin, 20 I. & N. Dec. 867, 868 (BIA 1994). An act is turpitudinous if it "is accompanied by a vicious motive or a corrupt mind." Partyka, 417 F.3d at 413.

As noted, one violates the TT Law when he "communicates, either directly or indirectly, a threat to . . . commit any crime of violence with intent to terrorize

another . . . ." 18 Pa.C.S.A § 2706(a)(1). The TT Law prohibits threats to commit a "crime of violence." Therefore, to ascertain whether the least culpable conduct necessary to sustain a conviction under the TT Law, a determination as to what actions qualify as crimes of violence under the TT Law is necessary. Then, if the least culpable conduct constituting a "crime of violence" is non-turpitudinous, the underlying criminal statute can rightly be considered as being divisible, rather than categorical.

In Bovkun v. Ashcroft, the Third Circuit considered Section 2706, Title 18 of the Pennsylvania Code. Bovkun v. Ashcroft, 283 F.3d 166, 170 (3d Cir. 2002). There, the Court found that Pennsylvania lacked a definition to a "crime of violence," and looked to Section 16, Title 18 of the United States Code for guidance. Id. The Court noted that

> [t]he actus reus of this offense is a threat to commit a crime of violence, and the mens rea is . . . the intent to terrorize another . . . . Because the actus reus must be shown in every case, Section 2706 always demands proof of a 'threat[] to commit a crime of violence.' The Pennsylvania Legislature has not defined the meaning of the term 'crime of violence' as it is used in Section 2706, and therefore the term is to be construed according to the fair import of its terms.

Id. (citing 18 Pa.C.S.A. § 105; 18 Pa.C.S.A. § 2706; 18 U.S.C. § 16; Commonwealth v. Ferrer, 283 Pa.Super. 21, 423 A.2d 423, 424 (1980)). In applying the "fair import," a "crime of violence," as used in the Pennsylvania statute, is, as described

in Section 16, Title 18 of the United States Code, an offense that has as an element "the use, attempted use, or threatened use of physical force against the person or property of another." Bovkun, 283 F.3d at 170.

With the import of this definition in mind, the Court must adhere to the form and nature of the statute, with respect to itself and as it sits within the overall statutory scheme. Here, the TT Law falls within Chapter 27 of the Pennsylvania Criminal Code, which relates specifically to assaults. See generally 18 Pa.C.S.A §§ 2701 – 2706. The statute and the violence, or attempted violence it criminalizes includes within its broad scope, the simplest of assaults to the serious aggravated assaults—each with its varying degrees of violence, intents and the like. Id. Read differently, the Pennsylvania Simple Assault statute, a non-turpitudinous crime, is clearly encompassed within the meaning of "crime of violence," as it, in turn is defined as "(1) attempt[ing] to cause or intentionally, knowingly or recklessly caus[ing] bodily injury to another; (2) negligently caus[ing] bodily injury to another with a deadly weapon; or (3) attempt[ing] by physical menace to put another in fear of imminent serious bodily injury." Pa.C.S.A. § 2701; see also Jean-Louis, 582 F.3d at 468 (finding that the least culpable conduct in the Pennsylvania Simple Assault statute was "reckless," and, therefore, not categorically a CIMT).

Provided that a conviction under the TT Law can be sustained by proving a threat to commit simple assault, and because simple assault itself is non-

turpitudinous, this Court must conclude that the threat is likewise non-turpitudinous. Thus, the TT Law is indeed divisible, because it encompasses both turpitudinous and non-turpitudinous conduct; consequently, this means that Petitioner's conviction should have been evaluated under the modified categorical approach, rather than the categorical approach. Both the Board and the Immigration Court erred in their application of the categorical approach, and, therefore, this Court must grant review of this Petition.

III. The Immigration Court Incorrectly Determined that the FR Law is Categorically a Firearms Offense under the Act, and, therefore, this Court Must Grant Review of this Petition.

The Immigration Court erred in holding that Section 6108, Title 18 of the Pennsylvania Code, which is the carrying of a concealed firearm within the geographic boundaries of the City of Philadelphia, is categorically a "firearm offense," under Section 1227(a)(2)(C), Title 8 of the Act. See 8 U.S.C. § 1227(a)(2)(C); 18 Pa.C.S.A. 6108; 18 U.S.C. § 921(a). Given this, the Immigration Court erred in sustaining Petitioner's removability under Section 1227(a)(2)(C), Title 8 of the Act. Id.

Here, the Court's review is limited to the Immigration Court's decision; the Board failed to consider the instant argument. Section 1227(a)(2)(C), Title 8 of the United States Code states, in relevant part that any

> alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device . . . in violation of any law is deportable.

8 U.S.C. § 1227(a)(2)(C). The Act defines a "firearm" as:

> [1] any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [2] the frame or receiver of any such weapon; [3] any firearm muffler or firearm silencer; or [4] any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a) (emphasis added). In Pennsylvania, the FR Law of which Petitioner was convicted makes it unlawful for one to

> carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless: (1) such person is licensed to carry a firearm; or (2) such person is exempt from licensing under section 6106(b) of this title (relating to firearms not to be carried without a license).

18 Pa.C.S.A. § 6108.

In sustaining removability under Section 1227(a)(2)(C), Title 8 of the United States Code, the Immigration Court incorrectly relied on Matter of Chairez-

Castrejon, 26 I&N Dec. 349 (BIA 2014). See 8 U.S.C. § 1227(a)(2)(C); Matter of Chairez-Castrejon, 26 I&N Dec. 349 (BIA 2014). The Immigration Court noted that

> [Petitioner] contends that Title 18, Section 6108, Pennsylvania Crimes Code for carrying a firearm in public, does not constitute a law or regulation relating to firearms under INA Section 237(a)(C) unless the Government can meet its burden of proof by clear and convincing evidence that the [Petitioner] did not possess an antique firearm. Without looking at the statute, the Court presumes the state offense here has the exception for an antique weapon. In Matter of Chairez-Castrejon, 26 I&N Dec. 349 (BIA 2014), the Board stated that a[n] antique firearms exception will only be considered overbroad relative to 237(a)(C) if the alien demonstrates that the statute has been successfully applied to prosecute offenses involving antique firearms. [Petitioner] has failed to demonstrate that his or any other case successfully prosecuted under State Statute 6108 involving an antique firearm.

16a-17a (emphasis added). The Board's Chairez holding, however, specifically addressed only those state statutes that have no exception for antique firearms:

> we clarify that a State firearms statute that contains no exception for 'antique firearms' is categorically overbroad relative to [S]ection 237(a)(2)(C) of the Act only if the alien demonstrates that the State statute has, in fact, been successfully applied to prosecute offenses involving antique firearms. The alien may carry that burden by proving that the statute was so applied in his own case . . .

Chairez-Castrejon, 26 I&N Dec. at 356 (emphasis added). Had the Immigration Court reviewed the Pennsylvania Statutes related to criminal prosecution for firearm offenses, the Court would have noticed (rather than presume) that an antique

firearms exception is present within Pennsylvania's Statutes related to firearms. It is in the exceptions themselves that differences exist – differences that would render the Pennsylvania antique firearms exception, under inclusive when compared to the federal antique firearms exception. The Pennsylvania antique firearms exception provides exceptions within itself, which, Petitioner contends, place the same outside of the broad Federal antique firearms exception. It is this under inclusive nature of the Pennsylvania antique firearms exceptions, when compared to the federal firearms exception, which lends error to the Immigration Court finding categorical determination of Petitioner's removability under Section 1227(a)(2)(C), Title 8 of the United States Code. 8 U.S.C. § 1227(a)(2)(C).

The federal antique firearms exception defines an antique firearm as

> (A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
> (B) any replica of any firearm described in subparagraph (A) if such replica—
>
> > (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
> > (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
>
> (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black

> powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

18 U.S.C. § 921(a)(16). In Pennsylvania, an antique firearm is defined as:

> (A) Any firearm with a matchlock, flintlock or percussion cap type of ignition system.
> (B) Any firearm manufactured on or before 1898.
> (C) Any replica of any firearm described in paragraph (B) if such replica:
>
> (i) is not designed or redesigned for using rimfire or conventional center fire fixed ammunition; or
> (ii) uses rimfire or conventional center fire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

18 Pa.C.S.A. § 6118. On its face, the exception is under inclusive of what would be exempt under the federal antique firearms exception. More importantly, however, is that the Pennsylvania antique firearms exception contains an exception within itself:

> [The Pennsylvania antique firearms exception] shall not apply to the extent that such antique firearms, reproductions or replicas of firearms are concealed

> weapons . . . . if such antique firearms, reproductions or replicas of firearms are suitable for use.

Id. at § 6118(b). This is an exception within an exception, which clearly, on its face, places categories of "antique firearms" that are protected under the federal antique firearm exception, within the scope of criminal prosecution for possession. See id.; see also 8 U.S.C. § 1227(a)(2)(C); 18 Pa.C.S.A. 6108; 18 U.S.C. § 921(a).

Simply put, Pennsylvania's antique firearm exception is under inclusive, when compared to the broad definition (without internal exceptions) of the federal antique firearms exception.[4] The Immigration Court's categorical conclusion was a fatal misapplication of the precedent of the Board itself and was clearly contrary to the words of the federal and Pennsylvania antique firearms exceptions. This Court must, therefore, grant review of this Petition.

[4] While referencing the general firearm possession crime, rather than the firearm possession within a first-class city crime, the Pennsylvania Superior Court clearly established that a conviction based on the defendant's possession of a replica of an antique revolver that was common in the late nineteenth century and did not require a gun license to purchase, was supported as the firearm, albeit antique, could be operable. Commonwealth v. Berta, 356 Pa. Super. 403 (Pa. Sup. Ct. 1986); see also 18 Pa.C.S.A §§ 6106, 6108 and 6118.

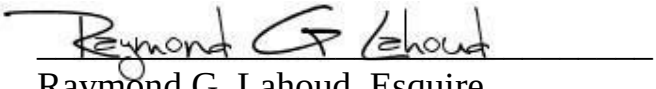
CONCLUSION

For the reasons set forth herein, Petitioner, Jhonathan Victoria Javier, respectfully requests that this Court grant of Review of his Petition.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015



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CERTIFICATION OF WORD COUNT

I, Raymond G. Lahoud, Esquire, being an attorney duly sworn to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 4,379 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman style.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify that the Electronic Brief and Electronic Appendixes are identical to the Hard Copies submitted to the Court and served upon opposing Counsel.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

STATEMENT OF RELATED CASES

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify that I am unaware of any other case that will directly affect or be directly affected by this Court's decision in the present Petition, which is the consolidation of two petitions for review originally brought before this Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on this Petition was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in August of 2011 and is presently a member in good standing of the Bar of said Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud, Esquire

CERTIFICATION OF VIRUS CHECK

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify that a virus check was performed on the Electronic Brief and Electronic Appendixes using Symantec Endpoint Protection 12.1.5 and that no viruses were found.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

CERTIFICATION OF SERVICE

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Jhonathan Victoria Javier, hereby certify that I have served the within Brief and Appendix by depositing a true copy of the same, enclosed in a postpaid properly addressed FedEx wrapper and caused it to be mailed upon the following on this 6th day of November, 2015:

Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

I further attest that, on this 6th day of November, 2015, I caused the within to be filed with this Court, through its Electronic Case Management System, to which the above-named is registered.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 6, 2015

Raymond G. Lahoud, Esquire

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NO. 15-2781 & 15-3068

United States Court of Appeals

FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,
Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals

PETITIONER'S APPENDIX
VOLUME I OF II, p. 1A-26A

RAYMOND G. LAHOUD, ESQUIRE
BAURKOT & BAURKOT
Attorneys for Petitioner, Jhonathan Victoria Javier,
227 South Seventh Street
Easton, Pennsylvania 18042
P: 484-544-0022

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Decision of the Board of Immigration Appeals, August 19, 2015 ..... 23a

Text of Chapter 27, Title 18 of the Pennsylvania Code 27a

Text of Chapter 61, Title 18 of the Pennsylvania Code 49a

No. 15-2781

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,

A 059-303-967 (DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR REVIEW

Petitioner, Jhonathan Victoria Javier (hereinafter referred to as the "Petitioner"), by and through her Counsel, Raymond G. Lahoud, Esquire of Baurkot & Baurkot, respectfully petitions for review the final agency order of the Board of Immigration Appeals (the "Board" or the "BIA") dismissing his Appeal.

Petitioner respectfully petitions the Board's final dismissal and denial dated July 13, 2015, together with any interlocutory rulings, and the decisions, interlocutory and final, of the Immigration Court at York, Pennsylvania (the "Immigration Court"), from where this Petition arises, including, but not limited to any factual and legal conclusions upon which the Board and the Immigration Court relied.

This Petition for Review is timely, as it is filed within thirty (30) days of the Board's dismissal of Petitioner's appeal. See 8 U.S.C. Sec. 1252(b)(1). To date, no court has upheld the validity of the removal order now for which review is petitioned.

Petitioner has attached to this Petition the final and interlocutory decisions of the Board and the Immigration Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: July 27, 2015

Raymond G. Lahoud, Esquire
227 South Seventh Street
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Easton, PA 18044-0801
P: (484) 544-0022
F: (201) 604-6791
E: rgl@bmblawyers.com

Attorneys for Petitioner

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on this Petition was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in August of 2011 and is presently a member in good standing of the Bar of said Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: July 27, 2015

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Petitioner's Petition for Review and a true and correct copy of the Decision of the Board of Immigration Appeals have been served upon the following in the manner and on the date set forth below:

Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

Attorneys for Respondent
Via US Post

Honorable Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Respondent
Via US Post

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: July 27, 2015

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Attorneys for Petitioner

EXHIBIT A
FINAL DECISION OF THE BOARD OF IMMIGRATION APPEALS
DATED JULY 13, 2015

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 20530

Lahoud, Raymond
Baurkot & Baurkot
227 South Seventh Street
P.O. Box 801
Easton, PA 18044

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: VICTORIA JAVIER, JHONATHAN A 059-303-967

Date of this notice: 7/13/2015

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:
Guendelsberger, John

Userteam: Docket

File: A059 303 967 – York, PA

Date: JUL 13 2015

In re: JHONATHAN VICTORIA JAVIER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

The respondent, a native and citizen of the Dominican Republic, appeals the decision of the Immigration Judge, dated April 2, 2015, ordering his removal from the United States. The respondent's appeal, which is opposed by the Department of Homeland Security, will be summarily dismissed.

The respondent's appeal is amenable to summary dismissal because his Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) does not contain statements that meaningfully apprise the Board of specific reasons underlying his challenge to the Immigration Judge's decision to order his removal from the United States. *See* 8 C.F.R. § 1003.1(d)(2)(i)(A); *Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986). While the respondent states that the issues of appeal are questions of law, the respondent raises no arguments on appeal which meaningfully challenge any of the Immigration Judge's holdings. Accordingly, the following order is entered.

ORDER: The respondent's appeal is summarily dismissed.

FOR THE BOARD

No. 15-3068

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JHONATHAN VICTORIA JAVIER,

A 059-303-967 (DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR REVIEW

Petitioner, Jhonathan Victoria Javier (hereinafter referred to as the "Petitioner"), by and through his Counsel, Raymond G. Lahoud, Esquire of Baurkot & Baurkot, respectfully petitions for review the final agency order of the Board of Immigration Appeals (the "Board" or the "BIA") dismissing his Appeal dated August 19, 2015.

Petitioner seeks review of the Board's denial, together with the orders of the Immigration Court at York, Pennsylvania (the "Immigration Court"), from where this Petition arises, including, but not limited to any factual and legal conclusions upon which either the Board or the Immigration Court relied.

This Petition is filed within thirty (30) days of the Board's denial of Petitioner's appeal. See 8 U.S.C. Sec. 1252(b)(1). Further, to date, no court has upheld the validity of the removal order for now which review is sought.

Petitioner submits that pending before this Court is a Petition for Review on a prior Board decision. See Jhonathan Victoria Javier v. Attorney General United States, No. 15-2781 (3d. Cir. filed July 27, 2015).

Petitioner has attached to this Petition the final decision of the Board.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: August 24, 2015

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Attorneys for Petitioner

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on this Petition was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in August of 2011 and is presently a member in good standing of the Bar of said Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: August 24, 2015

Raymond G. Lahoud, Esquire
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E: rgl@bmblawyers.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Petitioner's Petition for Review and a true and correct copy of the Decision of the Board of Immigration Appeals have been served upon the following in the manner and on the date set forth below:

Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

Attorneys for Respondent
Via US Post

Honorable Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Respondent
Via US Post

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: August 24, 2015

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P: (484) 544-0022
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Attorneys for Petitioner

EXHIBIT A
DECISION OF THE BOARD OF IMMIGRATION APPEALS

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

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Baurkot & Baurkot
227 South Seventh Street
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Easton, PA 18044

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: VICTORIA JAVIER, JHONATHAN **A 059-303-967**

Date of this notice: 8/19/2015

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:
Guendelsberger, John

Userteam: Docket

must sv

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A059 303 967 – York, PA Date: AUG 19 2015

In re: JHONATHAN VICTORIA JAVIER

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

This case was previously before us on July 13, 2015, when we dismissed an appeal pursuant to 8 C.F.R. § 1003.1(d)(2)(i)(A). The respondent filed a brief which arrived at the Board of Immigration Appeals on July 10, 2015, prior to the issuance of the decision. Under the circumstances, we will sua sponte reopen the case for the purpose of consideration of the arguments in the respondent's appellate brief. [1]

The respondent, a native and citizen of the Dominican Republic, appeals the decision of the Immigration Judge, dated April 2, 2015, ordering his removal from the United States. The respondent's appeal, which is opposed by the Department of Homeland Security, will be dismissed.

The respondent is charged with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), which requires proof that he was convicted of a crime involving moral turpitude ("CIMT"). The Act also requires that the crime be one for which a sentence of one year or longer may be imposed and that the crime be committed within five years after the date of admission: those provisions are not in dispute.

On or about July 14, 2013, less than five years after the respondent's admission to the United States as a lawful permanent resident, the respondent committed the criminal offense of terroristic threats, for which he was convicted in the Court of Common Pleas of Philadelphia County, Pennsylvania, on March 7, 2014. The statute under which he was convicted, Pennsylvania Consolidated Statutes § 2706(a)(1), has provided, in language last amended in 2002, that a person commits an offense if "the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another."

Under long-standing case law, an offense must have two essential elements to be a CIMT: a culpable mental state and reprehensible conduct. *See Partyka v. Att'y Gen.*, 417 F.3d 408, 414

[1] The brief was accompanied by a motion to accept a late filed brief, which set forth a description of circumstances beyond the respondent's control which caused the brief to be significantly delayed in transit to the Board. Upon consideration of the motion to accept a late filed brief, we conclude that the circumstances described justify a grant of said motion.

(3d Cir. 2005) (the "hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation"); *see also Matter of Louissant*, 24 I&N Dec. 754, 756-57 (BIA 2009) (stating that a "crime involving moral turpitude involves reprehensible conduct committed with some degree of scienter, either specific intent, deliberateness, willfulness, or recklessness"). The offense defined by Pennsylvania Consolidated Statutes § 2706(a)(1) satisfies the culpable mental state requirement because it involves an act carried out against another person with an "appreciable level of consciousness or deliberation" with the criminal goal of terrorizing the threatened victim of criminal violence.

This Board has long held in precedent decisions that offenses involving the intentional transmission of threats of violence are categorical CIMTs. *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). For purposes of CIMT analysis, moreover, we have never required proof that the elements of the offense require that the defendant was actually capable of carrying out either a simple assault or an aggravated assault, or indeed any violent assault at all; what matters is the defendant's culpable intent to instill terror in the victim. While the word "terrorize" is not defined by statute in Pennsylvania, the courts in that state have held that the harm "sought to be avoided is the psychological distress that follows an invasion of the victim's sense of personal security." *See, e.g. Commonwealth v. Tizer*, 454 Pa.Super. 1, 684 A.2d 597, 600 (1996). We conclude that an intentional action whose goal is to inflict such psychological distress violates the norms of society to such a degree as to constitute moral turpitude.

In his appellate brief, the respondent notes that the threat involved might be considered to be a threat to commit simple assault, which in itself is not a CIMT. However, while certain simple assault statutes cover conduct that may not necessarily be turpitudinous, the line of cases dealing with that issue is not relevant here.[2] The central gravamen of the offense at bar relates to the intent to instill terror in the victim, regardless of any unrelated specific intent to commit a separate crime of actual assault.

In light of the foregoing, we conclude that the respondent's conviction for terroristic threats is a categorical CIMT and a valid predicate for the respondent's removal charge under section 237(a)(2)(A)(i) of the Act, as an alien who has been convicted of a CIMT within five years after admission for which a sentence of one year or longer may be imposed. We need not address the question of whether the respondent's conviction for carrying firearms in public in violation of Pennsylvania law also renders the respondent removable (under section 237(a)(2)(C) of the Act).

In conclusion, the respondent is removable from the United States. The respondent has not applied for any form of relief for which he might be eligible in these proceedings. I.J. at 3.

The respondent has filed a stay of removal, which will be denied as moot. The following orders will be entered.

ORDER: Proceedings are sua sponte reopened pursuant to 8 C.F.R. § 1003.2(a).

FURTHER ORDER: The appeal is dismissed and the Immigration Judge's removal order is affirmed.

[2] For example, in *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988), the Board stated that "assault has been said to be an offense that may or may not involve moral turpitude."

A059 303 967

FURTHER ORDER: The respondent's motion for a stay of removal is denied as moot.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File: A059-303-967 April 2, 2015

In the Matter of

JHONATHAN VICTORIA JAVIER	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(C), 237(a)(I).

APPLICATIONS: Termination.

ON BEHALF OF RESPONDENT: ANDREW MAHON, ESQUIRE

ON BEHALF OF DHS: ALICE SONG HARTYE, ASSISTANT CHIEF COUNSEL

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 26-year-old single male alien, native and citizen of Dominican Republic, placed into removal proceedings by a personal service of the Notice to Appear, form I-862 on or about August 28, 2014. Respondent concedes the allegations in the Notice to Appear, 1 through 6. He denies both grounds. Government has submitted evidence into the record, appended ~~dependent~~ at Exhibit 2.

First of all, respondent sought a PCRA which this Court permitted him to pursue in the exercise of discretion. Alas, the trial court denied the respondent's PCRA petition just recently.

Respondent contends that Title 18, Section 6108, Pennsylvania Crimes Code for carrying a firearm in public, does not constitute a law or ~~lower~~ regulation relating to firearms under INA Section 237(a)(C) unless the Government can meet its burden of proof by clear and convincing evidence that the respondent did not possess an antique firearm. Without looking at the statute, the Court presumes the state offense here has the exception for an antique weapon. In the Matter of Chairez-Castrejon, 26 I&N Dec. 349 (BIA 2014), the Board stated that a ~~state firearms statute~~ antique firearms exception will only be considered overbroad relative to 237(a)(C) if the alien demonstrates that the statute has been successfully applied to prosecute offenses involving antique firearms. Respondent has failed to demonstrate that his or any other case successfully prosecuted under State Statute 6108 involving antique firearm. Consequently, the respondent's motion to terminate on that particular issue is denied and the Government has met its burden of proof by clear and convincing evidence.

Respondent also contends that his terroristic threats conviction at~~and~~ allegation 5 has not been established by the Government by clear and convincing evidence as a crime involving moral turpitude.

Terroristic threats in violation of 18 Pennsylvania Consolidated Statute, Section 2706(a)(1) states as follows: "a person commits a crime of terroristic threats if the person communicates either directly or indirectly a threat to commit any crime of violence with intent to terrorize another."

Given the requisite conduct to threaten to commit a crime of violence against another, coupled with the mental state involved, respondent's conviction under this Section of the Statute is a crime involving moral turpitude. Further, although the Board has yet to issue a public decision analyzing terroristic threats, specifically as a CIMT under Pennsylvania Statute, it has long been held that conduct involving the

intentional transmission of threats of violence are categorically crimes involving moral turpitude. See Matter of Ajami, 22 I&N Dec. 949 (BIA 1999) (holding Michigan stalking statute as CIMT because it involves willful course of conduct ~~then~~ to cause another a great fear): Matter of B-, 6 I&N Dec. 98 (BIA 1954) (usury by intimidation and threats of bodily harm): Matter of G-T-, 4 I&N Dec. 446 (BIA 1951): (sending of threatening letters with intent to extort money is a CIMT): Matter of F-, 3 I&N Dec. 361 (BIA 1949) (mailing menacing letters that demand of property and threaten violence to recipient is a CIMT).

Because the Court finds the Government has met its burden of proof by clear and convincing evidence on both grounds of removability, respondent's motion to terminate is inappropriate and is denied.

Respondent does not have the requisite seven years as a permanent resident to seek cancellation of removal as a permanent resident. He was offered voluntary departure. He has declined. Consequently, the following orders are hereby entered.

ORDERS

Respondent is hereby removed from the United States to the Dominican Republic.

WD***Please see the next page for electronic signature***

WALTER A. DURLING
Immigration Judge

//s//

Immigration Judge WALTER A. DURLING

durlingw on May 18, 2015 at 4:23 PM GMT

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 20530

Lahoud, Raymond
Baurkot & Baurkot
227 South Seventh Street
P.O. Box 801
Easton, PA 18044

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: VICTORIA JAVIER, JHONATHAN A 059-303-967

Date of this notice: 7/13/2015

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:
Guendelsberger, John

Userteam: Docket

File: A059 303 967 – York, PA

Date: JUL 13 2015

In re: JHONATHAN VICTORIA JAVIER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

The respondent, a native and citizen of the Dominican Republic, appeals the decision of the Immigration Judge, dated April 2, 2015, ordering his removal from the United States. The respondent's appeal, which is opposed by the Department of Homeland Security, will be summarily dismissed.

The respondent's appeal is amenable to summary dismissal because his Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) does not contain statements that meaningfully apprise the Board of specific reasons underlying his challenge to the Immigration Judge's decision to order his removal from the United States. *See* 8 C.F.R. § 1003.1(d)(2)(i)(A); *Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986). While the respondent states that the issues of appeal are questions of law, the respondent raises no arguments on appeal which meaningfully challenge any of the Immigration Judge's holdings. Accordingly, the following order is entered.

ORDER: The respondent's appeal is summarily dismissed.

FOR THE BOARD

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

Lahoud, Raymond
Baurkot & Baurkot
227 South Seventh Street
P.O. Box 801
Easton, PA 18044

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: VICTORIA JAVIER, JHONATHAN A 059-303-967

Date of this notice: 8/19/2015

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:
Guendelsberger, John

Userteam: Docket

File: A059 303 967 – York, PA

Date: AUG 19 2015

In re: JHONATHAN VICTORIA JAVIER

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

This case was previously before us on July 13, 2015, when we dismissed an appeal pursuant to 8 C.F.R. § 1003.1(d)(2)(i)(A). The respondent filed a brief which arrived at the Board of Immigration Appeals on July 10, 2015, prior to the issuance of the decision. Under the circumstances, we will sua sponte reopen the case for the purpose of consideration of the arguments in the respondent's appellate brief. [1]

The respondent, a native and citizen of the Dominican Republic, appeals the decision of the Immigration Judge, dated April 2, 2015, ordering his removal from the United States. The respondent's appeal, which is opposed by the Department of Homeland Security, will be dismissed.

The respondent is charged with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), which requires proof that he was convicted of a crime involving moral turpitude ("CIMT"). The Act also requires that the crime be one for which a sentence of one year or longer may be imposed and that the crime be committed within five years after the date of admission: those provisions are not in dispute.

On or about July 14, 2013, less than five years after the respondent's admission to the United States as a lawful permanent resident, the respondent committed the criminal offense of terroristic threats, for which he was convicted in the Court of Common Pleas of Philadelphia County, Pennsylvania, on March 7, 2014. The statute under which he was convicted, Pennsylvania Consolidated Statutes § 2706(a)(1), has provided, in language last amended in 2002, that a person commits an offense if "the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another."

Under long-standing case law, an offense must have two essential elements to be a CIMT: a culpable mental state and reprehensible conduct. *See Partyka v. Att'y Gen.*, 417 F.3d 408, 414

[1] The brief was accompanied by a motion to accept a late filed brief, which set forth a description of circumstances beyond the respondent's control which caused the brief to be significantly delayed in transit to the Board. Upon consideration of the motion to accept a late filed brief, we conclude that the circumstances described justify a grant of said motion.

(3d Cir. 2005) (the "hallmark of moral turpitude is a reprehensible act committed with an appreciable level of consciousness or deliberation"); *see also Matter of Louissant*, 24 I&N Dec. 754, 756-57 (BIA 2009) (stating that a "crime involving moral turpitude involves reprehensible conduct committed with some degree of scienter, either specific intent, deliberateness, willfulness, or recklessness"). The offense defined by Pennsylvania Consolidated Statutes § 2706(a)(1) satisfies the culpable mental state requirement because it involves an act carried out against another person with an "appreciable level of consciousness or deliberation" with the criminal goal of terrorizing the threatened victim of criminal violence.

This Board has long held in precedent decisions that offenses involving the intentional transmission of threats of violence are categorical CIMTs. *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). For purposes of CIMT analysis, moreover, we have never required proof that the elements of the offense require that the defendant was actually capable of carrying out either a simple assault or an aggravated assault, or indeed any violent assault at all; what matters is the defendant's culpable intent to instill terror in the victim. While the word "terrorize" is not defined by statute in Pennsylvania, the courts in that state have held that the harm "sought to be avoided is the psychological distress that follows an invasion of the victim's sense of personal security." *See, e.g. Commonwealth v. Tizer*, 454 Pa.Super. 1, 684 A.2d 597, 600 (1996). We conclude that an intentional action whose goal is to inflict such psychological distress violates the norms of society to such a degree as to constitute moral turpitude.

In his appellate brief, the respondent notes that the threat involved might be considered to be a threat to commit simple assault, which in itself is not a CIMT. However, while certain simple assault statutes cover conduct that may not necessarily be turpitudinous, the line of cases dealing with that issue is not relevant here.[2] The central gravamen of the offense at bar relates to the intent to instill terror in the victim, regardless of any unrelated specific intent to commit a separate crime of actual assault.

In light of the foregoing, we conclude that the respondent's conviction for terroristic threats is a categorical CIMT and a valid predicate for the respondent's removal charge under section 237(a)(2)(A)(i) of the Act, as an alien who has been convicted of a CIMT within five years after admission for which a sentence of one year or longer may be imposed. We need not address the question of whether the respondent's conviction for carrying firearms in public in violation of Pennsylvania law also renders the respondent removable (under section 237(a)(2)(C) of the Act).

In conclusion, the respondent is removable from the United States. The respondent has not applied for any form of relief for which he might be eligible in these proceedings. I.J. at 3.

The respondent has filed a stay of removal, which will be denied as moot. The following orders will be entered.

ORDER: Proceedings are sua sponte reopened pursuant to 8 C.F.R. § 1003.2(a).

FURTHER ORDER: The appeal is dismissed and the Immigration Judge's removal order is affirmed.

[2] For example, in *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988), the Board stated that "assault has been said to be an offense that may or may not involve moral turpitude."

FURTHER ORDER: The respondent's motion for a stay of removal is denied as moot.

FOR THE BOARD