



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: KIM, YOUNG HO

A041-607-325

Date of this notice: 1/29/2010

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:

Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

The logo for USAID (United States Agency for International Development), featuring the letters "USAID" in a stylized font.

Falls Church, Virginia 22041

File: A041 607 325 - Atlanta, GA

Date:

JAN 29 2010

In re: YOUNG HO KIM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mark J. Newman, Esquire

ON BEHALF OF DHS: James R. McHenry, III
Assistant Chief Counsel

CHARGES:

Notice: 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

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

APPLICATION: Cancellation of removal

On July 15, 1998, the respondent was convicted for family violence battery under section 16-5-23.1 of the Georgia Code. The judgement and conviction order specifies that he was sentenced to 12 months in a correctional institution. On October 21, 2008, the State Court of Gwinnet County, Georgia, issued an "Order to Clarify Sentence," which specifies that "the negotiated plea called for a sentence of twelve (12) months probation with no period of confinement whatsoever." The court ordered that the respondent "be and is hereby sentenced to twelve (12) months probation" and that the court "did not nor does it now impose any confinement whatsoever."

On April 21, 2009, an Immigration Judge granted the Department of Homeland Security's ("DHS") motion to pretermitt the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). In so doing, the Immigration Judge determined that the respondent's conviction for family violence battery was an aggravated felony (I.J. at 3). The Immigration Judge found that DHS affirmatively showed that the trial court did not have jurisdiction to correct the respondent's sentence because under Georgia law, a sentencing court only has jurisdiction to correct or reduce a sentence within a year of the date the sentence was imposed or within 120 days of the affirmance of the conviction and sentence on direct appeal (I.J. at 3). Thus, the Immigration Judge determined that it did not have to give full faith and credit to the Gwinett County court's order specifying that the respondent was sentenced only to probation (I.J. at 3). Consequently, the Immigration Judge found that the respondent remained convicted of a crime of violence for which the term of imprisonment imposed was at least 1 year,

rendering him statutorily ineligible for cancellation of removal pursuant to sections 101(a)(43)(F) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and 1229b(a)(3) (I.J. at 3). For these reasons, the Immigration Judge granted the DHS's motion to pretermitt.

The Immigration Judge certified the case to the Board for review. *See* 8 C.F.R. § 1003.1(c) (2009). We review the issues raised in this case under *de novo* review. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a lawful permanent resident who is a native of South Korea and a citizen of Korea (Exh. 1). In his appellate brief, the respondent argues that the Immigration Judge erred in finding his state court conviction to be an aggravated felony because the record evidence indicates that he was not sentenced to a term of imprisonment of at least 1 year (Respondent's Br. dated Sept. 24, 2009, at 5). *See* section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). He states that under Georgia law, the trial judge retains jurisdiction over misdemeanor convictions; unlike felony convictions, the trial judge may amend, modify, alter, suspend or probate sentences imposed for misdemeanor convictions at anytime (Respondent's Br. dated Sept. 24, 2009, at 5). According to the respondent, the section of Georgia law relied on by the Immigration Judge pertains to felony convictions (Respondent's Br. dated Sept. 24, 2009, at 5-6). Thus, he asserts, the Gwinnet County court was authorized to issue the order of clarification, and the Immigration Judge should have given full faith and credit to the order (Respondent's Br. dated Sept. 24, 2009, at 3-6).

We decline to address whether the Gwinnet County court's order clarifying the respondent's sentence was *ultra vires*.¹ The modification in the respondent's sentence is entitled to full faith and credit by the Board, without regard to the reasons for the court's clarification. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). Moreover, we cannot conclude from the record that the DHS affirmatively showed that the Gwinnet County court lacked jurisdiction because the provision of state law cited by the respondent seems to indicate that the trial court retains jurisdiction over misdemeanor convictions for purposes of altering, in some fashion, the sentence imposed. *See* section 17-10-3(b) of the Georgia Code.² *Compare Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970)

¹ As such, we decline to determine whether DHS is correct that there is no provision under the Georgia system that allows a sentencing court to impose straight probation (DHS Br. at 12, 18-25). *See United States v. Ayala-Gomez*, 255 F.3d 1314, 1318 (11th Cir. 2001) (stating that probation may be ordered directly under Georgia law). We also are not convinced that the DHS is correct in asserting that the phrase "the judge fixing the sentence shall prescribe a *determinate sentence* for a specific number of months or years," (emphasis added) as provided in section 17-10-1(a)(1) of the Georgia Code, means the judge must impose a sentence of confinement before imposing probation (Respondent's Br. dated Nov. 24, 2009, at 4-5; DHS Br. dated October 13, 2009, at 12; DHS Br. dated Dec. 15, 2009, at 11-12).

² To be sure, this section states that it does not apply to convictions prior to 2001 in which an offender was "sentenced to confinement." But the court's order in this case clarifies that no confinement sentence was ever imposed. However, we decline to consider the evidence submitted by the respondent with his reply brief, dated November 24, 2009, and his Notice of Filing Exhibit, (continued...)

(finding that the California court had the power to issue a modifying order under the writ of coram nobis) with *Matter of Tucker*, 15 I&N Dec. 337 (BIA 1975) (holding that California law did not authorize the court to vacate the alien's conviction following the successful completion of probation); *Matter of H-*, 9 I&N Dec. 460 (BIA 1961) (finding that Michigan law did not provide the justice court with the power to vacate a judgment of conviction). Inasmuch as the record indicates that the respondent was sentenced to a term of probation and not to a term of imprisonment of at least 1 year, we conclude that the respondent's conviction for family violence battery is not an aggravated felony crime of violence. See section 101(a)(43)(F) of the Act.

We next address DHS's argument that the respondent's probation sentence still qualifies the family violence battery offense as an aggravated felony under *United States v. Ayala-Gomez*, *supra* (DHS Br. dated Oct. 13, 2009, at 14-17; DHS Br. dated Dec. 15, 2009, at 8-11). In *United States v. Ayala-Gomez*, *supra*, the Eleventh Circuit held that the "term of imprisonment" described in sections 101(a)(43)³ and (a)(48)(B), 8 U.S.C. §§ 1101(a)(43), (a)(48)(B), includes all parts of a sentence of imprisonment from which the sentencing court excuses the defendant. *Id.* at 1319. Thus, it held that the term of imprisonment imposed on the alien included the parts of the sentence that the Georgia county court probated. *Id.* However, *United States v. Ayala-Gomez*, *supra*, is distinguishable because the sentencing court in that case specifically ordered a term of confinement to be probated. See *United States v. Ayala-Gomez*, *supra*, at 1316-1317. In the respondent's case, the clarifying order specifies that the court imposed only 12 months' probation, and "did not nor does it now impose any confinement whatsoever upon the [respondent]" (Order to Clarify Sentence at 1). Hence, because the order indicates that the respondent was not sentenced to a term of confinement that was subsequently probated, we are not persuaded that *United States v. Ayala-Gomez*, *supra*, applies in the instant case. See also *United States v. Guzman-Bera*, 216 F.3d 1019 (11th Cir. 2000) (holding that an offense is not an aggravated felony if the court imposes probation directly instead of ordering a period of incarceration that is then suspended).

In sum, we will give full faith and credit to the Gwinnet County court's order clarifying the respondent's sentence as being only probation. We also disagree with the DHS's proposition that the respondent's probation sentence still qualifies his conviction for family violence battery as an aggravated felony under *United States v. Ayala-Gomez*, *supra*. Therefore, we conclude that the respondent's family violence battery conviction is not an aggravated felony crime of violence because a term of imprisonment of at least 1 year was not imposed. See section 101(a)(43)(F) of the Act. Hence, we reverse the Immigration Judge's decision to pretermitt the respondent's application

² (...continued)

dated January 6, 2010. This Board does not consider evidence submitted on appeal but rather reviews the record that was before the Immigration Judge. See *Matter of Fedorenko*, 19 I&N Dec. 57, 73-4 (BIA 1984).

³ The provision at issue in *United States v. Ayala-Gomez*, *supra*, was section 101(a)(43)(G) of the Act, pertaining to theft offenses for which the term of imprisonment was at least 1 year. We also note that the case involved the definition of "aggravated felony" as used in § 2L1.2 (Unlawfully Entering or Remaining in the United States) of the federal sentencing guidelines, which incorporates the Act's definition of "aggravated felony" in section 101(a)(43).

for cancellation of removal under section 240A(a) of the Act.⁴ *See* 8 C.F.R. § 1003.1(d)(3)(ii). We will remand the record to the Immigration Judge. On remand, the parties shall be given an opportunity to present further evidence regarding the respondent's cancellation of removal application. The respondent shall also have an opportunity to apply for any other relief for which he may currently be eligible.

Accordingly, the following order is entered.

ORDER: The Immigration Judge's order premitting the respondent's application for cancellation of removal is vacated.

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



FOR THE BOARD

⁴ Having so concluded, the DHS's motion for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). We also exercise our discretion to accept both parties' reply briefs. *See* 8 C.F.R. § 1003.3(c)(1).