



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Seattle, WA 98104**

**DHS/ICE Office of Chief Counsel - TAC
1623 East J Street, Ste. 2
Tacoma, WA 98421**

Name: [REDACTED]

Date of this notice: 8/7/2018

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:
Guendeisberger, John
Grant, Edward R.
Kendall Clark, Molly

Schwartz,
User team: Docket

Falls Church, Virginia 22041

File: [REDACTED] – Tacoma, WA

Date: **AUG 07 2018**

In re: [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amy Kratz, Esquire

ON BEHALF OF DHS: Thomas P. Molloy
Assistant Chief Counsel

APPLICATION: Reconsideration; termination

The respondent has appealed from the Immigration Judge's decision dated February 6, 2018, denying the respondent's untimely motion to reconsider and to terminate his removal proceedings. The Department of Homeland Security (DHS) has filed a brief in opposition to the respondent's appeal. The appeal will be sustained and the proceedings will be terminated.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge denied the respondent's motion to reconsider as untimely (IJ at 3). The Immigration Judge further found that the respondent did not merit equitable tolling of the filing deadline because he was not prevented from timely filing his motion due to fraud or deception (IJ at 4-5). Finally, the Immigration Judge determined that respondent had not established exceptional circumstances warranting sua sponte reopening of his proceedings (IJ at 5-6).

The respondent does not dispute the untimeliness of his motion, but argues that reconsideration of his removability and termination of his removal proceedings is appropriate in the interests of justice. Specifically, he asserts that the United States Court of Appeals for the Ninth Circuit recently held in *U.S. v. Robinson*, 869 F.3d 933 (9th Cir. 2017), that Washington Revised Statutes section 9A.36.021 is overbroad and indivisible and therefore, a conviction for second degree assault under this statute does not qualify as a "crime of violence" under the United States Sentencing Guidelines (USSG). The respondent argues that based on this decision, his 2012 assault conviction no longer qualifies as an aggravated felony "crime of violence" as defined in section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(A)(43)(F).¹ Since

¹ The Ninth Circuit has found that the definition of "crime of violence" under the elements prong of the USSG is "practically identical to" the definition contained in 18 U.S.C. § 16(a). *See United States v. Grajeda*, 581 F.3d 1186, 1191 n.4 (9th Cir. 2009). Moreover, the Supreme Court recently


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this conviction served as the basis for the respondent's sole charge of removability under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), his removal proceedings should be terminated. The DHS opposes the respondent's motion arguing that the motion is untimely and undeserving of equitable tolling of the time limits or sua sponte reconsideration and termination because there was no gross miscarriage of justice (DHS Br. at 3).

Upon our de novo review, we find sua sponte reopening and termination of the respondent's removal proceedings appropriate. Given the Ninth Circuit's recent precedent, the respondent's removability under section 237(a)(2)(A)(iii) of the Act is no longer sustainable (Exh. 1). The respondent has not been charged under any other ground of removability, and the proceedings will, thus, be terminated.

ORDER: The respondent's appeal is sustained, and the Immigration Judge's February 6, 2018, decision is vacated.

FURTHER ORDER: The removal proceedings are terminated without prejudice and the record is returned to the Immigration Court without further action.



FOR THE BOARD

found 18 U.S.C. § 16(b) unconstitutionally void for vagueness, thus the "crime of violence" analysis is limited to 18 U.S.C. § 16(a). See *Dimaya v. Sessions*, 138 S.Ct. 1204 (2018).