U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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

Name: BAUTISTA, ELIZA VALDEZ BER... **A 035-383-901**

Date of this notice: 5/22/2013

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:
Pauley, Roger

williame
Userteam: Docket

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BAUTISTA, ELIZA VALDEZ BERNUDEZ
A035-383-901
C/O USDHS
1623 EAST J ST, STE 5
TACOMA, WA 98421

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1623 East J Street, Ste. 2
Tacoma, WA 98421

Name: BAUTISTA, ELIZA VALDEZ BER... **A 035-383-901**

Date of this notice: 5/22/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

williame
Userteam: Docket

File: A035 383 901 – Tacoma, WA Date: MAY 22 2013

In re: ELIZA VALDEZ BERNUDEZ BAUTISTA a.k.a. Liza Bermudez Valdez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hilary Han, Esquire

CHARGE:

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

APPLICATION: Termination

The respondent, a native and citizen of the Philippines, has appealed from an Immigration Judge's January 10, 2013, decision denying her motion to terminate the removal proceedings and finding her removable as charged. The Department of Homeland Security ("DHS") has not filed a response to the respondent's appeal. The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7). The appeal will be dismissed.

The respondent, a lawful permanent resident, was convicted on November 1, 2011, for the offense of Misuse of Social Security Number in violation of 42 U.S.C. § 408(a)(8) and was sentenced to 13 months confinement. The issue before us is whether that conviction renders the respondent deportable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony; namely, "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *See* section 101(a)(43)(M)(i) of the Act.

The respondent argues that her offense does not involve fraud or deceit under a categorical or a modified categorical approach. The statute of conviction provides:

> Whoever . . . discloses, uses or compels the disclosure of the social security number of any person in violation of the laws of the United States; . . . shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both.

42 U.S.C. § 408(a)(8). The DHS conceded below, and the Immigration Judge found that 42 U.S.C. § 408(a)(8) is not categorically an aggravated felony because the statute is divisible and criminalizes conduct not necessarily involving fraud or deceit (I.J. at 3); *Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010).

Because 42 U.S.C. § 408(a)(8) does not categorically constitute a crime that involves fraud or deceit, we use a modified categorical approach and examine the documents of conviction to

determine whether the conviction "unequivocally" satisfies the aggravated felony definition of an "offense that involves fraud or deceit." *Carlos-Blaza v. Holder, supra*, at 588. The plea agreement states that the respondent pleaded guilty to a crime of fraud. She pleaded guilty to count 4 of the indictment, which states that she "used the social security number of L.P. in violation of the laws of the United States, to wit: to commit wire fraud with regard to the property located at 2828 Riverview Blvd., Everett, Washington, as alleged in paragraphs 1-39 above" (I.J. at 3-4; Exh. 4). Paragraphs 1-39 of the indictment describe how the respondent fraudulently used a prior client's personal information to obtain financing from a mortgage lender for a current client's purchase of a home. Thus, we disagree with the respondent's argument, citing *Aguilar-Turcios v. Holder*, 691 F.3d 1025 (9th Cir. 2012), that the facts she admitted involving an intent to defraud or deceive relate to criminal charges that were dismissed. Contrary to her argument, her violation of the wire fraud laws was necessary to convict her under 42 U.S.C. § 408(a)(8), and she pleaded "as charged" that she misused another's social security number to commit wire fraud. Thus, we agree with the Immigration Judge that the respondent's offense involved fraud or deceit.

The respondent also argues that her conviction is not an aggravated felony because it does not involve a loss to the victim or victims of more than $10,000. In particular, she argues that the discrete act of misusing another person's social security number, for which she was convicted, did not lead to any particular amount of financial loss. She claims that the loss to the mortgage lender referenced in the indictment is related to a scheme of misconduct, i.e. wire and mail fraud, for which she was not convicted. Further, the respondent argues that, even assuming that there was a loss of $10,000 tethered to the conduct for which she was convicted, the loss was suffered by the lending companies, not the individual victim of the misuse of the social security number.

To determine whether the respondent's conviction is for an offense "in which the loss to the victim or victims exceeds $10,000," we use a "circumstance-specific" approach by examining the specific circumstances surrounding the respondent's commission of the offense. *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). The respondent was convicted of count 4 of the indictment, for disclosing and misusing the social security number of L.P. to commit wire fraud as alleged in paragraphs 1-39 of the indictment. We agree with the Immigration Judge that the language in count 4 incorporates the facts in paragraphs 1-39, and particularly in paragraphs 31-38, which shows a loss to the victim exceeding $10,000 (I.J. at 5-6; Exh. 4 at 24-25 (noting a loss to the mortgage company of $34,000)). Further, we disagree that the mortgage company cannot be considered the victim under section 101(a)(43)(M)(i) of the Act. The Supreme Court has held that the "loss to the victim" phrase in section 101(a)(43)(M)(i) refers to the specific circumstances in which the alien committed the fraud crime, not to the generic definition of the crime itself. *Nijhawan, supra*. The respondent's reference to 42 U.S.C. § 408(b)'s definition of victim is simply in relation to who is considered a victim for purposes of court-ordered restitution under section 408. However, under *Nijhawan*, it is irrelevant how victim is defined for purposes of restitution. What is relevant is who is considered the victim in the specific circumstances under which the respondent committed her crime of misuse of a social security number. As her plea agreement indicates, the mortgage company was a victim that suffered a loss in excess of $10,000.

The respondent has also filed a supplemental brief, arguing that the Supreme Court's recent decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), directly impacts her case. She argues that the Supreme Court implicitly held in *Moncrieffe* that the modified categorical approach is limited to criminal statutes that contain several different crimes, each described separately, and that because misuse of a social security number is not such a statute, we may not examine the record of conviction to determine if her conviction involves fraud or deceit.

The issue in *Moncrieffe*, however, was the application of the categorical approach to a state conviction for possession of marijuana with intent to distribute and whether that state statute categorically constitutes an illicit trafficking in a controlled substance aggravated felony under section 101(a)(43)(B) of the Act. In dicta, the Court stated that the categorical approach is qualified and gave as an example state statutes that contain several different crimes, each described separately. *Moncrieffe, supra*, at 1684. We do not view this dicta as an overruling of our holding in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), in which we held that a modified categorical approach, or divisibility analysis, is applied to all statutes regardless of their structure. As we stated in *Matter of Lanferman, supra*, the functional purpose of the modified categorical approach is to determine when documents in an alien's record of conviction may be considered to ascertain if the crime at issue falls within the class of offenses defined by the applicable provision of inadmissibility or removability. *Id.* at 723. In the respondent's case, we have determined commission of wire fraud was "necessary" to convict her under the language of 42 U.S.C. § 408(a)(8), and that she pleaded guilty "as charged" that she misused another's social security number to commit wire fraud.

We disagree with the respondent that *Moncrieffe* prevents a modified categorical approach to determine whether the conviction involves fraud or deceit. The Supreme Court specifically noted that, unlike an analysis of an illicit trafficking conviction, which is a generic crime, determining whether an offense involves fraud or deceit in which the loss to the victim exceeds $10,000 requires a circumstance-specific examination of the conduct involved in the commission of the offense. *Moncrieffe v. Holder, supra*, at 1691; *see also Nijhawan, supra*, at 41 (requiring only fundamentally fair procedures that given an alien a fair opportunity to dispute a Government claim that a prior conviction involved fraud with the relevant loss to the victims).

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WA 98421

DOBRIN & HAN, PC
HAN ESQ. HILARY A.
705 SECOND AVENUE, SUITE 610
SEATTLE, WA 98104

IN THE MATTER OF FILE A 035-383-901 DATE: Jan 10, 2013
BAUTISTA, ELIZA VALDEZ BERNUDEZ

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1623 EAST J STREET, SUITE 3
TACOMA, WA 98421

__ OTHER: _____

_____

COURT CLERK
IMMIGRATION COURT FF

CC: CAPECE, ANTHONY M., ICE ASST. CHIEF COUNSEL
1623 EAST J. STREET, SUITE 2
TACOMA, WA, 98421

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
NORTHWEST DETENTION CENTER
IMMIGRATION COURT
TACOMA, WASHINGTON

In the Matter of:

Eliza BAUTISTA,

Respondent

File Number: **A035-383-901**
In Removal Proceedings

Charge: INA § 237(a)(2)(A)(iii) – an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(M), an offense that involves fraud or deceit in which the loss to the victim exceeds $10,000

Applications: Motion to Terminate Removal Proceedings

On Behalf of the Respondent
Hilary Han, Esq.
Dobrin & Han, PC
705 Second Avenue, Suite 610
Seattle, WA 98104

On Behalf of DHS
John C. Odell, Esq.
Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
1623 East J Street, Suite 2
Tacoma, Washington 98421

DECISION OF THE IMMIGRATION JUDGE

I. Introduction and Procedural History

Respondent, a native and citizen of the Philippines, entered the United States on February 21, 1976 as a legal permanent residence (LPR). (Exh. 1). On November 1, 2011, respondent was convicted of the offense Misuse of Social Security Number in violation of 42 U.S.C. § 408(a)(8) and sentenced to thirteen months in federal prison. (Exh. 4 at 6-7). The Department of Homeland Security (DHS) charged respondent as removable under the Immigration and Nationality Act (INA) § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony defined

under INA § 101(a)(43)(M), an alien convicted of an offense that involves fraud or deceit in which the loss to the victim exceeds $10,000. (Exh. 1). Respondent appeared, with counsel, at a master calendar hearing on December 10, 2012. Through counsel, respondent submitted a Motion to Terminate Removal Proceedings (Exh. 2), which the government opposed (Exh. 3). For the foregoing reasons, the court denies respondent's Motion to Terminate Removal Proceedings.

II. Statement of the Law

In order to determine whether a conviction constitutes a predicate offense for immigration purposes, the court applies the two-step approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990) and *Shepard v. United States*, 544 U.S. 13, 15 (2005). First, the court employs the categorical approach. The court does not look to the facts of the conviction, but will "first make a categorical comparison of the elements of the statute of conviction to the generic definition, and decide whether the conduct proscribed [by the statute] is broader than, and so does not categorically fall within, this generic definition." *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887 (9th Cir. 2003); *Tijani v. Holder*, 628 F.3d 1071, 1075 (asking whether the "full range of conduct" proscribed in the state statute constitutes a CIMT).

Second, if the state statute encompasses conduct not constituting a predicate offense, the court applies the modified categorical approach and looks to a narrow, specified set of documents that are part of the record of conviction. These documents include the "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc) (quoting *Shepard*, 544 U.S. at 16). Looking to these documents allows the court to determine "if the record unequivocally

establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc), *superseded on other grounds by* U.S.S.G. § 2L1.2 cmt. n. 4.

On November 1, 2011 respondent plead guilty to Misuse of Social Security Numbers in violation of 42 U.S.C. § 408(a)(8). (Exh. 4 at 6-7). The federal statute states:

> Whoever ... discloses, uses or compels the disclosure of the social security number of any person in violation of the laws of the United States; ... shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than five years, or both.

42 U.S.C. § 408(a)(8). To be convicted under this statute, respondent must have (1) disclosed, used, or compelled the disclosure of the social security number of another person, and (2) done so in violation of a federal law. DHS and respondent agree (Exh. 3 at 3 & Exh. 2 at 3-4) that because this statute is divisible and criminalizes conduct not necessarily involving fraud or deceit, respondent's conviction does not categorically qualify as an aggravated felony. *See Carlos-Blaza v. Holder*, 611 F.3d 583 (9th Cir. 2010) (holding that a crime that does not contain the element of intent to defraud or deceive does not categorically qualify as an aggravated felony under INA § 101(a)(43)(M)).

The parties disagree as to whether under the modified categorical approach, DHS met its burden to establish that respondent was convicted of a crime involving fraud or deceit in which the loss to the victim exceeds $10,000. INA § 101(a)(43)(M). DHS submitted the Judgment in respondent's criminal case, which states respondent "pleaded guilty to count(s) 4 of the Indictment." (Exh. 4 at 6). Count 4 in the Indictment states:

> On or about July 7, 2006, within the Western District of Washington, LIZA BAUTISTA, disclosed and used the social security number of L.P. in violation of the laws of the United States, to wit: to commit wire fraud with regard to the property located at 2828 Riverview Blvd., Everett, Washington, as alleged in paragraphs 1-39 above.

(Exh. 4 at 24-25). Paragraphs 1-39 in her Indictment (*Id.* at 12-22) and the Statement of Facts in her Plea Agreement (*Id.* at 29-31) describe how respondent fraudulently used a prior client's personal information to obtain financing from a mortgage lender for a current client's purchase of a home. Count 4 in the Indictment and the description of the basis of her conviction makes clear that the predicate offense for respondent's conviction under 42 U.S.C. § 408(a)(8) was wire fraud, a crime that self-evidently involves fraud or deceit.

Citing to *Aguilar-Turcios*, respondent argues that her conviction did not *necessarily rest* on her intent to deceive or defraud and therefore does not qualify as an aggravated felony under INA § 101(a)(43)(M). (Exh. 2 at 6). The court agrees with respondent that it can only rely on the facts for which her conviction necessarily rested. *See Aguilar-Turcios v. Holder*, 691 F.3d 1025, 1032-33 (9th Cir. 2012) ("'It is not enough that an indictment merely allege a certain fact or that the defendant admit to a fact.' Instead, to conclude that 'the factfinder necessarily found the elements of the generic crime,' the modified categorical approach requires that 'the defendant could not have been convicted of the offense of conviction *unless* the trier of fact found the facts that satisfy the elements of the generic crime.'") (emphasis in original) (quoting *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011)). 42 U.S.C. § 408(a)(8) has two elements: (1) that respondent disclose, use, or compel the disclosure of the social security number of another person; and (2) that this was done so in a way that violated a federal law. Respondent's contention that "the only facts relevant to her guilty plea to this particular offense were her admissions that she used the social security number of L.P., a former client, on a loan application without L.P.'s consent" (Exh. 2 at 6) addresses only the first element of 42 U.S.C. §408(a)(8) and ignores the second element, *i.e.* the statutory requirement that respondent's use of L.P.'s social security number must have been "in violation of the laws of the United States" (42 U.S.C.

§ 408(a)(8)). Count 4 in the Indictment clearly states that the law of the United States that respondent violated was "wire fraud with regard to the property located at 2828 Riverview Blvd., Everett, Washington." (Exh. 4 at 24-25). Respondent's conviction necessary rested on the fact that she committed wire fraud, and thus her conviction necessarily rested on the fact that it involved fraud or deceit. *See Nijhawan v. Holder*, 557 U.S. 29, 32 (2009) (holding that a conviction for wire fraud qualified as an aggravated felony under INA § 101(a)(43)(M)).

Respondent also argues that her conviction under 42 U.S.C. § 408(a)(8) did not cause a loss to the victim in excess of $10,000. (Exh. 2 at 7-11). Both parties agree that the loss to the victim must "be tied to the specific counts covered by the conviction." *Nijhawan*, 557 U.S. at 31; *see also Chang v. INS*, 307 F.3d 1185, 1191 (9th Cir. 2002). As stated above, respondent plead guilty to Count 4 in the Indictment, which states:

> On or about July 7, 2006, within the Western District of Washington, LIZA BAUTISTA, disclosed and used the social security number of L.P. in violation of the laws of the United States, to wit: to commit wire fraud with regard to the property located at 2828 Riverview Blvd., Everett, Washington, as alleged in paragraphs 1-39 above.

(Exh. 4 at 24-25). Although Count 4 incorporates paragraphs 1-39 in the Indictment, the only paragraphs relevant to the scheme against "L.P." are paragraphs 31-38. (*Id.* at 20-22). The Indictment states that the lender "Argent Mortgage Co., or its successor in interest" sold the property "out of foreclosure at a minimum loss of approximately $34,000.00" (¶ 35), and that respondent profited a "loan origination commission of $5,728.00 ... as well as a yield spread premium rebate of $2,864.00" (¶ 38). The court finds that these monetary losses listed in the Indictment under Count 4 satisfy INA § 101(a)(43)(M)'s requirement that the loss to the victim exceed $10,000.

Respondent argues that the conviction records fail to demonstrate that her "discrete offense of misuse of a social security number" led to any discernible amount of loss. *See* Resp.'s

Rely to DHS Opposition to Motion to Terminate Removal Proceedings at 2. This reading of Count 4 would narrow the "specific count covered by the conviction" inquiry mandate from *Nijhawan* and *Chang* to a "specific line or act listed in the specific count covered by the conviction" inquiry and ignore the fact that Respondent was found to have misused L.P.'s social security number *to commit wire fraud.* Respondent's Plea Statement and the information in the Indictment indicate that she fraudulently used L.P.'s personal information, including L.P.'s social security number, to obtain fraudulent loans to purchase property. Respondent would not have been able to obtain the fraudulent loan without L.P.'s social security number and it is immaterial that respondent needed to use L.P.'s other personal information and financial information to obtain the loan. The court finds that under Count 4, the specific count that respondent was convicted under, establishes that respondent caused a monetary loss in excess of $10,000.

In addition, respondent argues that the lending company who unwittingly made the fraudulent loan does not qualify as a "victim" under INA § 101(a)(43)(M) because 42 U.S.C. § 408(a)(8) only protects the Social Security Commissioner and individuals. (Exh. 2 at 10-11). The court need not answer the question as to whether the "victim" for immigration purposes must rely on the protected class defined by the statute of conviction because respondent fails to cite any support that the lending company "Argent Mortgage Co., or its successor in interest" do not qualify as an "individual" under 42 U.S.C. § 408(a)(8). In fact, in *United States v. Baker*, the Seventh Circuit affirmed that a restitution order against a defendant convicted of using another person's Social Security number in violation of 42 U.S.C. § 408 be paid to Coldwell Banker Residential Brokerage, the lending company in the case. *United States v. Baker*, 134 F. App'x

955 (7th Cir. 2005). The court finds that a lending company qualifies as a "victim" under 101(a)(43)(M)(i).

For the foregoing reasons, the court denies respondent's Motion to Terminate Removal Proceedings.

III. Order

It is **HEREBY ORDERED** that the Respondent's Motion to Terminate Removal Proceedings is **DENIED.**

It is **HEREBY FURTHER ORDERED** that the charge of removal in the Notice to Appear is sustained.

1-10-13
Date

Tammy L. Fitting
Immigration Judge