



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: M [REDACTED], M [REDACTED] V [REDACTED]

A [REDACTED]-705

Date of this notice: 8/23/2018

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:
Malphrus, Garry D.
Liebowitz, Ellen C
Geller, Joan B

Userteam: Docket

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Ng

Falls Church, Virginia 22041

File: [REDACTED] 705 – Hartford, CT

Date: **AUG 23 2018**

In re: M [REDACTED] V [REDACTED] M [REDACTED]
[REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Justin Conlon, Esquire

ON BEHALF OF DHS: Leigh Mapplebeck
Senior Attorney

APPLICATION: Cancellation of removal

This case is before the Board pursuant to a January 23, 2018, order of the United States Court of Appeals for the Second Circuit granting the parties' joint stipulation to remand the case for further consideration of whether the respondent's convictions under Connecticut General Statutes sections 53a-124 and 53a-125, both of which incorporate section 53a-119, are "theft offense" aggravated felonies, thereby rendering her ineligible for cancellation of removal. On remand, the respondent argues that she has not been convicted of an aggravated felony and requests a remand to the Immigration Court for further consideration of her eligibility for cancellation of removal. The Department of Homeland Security argues that the Board should affirm the Immigration Judge's decision finding the respondent ineligible for cancellation of removal and dismiss her appeal. The record will be remanded.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Jamaica, was charged with removability 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 as defined by section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least 1 year, and under section 237(a)(2)(A)(i) of the Act, as an alien who, at any time after admission, is convicted of two or more crimes involving moral turpitude. The respondent conceded her removability under section 237(a)(2)(A)(i) of the Act but denied the charge under section 237(a)(2)(A)(iii) and requested cancellation of removal for certain permanent residents pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b(a). In a decision dated April 2, 2014, the Immigration Judge concluded that the respondent was convicted of an aggravated felony and denied her application for cancellation of removal. The respondent filed an appeal from that decision.

On May 29, 2015, we dismissed the respondent's appeal and affirmed the Immigration Judge's decision after determining that the respondent's convictions under sections 53a-124 and 53a-125 of the Connecticut General Statutes for larceny in the third and fourth degree, respectively, were for aggravated felonies. In doing so, we noted that the Second Circuit had previously determined that offenses committed pursuant to the Connecticut larceny statutes are "theft offense" aggravated felonies under section 101(a)(43)(G) of the Act. See *Dawkins v. Holder*, 762 F.3d 247 (2d Cir. 2014); *Almeida v. Holder*, 588 F.3d 778, 789 (2d Cir. 2009); *Abimbola v. Ashcroft*, 378 F.3d 173, 180 (2d Cir. 2004). The respondent filed a petition for review from that decision.

On July 7, 2016, the Second Circuit granted the parties' joint motion to remand for further consideration of whether the respondent's offenses are aggravated felonies, including whether we are bound by the Second Circuit's decisions in *Abimbola* and *Almeida*, in light of the fact the decisions did not apply the Board's reasoning set forth in *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). The remand indicated that if the Board determines that *Matter of Garcia-Madruga* conflicts with Second Circuit precedent, then we should consider whether to invoke our authority under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (hereinafter "*Brand X*"), to reexamine if the respondent's convictions are for "theft offense" aggravated felonies. Finally, the remand requested the Board to consider the effect, if any, of the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016).

On June 30, 2017, we dismissed the respondent's appeal again. We observed that, after the Board issued *Matter of Garcia-Madruga*, the Second Circuit issued at least two decisions determining that the Connecticut larceny statutes constitute categorical theft offenses. Compare *Dawkins v. Holder*, 762 F.3d 247, and *Almeida v. Holder*, 588 F.3d 778, with *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (distinguishing between theft-based and fraud-based offenses when considering whether an offense constitutes an aggravated felony, namely as an individual perpetrating a fraud offense frequently has the consent of the owner, unlike theft-based offenses). Because there was subsequent Second Circuit precedent, we deferred to the court's interpretation of the statutes. We declined to exercise our *Brand-X* authority and concluded that an examination of the impact of the holding in *Mathis v. United States*, 136 S. Ct. at 2243, was unnecessary given the disposition of the case. The respondent filed a petition for review from that decision.

On January 23, 2018, the Second Circuit granted the parties' joint stipulation to remand the case for further consideration of whether the respondent's convictions are for aggravated felonies in light of the Second Circuit's order in *Bastian-Mojica v. Sessions*, 716 Fed. App'x. 45 (2d Cir. 2017), in which the court indicated that it does not consider *Almeida* and *Abimbola* to have adjudicated the issue of whether Connecticut General Statutes section 53a-119 is categorically a "theft offense" aggravated felony in light of the distinction between theft and fraud offenses discussed in *Matter of Garcia-Madruga*.

In light of the Second Circuit's statement that it does not consider its own case law to have resolved the specific issue before us in this matter, and in light of the court's discussion of the impact of relevant Board case law on this issue, we conclude that, under these circumstances, the respondent has not been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act. Accordingly, the respondent's appeal will be sustained and the record will be remanded for further consideration of her application for cancellation of removal, including whether the

respondent is otherwise eligible for such relief and, if so, whether relief would be warranted in the exercise of discretion. The Immigration Judge may also address any other issues he deems appropriate. The following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision.



FOR THE BOARD