U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Falls Church, Virginia 22041

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DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: GUSTKE, CATERINA

A 089-203-196

Date of this notice: 12/14/2017

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.
Mullane, Hugh G.
Pauley, Roger

Userteam: Docket

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5107 Leesburg Pike, Suite 2000
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GUSTKE, CATERINA
21828-021/A089-203-196
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11070 ALABAMA HWY 14
ALICEVILLE, AL 35442

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: GUSTKE, CATERINA

A 089-203-196

Date of this notice: 12/14/2017

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:
Malphrus, Garry D.
Mullane, Hugh G.
Pauley, Roger

Userteam:

File: A089 203 196 – Aliceville, AL Date: DEC 14 2017

In re: Caterina GUSTKE a.k.a. Caterina Robinson

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paul Vincent Balducci, Esquire

ON BEHALF OF DHS: Thomas Ayze
Assistant Chief Counsel

APPLICATION: Termination

The respondent appeals from an Immigration Judge's July 19, 2017, decision ordering her removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained, the Immigration Judge's decision will be vacated, and the removal proceedings will be terminated.

On June 8, 2017, the DHS began these removal proceedings by filing a notice to appear in Immigration Court, charging the respondent with being removable from the United States under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i) (2012), as an alien convicted of a crime involving moral turpitude ("CIMT"), committed within 5 years after the date of admission, and for which a sentence of 1 year or longer may be imposed (Exh. 1). In support of that charge, the DHS alleged that the respondent is a native and citizen of Germany who was admitted to the United States as a nonimmigrant in March 1998, and whose status was adjusted to that of a lawful permanent resident of the United States in February 2013 (Exh. 1, allegations 1-4). Further, the DHS alleged that the respondent sustained a 2017 conviction in a United States district court for the offense of theft of mail by a postal employee, a violation of 18 U.S.C. § 1709 which she committed in March 2015 and for which a term of imprisonment of more than 1 year may be imposed (Exh. 1, allegations 5-6).

At a removal hearing conducted on July 19, 2017, the respondent—who was then *pro se*—admitted the foregoing allegations (Tr. at 3-7), and the Immigration Judge sustained the removal charge on the basis of those admissions, while also considering documentary evidence of the respondent's 2017 conviction (IJ at 2; Tr. at 7). Finding no available relief, the Immigration Judge ordered the respondent removed to Germany (IJ at 2-3). This timely appeal followed, in which the respondent—now represented by counsel—argues that she is not removable under section 237(a)(2)(A)(i) of the Act because the DHS did not prove that her offense of conviction was "committed within five years … after the date of admission." We agree with the respondent.[1]

[1] As the respondent was pro se below, and the legal issue is somewhat complex, we will not hold the respondent to her conclusion.

An alien's CIMT conviction triggers removability under section 237(a)(2)(A)(i) of the Act only if the alien committed the crime within 5 years after the date of the admission by virtue of which she was then present in the United States. *See Matter of Alyazji*, 25 I&N Dec. 397, 406 (BIA 2011). In other words, an "admission" triggers section 237(a)(2)(A)(i)'s 5-year clock only if it *commenced* the period of presence during which the alien committed her crime; an admission which merely *extended* an existing period of presence does not count. *Id.* at 406-08.

Applying *Alyazji* to the present facts, we look first to the date when the respondent committed her offense—March 2015—and ask whether, on that date, she was "in the United States pursuant to an admission that occurred within the prior 5-year period." *Id.* at 406. Based on the facts alleged in the notice to appear and found by the Immigration Judge, the answer to that question is no. When the respondent committed her theft of mail offense, she was still in the United States pursuant to her 1998 admission as a nonimmigrant. Although she had adjusted status in 2013, that new admission "did not reset the 5-year clock because it added nothing to the deportability inquiry; it merely extended or reauthorized [her] then-existing presence, but it did not change [her] status vis-à-vis the grounds of deportability." *Id.* at 408.

In its opposition brief, the DHS argues for the first time that the respondent is removable under section 237(a)(2)(A)(i) because in April 2014—less than 1 year before she committed her theft of mail offense—she was "admitted" to the United States as a returning lawful permanent resident (DHS Br. at 2, 4-5 & n.1). We find that argument unpersuasive, for several reasons. Most importantly, section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), clearly provides that the entry into the United States of a returning lawful permanent resident is *not* an "admission" unless one or more of six statutory conditions applies. *Accord Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). The DHS does not allege that any of those six conditions applied to the respondent as of the date of her 2014 entry, and therefore the date of that entry could not have been a "date of admission" under section 237(a)(2)(A)(i) of the Act.

In light of the foregoing, we conclude that the DHS has not proven by clear and convincing evidence that the respondent is removable from the United States under section 237(a)(2)(A)(i) of the Act. Accordingly, we will vacate the Immigration Judge's decision and terminate the removal proceedings.

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the removal proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MIAMI, FLORIDA

File: A089-203-196 July 19, 2017

In the Matter of

CATERINA GUSTKE	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(i) of the Immigration and Nationality Act; respondent having been convicted of a crime involving moral turpitude within five years after her admission to the United States

APPLICATIONS: None

ON BEHALF OF RESPONDENT: Pro Se
Aliceville Correction Institute Box 445
Aliceville, Alabama 35442

ON BEHALF OF DHS: Thomas Ayes, Assistant Chief Counsel
Immigration Customs Enforcement
333 South Miami Avenue 2nd Floor
Miami, Florida 33130

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 55-year-old divorced female native and citizen of Germany. She initially entered the United States on a non-immigrant worker's visa March 18th, 1998, and eventually adjusted status and became a lawful permanent resident on February 13th of 2013. Respondent thereafter on March 9th of 2017 was

convicted in the southern district of Georgia for the offence of theft of mail matter by a postal employee that had been committed on or about March 15th of 2015, to which she was sentenced to six months of incarceration and to pay a small amount of restitution. At a master calendar hearing conducted today on July 19th, 2017, the respondent waived right to counsel, represented herself, admitted the six allegations, and based on those admissions as well as group Exhibit 2 which included the judgment of conviction the court found the charge of removal sustained by clear and convincing evidence. See generally Woodby v INS, 385 U.S. 276 (1966). Thereafter, the respondent designated Germany as the country of removal.

Respondent's children are ages 36, 29, and 16. The two older children are lawful permanent residents of the United States. Her youngest child, the 16-year-old, is a United States citizen. That child cannot petition for the respondent until its 21st birthday. As the older two children could petition, it would not be as a relative [indiscernible] classification for which there is multiple years of wait before that would become current. Under the test in Lenier, the respondent would not be eligible immediately for a visa to therefore adjust status. Respondent has no fear of returning to Germany; thus, there's no relief with protection or under the Convention Against Torture. The respondent has indicated she'd like to have the mercy of the court and some exercise of discretion. The court does not have that exercise of discretion or authority permitted under the Immigration and Nationality Act. Accordingly, the following orders are hereby entered.

ORDERS

The respondent is found subject to removal based on the charge contained in the Notice to Appear.

Further ordered that respondent is hereby removed from the United States to Germany.

J. DANIEL DOWELL
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE J. DANIEL DOWELL, in the matter of:

CATERINA GUSTKE

A089-203-196

MIAMI, FLORIDA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Allyson Mead

ALLYSON MEAD (Transcriber)

NATIONAL CAPITOL CONTRACTING

September 22, 2017

(Completion Date)