U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: AL MAQTARI, NASER NOAMAN ... **A 077-251-699**

Date of this notice: 6/2/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Liebowitz, Ellen C
Malphrus, Garry D.

Userteam: Docket

File: A077 251 699 – Arlington, VA Date: JUN – 2 2017

In re: NASER NOAMAN MOHAMED AL MAQTARI a.k.a. Naser Noaman Al-Maqtari

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jay S. Marks, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

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

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(M)

APPLICATION: Removability

This case was last before us on December 30, 2014, at which time we dismissed the respondent's appeal from the Immigration Judge's September 11, 2012, decision finding him removable as an alien convicted of an aggravated felony and therefore ineligible for asylum under section 208(b)(2)(A)(ii), (B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).[1] This case is now before us on remand pursuant to a June 11, 2015, order from the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit granted a remand request for us to reconsider our December 30, 2014, decision in light of *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. 2014), which interpreted *Descamps v. United States*, 133 S. Ct. 2276 (2013).

We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly

[1] The Immigration Judge granted the respondent's applications for withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture (CAT). The Department of Homeland Security (DHS) did not appeal those determinations. The full history of this case is set out in our December 30, 2014, decision.

erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii). The respondent's appeal will be sustained, and the record will be remanded.

The respondent was charged with being removable under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i), i.e., an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.[2]

The respondent was convicted in 2009 of violating 18 U.S.C. § 641, which reads:

> § 641. Public money, property or records
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--
> Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

To determine whether the respondent is removable as charged under section 101(a)(43)(M)(i) of the Act as an alien convicted of an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000, we employ the "categorical approach" and focus only on the elements of the offense, and not on the facts surrounding the commission of the crime. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, *supra*, at 2281; *Omargharib v. Holder*, *supra*, at 196; *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). If the statute is not a categorical match, we next must determine whether the statute is divisible – i.e., it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction. If it is divisible, and if at least one, but not all, of the offenses under the statute qualifies as an aggravated felony within the meaning of section 101(a)(43)(M)(i) of the Act, we must attempt to identify the respondent's actual crime of conviction for the purpose of determining whether it falls within section 101(a)(43)(M)(i). *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2281; *Omargharib v. Holder*, *supra*, at 197-98; *Matter of Chairez*, *supra*, at 821-22. To do so, we would employ the "modified categorical approach" by looking to a limited class of documents in the record of conviction, such as a charging document, jury instructions, a plea agreement, or a transcript of the plea colloquy between the defendant and the judge. *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2283-86; *Matter of Chairez*, *supra*, at 822.

[2] The lodged charge on the March 16, 2011, Form I-261 refers generally to section 101(a)(43)(M), but there is no dispute in this case that section 101(a)(43)(M)(ii) of the Act (relating to tax evasion) is not at issue.

We first consider whether 18 U.S.C. § 641 categorically describes offenses involving fraud or deceit. The Supreme Court has advised that "[t]he scope of [section 101(a)(43)(M)(i) of the Act] is not limited to offenses that include fraud or deceit as formal elements. Rather, [it] refers more broadly to offenses that 'involv[e]' fraud or deceit – meaning offenses with elements that necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, 565 U.S. 478, 483-84 (2012). The Court added that for purposes of section 101(a)(43)(M) of the Act, the term "deceit" means "the act or process of deceiving (as by falsification, concealment, or cheating)." *Id.* (citing Webster's Third New International Dictionary 584 (1993)).

Therefore, the proper inquiry is whether an offense under 18 U.S.C. § 641 necessarily entails fraudulent or deceitful conduct, not whether it did in this particular case. We conclude that it is possible to commit this offense without fraud or deceit. The Supreme Court, in discussing 18 U.S.C. § 641, which proscribes knowing conversions, has advised that knowing conversions include "intentional and knowing abuses and unauthorized uses of government property." *See Morissette v. United States*, 342 U.S. 246, 272 (1952). Conversion "may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact." *Id.* These forms of knowing conversion do not "necessarily entail fraudulent or deceitful conduct." *Kawashima v. Holder*, *supra*, at 484. Because conversion under 18 U.S.C. § 641 does not necessarily entail fraudulent or deceitful conduct, a violation of the statute is not categorically a fraud or deceit offense within the meaning of section 101(a)(43)(M)(i) of the Act.

The next step in the analysis is to determine whether the statute at issue is divisible – i.e., it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction. However, in this case we can skip that step, for even if we assume the statute to be divisible and therefore proceed to the modified categorical approach, we would conclude that the record does not establish that the respondent is removable for a fraud or deceit aggravated felony under current case law.

Applying the modified categorical approach to attempt to identify the respondent's actual crime of conviction, *see Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2284-85; *Omargharib v. Holder*, *supra*, at 197-98, we look first at the November 20, 2009, Judgment issued in connection with the respondent's conviction under 18 U.S.C. § 641 (Exh. 2). The Judgment reflects that the respondent was adjudicated guilty of Count 1 of the Indictment (Exh. 2), which alleged that the respondent "did unlawfully, knowingly, willfully, embezzle, steal, and purloin money or things of value of the United States." The respondent was not necessarily convicted of each of these offenses, for it is acceptable practice for a charging document to state allegations in the conjunctive, although the statute lists multiple offenses in the disjunctive, and a conviction may rest upon proof of any of the offenses alleged. *See United States v. Perry*, 560 F.3d 246, 256 (4th Cir. 2009) (citing *United States v. Champion*, 387 F.2d 561, 563 n.6 (4th Cir. 1967)).

We look next at the respondent's August 27, 2009, Plea Agreement (Exh. 2) to see if it sheds any light on the specific offense of which the respondent was convicted. The Plea Agreement provides that the respondent agreed to plead guilty to "embezzling, stealing, purloining and converting to his use, money and things of value." This language is broader even than that set

forth in the Indictment, in that it includes conversion. However, under the Plea Agreement, the respondent also admitted the facts set forth in the August 27, 2009, Statement of Facts (Exh. 2).[3] The Statement of Facts likewise states broadly that the respondent "embezzled, stole, purloined, and knowingly converted" money or things of value. In addition, the Statement of Facts includes a more specific admission by the respondent that he "misrepresented his income and employment, resulting in the overpayment of government benefits from four federally-funded programs." Although this factual admission may establish that the respondent actually committed a fraud or deceit offense, these specific factual admissions are only "brute facts," which are "extraneous to the crime's legal requirements," *see Mathis v. United States*, *supra*, at 2248-49, since the statute does not refer to misrepresentation aimed at securing government benefits. Thus we cannot rely on the Statement of Facts to conclude that the respondent committed a fraud or deceit offense.

Turning back, then, to the most narrowly tailored language found in the conviction records – the Indictment's language that the respondent did "embezzle, steal, and purloin money or things of value of the United States," we must consider whether any of these offenses does not necessarily entail fraudulent or deceitful conduct. "To steal means to take away from one in lawful possession without right with the intention to keep wrongfully." *Morissette v. United States*, *supra*, at 271. "Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin." *Id.* at 266 n.28 (quoting *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938)). Such an offense does not necessarily entail fraud or deceit.

We therefore conclude that the record does not establish by clear and convincing evidence, as required by section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A), that the respondent is removable as charged under section 237(a)(2)(A)(iii) of the Act as an alien convicted of a fraud or deceit aggravated felony, as defined at section 101(a)(43)(M)(i) of the Act.[4]

Inasmuch as the record does not demonstrate that the respondent is removable as an aggravated felon, we remand the record to allow the Immigration Court to consider the respondent's eligibility for asylum under section 208 of the Act.

Accordingly, the following orders will be entered.

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[3] In *Shepard v. United States*, 544 U.S. 13, 16 (2005), the Supreme Court advised that the modified categorical approach may include examination of "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*" (emphasis added). We therefore may consider the Statement of Facts, which was incorporated into the Plea Agreement.

[4] We need not reach the issue whether any such fraud or deceit resulted in a loss to the victim or victims exceeding $10,000, as would be required to render the respondent removable under section 101(a)(43)(M)(i) of the Act. *See Nijhawan v. Holder*, 557 U.S. 29 (2009).

ORDER: The appeal is sustained with regard to the respondent's removability under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings.

FOR THE BOARD