



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 20530

**WANYOIKE, PAUL KIBUA
HF 5881/A078-496-780
SCI-MAHANAY
301 MOREA RD
FRACKVILLE, PA 17932**

**DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402**

Name: WANYOIKE, PAUL KIBUA

A 078-496-780

Date of this notice: 1/24/2014

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:
Grant, Edward R.

williams
User team: Docket

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Handwritten initials

Falls Church, Virginia 20530

File: A078 496 780 – York, PA

Date:

JAN 24 2014

In re: PAUL KIBUA WANYOIKE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Jon D. Staples
Assistant Chief Counsel

CHARGE:

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

Lodged Sec. 237(a)(1)(D)(i), I&N Act [8 U.S.C. § 1227(a)(1)(D)(i)] -
Conditional resident status terminated

The respondent, a native and citizen of Kenya, has appealed from the Immigration Judge's September 25, 2013, decision sustaining the above charges of removability and ordering his removal. We review findings of fact by the Immigration Judge for clear error, while all other issues, including whether the parties have met the relevant burden of proof, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). The respondent's appeal will be dismissed.

The respondent has not identified any error in the Immigration Judge's determination that he is removable under section 237(a)(1)(D)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1227(a)(1)(D)(i). We affirm the Immigration Judge's determination that the respondent is removable on this basis.

The Immigration Judge correctly concluded that the respondent's conviction for voluntary manslaughter in violation of PA. CONST. STAT. ANN. § 2503 (2007) constitutes an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). The Immigration Judge properly determined that the respondent's offense constitutes a "crime of violence" as defined in 18 U.S.C. § 16(b) because of the substantial risk that force will be used in the commission of such offense. *See Aguilar v. Att'y Gen.*, 663 F.3d 692, 696 (3d Cir. 2011). The respondent asserts that he was wrongly convicted of this offense. However, we do not look behind the fact of conviction to re-litigate the question of guilt or innocence. *See Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991). Accordingly, we affirm the Immigration Judge's determination that the respondent is removable under section 237(a)(2)(A)(iii) of the Act as the result of having been convicted of an aggravated felony crime of violence as defined in section 101(a)(43)(F) of the Act.

We do not find support for the respondent's argument that the Immigration Judge erred in finding him ineligible for relief from removal. The respondent is not eligible for relief under former section 212(c) of the Act, 8 U.S.C. § 1182(c), because this section of the Act was repealed in 1996 and is inapplicable to the respondent's 2007 conviction. *See generally Judulang v. Holder*, 132 S. Ct. 476 (2011). We also do not find support for the respondent's assertion that his conviction may be waived by application of section 237(a)(7)(A) of the Act, which pertains to the ground of removability contained at section 237(a)(2)(E)(i) of the Act, but does not address an aggravated felony offense contained in section 237(a)(2)(A)(iii) of the Act. To the extent that the respondent asserts that he was subject to extreme cruelty, we note that a conviction for an aggravated felony offense is a bar to special rule cancellation of removal under section 240A(b)(2)(A) of the Act, 8 U.S.C. § 1229b(b)(2)(A). *See* section 240A(b)(2)(A)(iv) of the Act.

For the aforementioned reasons, the following order will be entered.

ORDER: The respondent's appeal is dismissed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A078-496-780

September 25, 2013

In the Matter of

PAUL KIBUA WANYOIKE

RESPONDENT

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IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), alien at any time after admission convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the INA, a crime of violence (as defined in Section 16 of title 18 U.S.C. but not including a purely political offense) for which the term of imprisonment ordered is at least one year;

Section 237(a)(1)(D) of the INA, alien with permanent resident status on a conditional status who has had such status terminated.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: JON STAPLES
ASSISTANT CHIEF COUNSEL
Immigration and Customs Enforcement
York, Pennsylvania

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

Respondent is a 40-year-old male, native and citizen of Kenya. On August 1, 2013 the Department of Homeland Security filed a Notice to Appear in this

matter. The filing of the Notice to Appear vested jurisdiction with this Court. That document is marked as Exhibit number 1. On September 25, 2013 the respondent appeared via VTC from SCI Mahanoy. On that date the respondent conceded proper service of the Notice to Appear. Based on the respondent's concessions and admissions of the certificate of service, the Court finds that document has been properly served. On that date the Court took pleadings. Respondent admitted allegations 1 through 6. The Court found that the respondent was removable as charged.

Specifically, the Court finds that the respondent has been convicted of an aggravated felony as that term is defined in Section 101(a)(43)(F) of the INA. Pursuant to Section 101(a)(43)(F) of the INA, the term "aggravated felony" includes "a crime of violence (as defined in Section 16 of Title 18 U.S.C. but not including a purely political offense) for which the term of imprisonment order is at least one year". The referenced provision defines the term "crime of violence" as (aA)— an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or (bB)— any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. 16. When analyzing whether a particular offense constitutes an aggravated felony, the Court is to apply a "categorical approach" and look only at the statutory definition of the offense. See Taylor v. United States, 495 U.S. 575 (1990). The Court is to not consider the factual circumstances of the particular violation. Id. Where the statute is "divisible" however in that and it encompasses first certain classes of criminal acts, some of which are grounds for removal and others of which are not, the Court is to examine the statute through a "modified categorical approach". Matter of Sweetser, 22 I&N Dec. 709, 713-14 (BIA 1999). This approach allows the Court to look beyond the statute to the record of

conviction for the limited purpose of determining whether the alien's conviction falls under the portion of the statute that would render the alien removable. See Alaka v. Attorney General, 456 F.3d 88, 105-106 (3d Cir. 2006); Matter of Vargas-Sarmiento, 23 I&N Dec. 651, 654 (BIA 2004).

The provision under which the respondent was convicted states "a person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by 1. the individual killed or 2. another whom the actor endeavors to kill but he negligently or accidentally causes the death of the individual killed". That provision further states "a person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification) but his belief is unreasonable". The Court would find that most offenses under this provision would include the use of force; however, the Court notes that force is not an element in the offense. Accordingly the Court concludes that the crime in question is not a crime of violence as that term is defined in 18 U.S.C. 16(a). The crime in question is a felony of the first degree under Pennsylvania law. See 18 Pennsylvania Criminal Statute Section 2503(c). The Court concludes that the crime in question is an aggravated felony as that term is defined in Section 101(a)(43)(B) of the INA. As the Supreme Court held in Leocal v. Ashcroft, "Section 16(b) sweeps more broadly than Section 16(a), defining a crime of violence as including 'any other offense that is a felony and that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' Section 16(b) does not thereby encompass all negligent misconduct such as the negligent operation of a vehicle. It simply covers

offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in Section 16 relates not to the general conduct or to the possibility that harm will result from a person's conduct but to the risk that the use of physical force against another might be required in committing a crime. A classic example is burglary. A burglary would be covered under Section 16(b) not because the offense could be committed in a generally reckless way or because someone may be injured, but because burglary by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime". Leocal v. Ashcroft, 543 U.S. 1, 10 (2004).

It is noted the crime in question is a felony. Further, the Court concludes that the crime is one that involves a substantial risk that the actor would use force against the victim in completing the crime; specifically, that the actor would use force against the victim of the offense if the victim attempts to repulse that killing. Accordingly the Court finds that the crime in question, voluntary manslaughter under 18 Pennsylvania Code Section 2503, is a crime of violence as that term is defined in 18 U.S.C. 16(b), regardless of which Section's or subsection is implicated in the offense. Further, the respondent has admitted that he received a sentence of 10 to 20 years for that crime. In accordance with Bovkun v. Ashcroft, 283 F.3d 166, 170-71 (3d Cir. 2002), the Court concludes that the functional equivalent of the sentence is the maximum; that is 20 years. Accordingly the Court finds that the respondent has received a sentence of 20 years for a crime that is a crime of violence as that term is defined in 18 U.S.C. 16(b). Accordingly the Court finds the respondent is removable under Section 237(a)(2)(A)(iii) of the INA as an alien convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the INA, a crime of violence, as defined in 18 U.S.C. 16(b) for which a term of imprisonment ordered is at least one year. Further, the Court finds,

based upon the respondent's admission to the sole allegation set forth in the Form I-261, thate respondent is removable based on the second charge as well. It does not appear that the respondent is eligible for any relief from removal.

ORDER

Accordingly it is the order of the Court that the respondent be removed from the United States to Kenya based on the charge set forth in the Notice to Appear and in the Form 1-261 (Exhibits 1 and 1A respectively).

Please see the next page for electronic

signature

ANDREW R. ARTHUR
Immigration Judge

//s//

Immigration Judge ANDREW R. ARTHUR

arthura on November 21, 2013 at 9:09 PM GMT