U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: SIMILIEN, EUGENE YGENE

A 059-297-675

Date of this notice: 12/29/2017

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:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A059 297 675 – Miami, FL

Date: DEC 29 2017

In re: Eugene Ygene SIMILIEN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bennett L. Grossman, Esquire

ON BEHALF OF DHS: Y. Michelle Ramirez
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The respondent, a native and citizen of Haiti and a lawful permanent resident of the United States, appeals from the Immigration Judge's February 22, 2017, decision finding the respondent removable as charged and ordering his removal from the United States. The appeal will be sustained, the removal order will be vacated, and the respondent's proceedings will be terminated.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The following facts are not in dispute. The respondent was accorded status as a lawful permanent resident on June 4, 2008 (IJ at 1; Tr. at 2; Exh. 1). On September 13, 2012, he pleaded nolo contendere to and was convicted of grand theft in the third degree in violation of Fla. Stat. § 812.014(2)(c)(ii) (2007), committed on June 24, 2009, and for which he was sentenced to five years of probation (IJ at 1; Tr. at 2; Exh. 1; Department of Homeland Security (DHS) February 29, 2016, Documentary Submission at Tabs 1-2, 4-5). The respondent returned to this country on December 4, 2014, following international travel, at which time the DHS identified him as an arriving alien who is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012) (IJ at 1; Tr. at 2; Exh. 1). *See* section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v). The Immigration Judge concluded that the respondent's conviction is for a crime involving moral turpitude pursuant to section 212(a)(2)(A)(i)(I) of the Act, and thus, it renders him inadmissible as charged (IJ at 1-2). Thus, the Immigration Judge ordered the respondent's removal to Haiti as the respondent indicated that he was not pursuing any applications for relief from removal (IJ at 1-2; Tr. at 11).

At the outset, we note that the DHS bears the initial burden of establishing by clear and convincing evidence that, as a returning lawful permanent resident, the respondent falls within a category set forth at section 101(a)(13)(C) of the Act, subjecting him to treatment as an arriving alien. *Matter of Rivens*, 25 I&N Dec. 623, 624-27 (BIA 2011). Thus, as an initial matter, the DHS

bears the burden of establishing, pursuant to section 101(a)(13)(C)(v), that the respondent has committed an offense identified at section 212(a)(2) of the Act (Respondent's Br. at 3-4).

In evaluating whether the respondent has committed a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, we must examine, pursuant to *Matter of Silva-Trevino III*, 26 I&N Dec. 826, 830 (BIA 2016), how the categorical or modified categorical approaches apply to the statute of conviction. These approaches provide the proper framework for determining whether an offense constitutes a crime involving moral turpitude. To this end, when determining whether a conviction for a State or Federal offense involves moral turpitude, we have held that unless controlling case law of the governing Federal court of appeals expressly dictates otherwise, the realistic probability test, which focuses on the minimum culpable conduct that has a realistic probability of being prosecuted under the statute of conviction, should be applied in determining whether an offense is a categorical crime involving moral turpitude. In evaluating what is a "realistic probability" in a given case, it is appropriate to consider how the controlling Federal circuit applies that test. *Matter of Chairez III*, 26 I&N Dec. 819, 820 (BIA 2016). While the United States Court of Appeals for the Eleventh Circuit, the jurisdiction in which this case arises, has adopted the categorical approach based on Supreme Court precedent, it has not expressly addressed the realistic probability test. *See, e.g.*, *Walker v. U.S. Att'y Gen.*, 783 F.3d 1226, 1229 (11th Cir. 2015).

In cases where the statute of conviction includes some crimes that involve moral turpitude and others that do not, adjudicators must determine if the statute is divisible, and thus, susceptible to a modified categorical analysis. Such a statute is divisible so as to warrant a modified categorical inquiry only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction and (2) at least one, but not all, of those listed offenses or combinations of disjunctive elements categorically match the relevant generic standard. *Matter of Chairez III*, 26 I&N Dec. at 822 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2281-83 (2013)).

The statute under which the respondent was convicted requires proof of the following three elements: (1) knowingly obtaining or using, or endeavoring to obtain or use, the property of another (2) with intent to permanently or temporarily (3) either (a) deprive another of a right or benefit of the property or (b) appropriate the property to one's own use or to the use of any person not entitled to use of the property. Fla. Stat. § 812.014(1); *see also* Fla. Stat. § 812.014(2)(c)(ii) (providing that a violation is punished as a third-degree felony where the property at issue is valued at between $5,000 and $10,000).

The Board recently held in *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016), that a theft offense is a crime involving moral turpitude if it involves a taking or an exercise of control over another's property without consent and with an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded. Although any bright-line distinction between intent to deprive permanently versus temporarily has been clarified by *Matter of Diaz-Lizarraga*, we conclude that the respondent's

statute of conviction applies to conduct in which moral turpitude does not necessarily inhere.[1] The criminal statute at issue here, by its very terms, applies even if a temporary taking or appropriation of property is intended. *See generally Jaggernauth v. U.S. Att'y Gen.*, 432 F.3d 1346, 1353-54 (11th Cir. 2005) (discussing the requirements of Fla. Stat. § 812.014(1)). There is no required element that the "theft" punishable under the statute occur under circumstances where the owner's property rights are substantially eroded. Thus, a theft offense under Florida law is categorically broader than a generic theft crime involving moral turpitude.

The next issue is whether the statute of conviction is divisible. *See Descamps v. United States*, 133 S. Ct. at 2281 (explaining that resort to the modified categorical approach is appropriate only where the statute of conviction is "divisible," meaning "one or more of the elements of the offense [are set out] in the alternative"). The Eleventh Circuit's approach to divisibility focuses on whether jury unanimity is required with respect to any alternative, overbroad portions of the statute of conviction. *See United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) ("[W]e should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?"). Here, the DHS primarily contends that the conviction statute is a categorical match (DHS's Br. at 2-12). However, as the party that bears the burden of proof on the issue of removability, the DHS has identified no authority for concluding that jury unanimity is required with respect to any alternative, overbroad portions of the statute (DHS's Br. at 13-15). *Matter of Chairez III*, 26 I&N Dec. at 820.

Even if we assume arguendo that Fla. Stat. § 812.014(1) is divisible with respect to the intent to deprive requirement, we conclude that the DHS has not carried its burden, under the modified categorical approach, to establish that the respondent's conviction involved a permanent taking or one under which the owner's property rights are substantially eroded. The criminal information provides no specification among the elements/means of committing the offense as the respondent was charged therein under another Florida Statute and the affidavit of probable cause recites generally the language of the theft statute referencing the respondent's "knowingly obtaining or attempting to obtain property with intent to either temporarily or permanently deprive" the owner(s) (DHS February 29, 2016, Documentary Submission at Tabs 1, 4-5). Moreover, the judgment entered offers no further information regarding any specific admissions made by the respondent in support of his nolo contendere plea (DHS February 29, 2016, Documentary Submission at Tabs 2, 4).

Thus, because the DHS has not established that the respondent's conviction for grand theft under Florida law is for a crime involving moral turpitude, the DHS has not established that the respondent is an arriving alien within the ambit of section 101(a)(13)(C)(v) of the Act. Accordingly, the charge under section 212(a)(2)(A)(i) of the Act cannot be sustained. As there are

[1] In light of our holding in *Matter of Diaz-Lizzaraga*, we agree with the DHS that the respondent's arguments regarding whether moral turpitude arises with a temporary taking are no longer the focus in any moral turpitude analysis involving a theft statute (DHS's Br. at 3-4; Respondent's Br. at 7-8, 11).

no other charges pending against the respondent at this time, the removal proceedings will be terminated. In reaching this conclusion we note that the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction is not for a crime involving moral turpitude and the respondent is thus not inadmissible under section 212(a)(2)(A)(i) of the Act. *See Matter of Silva-Trevino III*, 26 I&N Dec. at 826.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Immigration Judge's February 22, 2017, decision is vacated, and these removal proceedings are terminated.

FOR THE BOARD

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

File: A059-297-675 February 22, 2017

In the Matter of

EUGENE YGENE SIMILIEN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT: BENNETT GROSSMAN

ON BEHALF OF DHS: SHANE BURNHAM

DECISION OF THE IMMIGRATION JUDGE

The respondent was issued a notice to show cause indicating he is not a citizen or national of the United States, but a native and citizen of Haiti who was accorded lawful permanent residence on the June 4, 2008, and who was convicted on September 13, 2012, for the offense of grand theft and placed on five years' probation. It is asserted that he sought to enter the United States on September 4, 2014, as a resident.

The Government has tendered the records of conviction relating to the respondent and they are contained in a submission filed February 29, 2016. I find the

respondent is removable as charged in the Notice to Appear, in that he has been convicted of a crime of moral turpitude.

Respondent's counsel has indicated that the respondent would not be eligible for relief if he is removable as charged and no relief applications are being filed. Counsel is challenging the Court's finding of removability in this matter and would seek to reserve on that basis. I find he is removable as charged. However, no relief applications are being requested.

ORDER

IT IS ORDERED that this respondent be removed from the United States to Haiti on the charges contained in the Notice to Appear.

Dated this the 22nd of February 2017.

TEOFILO CHAPA
U.S. Immigration Judge

CERTIFICATE PAGE

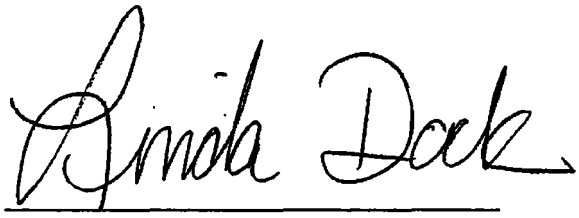
I hereby certify that the attached proceeding before JUDGE TEOFILO CHAPA, in the matter of:

EUGENE YGENE SIMILIEN

A059-297-675

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.



LINDA DOCK (Transcriber)

FREE STATE REPORTING, Inc.-2

MAY 11, 2017

(Completion Date)