U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

KOTOWSKI, AXEL
157268/A017-799-451
WAKULLA COUNTY JAIL
15 OAK STREET
CRAWFORDVILLE, FL 32327

DHS/ICE Office of Chief Counsel - RG1
333 South Miami Avenue, Suite 200
Miami, FL 33130

Name: KOTOWSKI, AXEL

A 017-799-451

Date of this notice: 7/27/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.
Grant, Edward R.
Pauley, Roger

Gilbeaur
Userteam: Docket

File: A017 799 451 – Miami, FL

Date: JUL 27 2017

In re: Axel KOTOWSKI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Monica V. Atkins
Assistant Chief Counsel

APPLICATION: Remand

The respondent, a native and citizen of Germany, who previously adjusted his status to lawful permanent resident on March 3, 1968, has appealed from the Immigration Judge's decision dated March 13, 2017, ordering him removed from the United States. The Department of Homeland Security (DHS) has filed a motion for summary affirmance of the Immigration Judge's decision. The record will be remanded to the Immigration Judge.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

In 2016, the respondent was convicted for the offense of arson under Florida Statute § 806.01(2), and sentenced to 22 months imprisonment (IJ at 2; Exh. 2). The DHS subsequently charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for conviction of an aggravated felony as defined under section 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), a crime of violence, for which the term of imprisonment is at least one year (Exh. 1). The Immigration Judge sustained the aggravated felony charge of removal and ordered the respondent removed (IJ at 3, 5). To the extent that the respondent challenges his removability on appeal, we find remanded proceedings to be warranted.

Florida Statute § 806.01(2) does not qualify as an aggravated felony under section 101(a)(43)(F) of the Act as its elements do not categorically match with the elements of the federal definition of a crime of violence. Under the federal definition of a crime of violence, the crime must involve the use, attempted use, substantial risk of, or threatened use of physical force against the person or property of *another*. *See* 18 U.S.C. § 16 (emphasis added). However, a conviction may be achieved under Florida Statute § 806.01(2) against a perpetrator who intentionally causes a fire or explosion against his or her own person or property. *See Torres v. Lynch*, 136 S. Ct. 1619, 1629 (2016) (noting in dicta that under many state statutes, arson would not be a crime of violence under section 101(a)(43)(F) of the Act, as it could involve destruction of one's own property); *United States v. Day*, 943 F.2d 1306, 1311 (11th Cir. 1991) (finding elements of arson met where perpetrator knowingly and willfully damaged his own boat by fire for the purpose of defrauding

an insurance carrier); *Moore v. State*, 932 So. 2d 524, 528 (Fla. Dist. Ct. App. 2006) (defendant found guilty of arson for knowingly burning his own mobile home).

Whether the damaged property is one's own property or that of another is not an element of the crime of arson in Florida, but rather describes alternative methods of committing one offense. *See United States v. Day*, 943 F.2d at 1310 ("Under Florida law arson is defined as willfully and unlawfully damaging by fire or exploding any structure."); *Stevens v. State*, 195 So. 3d 403, 406 (Fla. Dist. Ct. App. 2016) (noting that second degree arson hinges on whether a fire or explosion damaged or caused to be damaged any structure); *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (holding that a review of state law may clarify whether alternatively listed phrases in a statute are means or elements of the statute).

As the Florida arson statute can result in a conviction by various factual means (i.e. fire or explosion against one's own property as well as fire or explosion against another's property), its elements sweep more broadly than the elements required under the federal definition of a crime of violence. *See Mathis v. United States*, 136 S. Ct. at 2251 (reiterating that a state crime is not a categorical match with a federal offense if its elements are broader than those of a listed generic offense); *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013) (finding a California burglary statute swept more broadly than the generic definition of burglary because it could be achieved by various factual means, including lawful entry to commit a theft as well as breaking and entering to commit a theft).

In light of the foregoing, we will remand the record to the Immigration Judge to reevaluate the respondent's removability, and for any additional action that she deems necessary.[1]

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

[1] The Immigration Judge concluded that the respondent's conviction was an aggravated felony under 8 U.S.C. § 1101 (a)(43)(E). We take no present position on that conclusion.

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

File: A017-799-451 March 13, 2017

In the Matter of

AXEL KOTOWSKI	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended as an alien's been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act the law relating to a crime of violence.

APPLICATIONS:

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF DHS: Tom Ayze, Assistant Chief Counsel for Immigrations and Customs Enforcement

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in these proceedings is a male, native and citizen of Germany. The Department of Homeland Security initiated removal proceedings alleging he was removability from the United States even though he's a lawful permanent resident due to his conviction on August 18th, 2016, in the Hernando County, Florida, for the offense of arson in violation of Florida statute 806.01(2) for which he's currently serving a 22-month period of incarceration. An order to appear has

been marked and admitted into the record as Exhibit Number 1. The Department of Homeland Security did submit documentary evidence to include the conviction records in support of the respondent's removal. The Department of Homeland Security's evidence packet has been marked and admitted into the record as Group Exhibit Number 2. The respondent was provided with an opportunity to seek counsel. However, after reasonable time the court did ask the respondent to speak for himself since he'd been unable to find an attorney to help him at this time. The respondent did admit the allegations contained to the Notice to Appear. The court has reviewed the conviction records in support of the respondent's removal. The respondent was clearly convicted of second degree arson pursuant to Florida statute 806.01(2). That statute indicates that any person who willfully, unlawful or while in the commission of any felony by fire or explosion damages or causes to be damaged any structure whether the property of himself or herself or another under any circumstances not referred to in sub-section 1 is guilty of arson in the second degree. The court does find that the respondent's conviction is an aggravated felony crime of violence. Under 18 USC Section 16 the definition of crime of violence indicates that under A, it's an offense that has an element, the use, attempted use or threatened use of physical force against the person or property of another or, B, any other offense that is a felony and that by its nature involves a substantial risk to physical force against the person or property of another may be used in the course of committing the offense. The court notes that there is a mens rea requirement that the statute under which the respondent was convicted does indicate he must act willfully. That also requires the use of fire or explosion in causing the damage. The court would find that the respondent has been convict the categorically of a crime of violence for immigration purposes under 18 USC 16(a). And the court would find in the alternative there that it is also a crime of violent

under 16(b) as it is an offense that is a felony and that it, by its nature, involves a substantial risk that physical force against the person or property of another may be used in its course of committing the offense. In analyzing the respondent's statute the court did come across this afternoon during the hearing of another possibility in this case. It appears that the issue of whether a state arson conviction is an aggravated felony was recently addressed by the United States Supreme Court in Luna Torres v. Lynch. In that case it was an argument regarding whether a state criminal arson offense could be considered an aggravated felony. However, in that case it was under 101(a)(43)(E)(i) in analyzing the State New York arson offense analyzing it with the federal counterpart 844(i), which is the federal arson definition. And the Supreme Court did find that it has to match in every respect except for the federal interstate commerce. The court indicated that in Section 844(i) making it a crime to maliciously damage or destroy, attempt to damage or destroy by means of fire and explosive or building or vehicle used in interstate or foreign commerce. The court notes that in comparing the federal arson definition to the Florida arson definition they are similar in every respect other than, of course, the interstate or foreign commerce. But the Supreme Court has indicated that it does not need to have the interstate or foreign commerce aspect. The court finds that the respondent's conviction under Florida Section 806.01(2) is also an aggravated felony under 101(a)(43)(E)(i) of the Act and, although not charged on the NTA, would note that it is also an aggravated felony under that section of the Act. The court will sustain the charge of removal of an aggravated felony, in this case under the only charge on the NTA, the 101(a)(43)(F) of the Act. The court findings that the issue of removability has been established by evidence that is clear and convincing. The respondent has designated Germany in the event that removal became necessary. The respondent does not appear to be eligible for any relief from removal, although he does

not want to return to Germany because he hasn't been there for many years, he's been residing in the United States as a permanent resident for many years, he does not fear that the government is going to torture him upon his return. The respondent is single and has not children so the court does not see any possibility of readjustment of status. And as pointed out by the Department he entered, apparently, as an immigrant and the 11th Circuit decision in Lanier would accordingly not pertain to him.

The court will briefly address an issue that came up during today's master calendar hearing, the issue of competency. The evidence in the record does not support a finding that this respondent is not competent. The court notes that he was convicted in state court and there is no evidence that he was found to be incompetent. The respondent pointed out to the court that for a period of time he was placed in some type of facility. And the records do have some type of signature page that indicates that the court recommended a placement in a dual diagnosis facility. The court is not entirely clear of what the meaning of that is. The respondent mentioned that he's bipolar. However, in the respondent's immigration proceedings and the court taking into consideration the Board of Immigration Appeals precedent decisions on these matters of competency, significantly Matter of M-A-M-, the court does find that this respondent is competent to proceed and represent himself in these immigration proceedings. At no time did the court believe that this respondent did not understand the nature of these proceedings. The respondent understood the questions that the court posed to him. He responded coherently and rationally and intelligently. The respondent attempted to defend himself as best as he could. He made arguments, reasonable arguments on his behalf. The court finds that this respondent is competent to proceed in these immigration hearings. And the court is not concerned that this respondent did not understand the nature of these proceedings and has not been able to defend himself.

The court was able to engage the respondent and the respondent answered accordingly. So the court does find he is competent.

Unfortunately for the respondent, and as noted from him, this is a very harsh consequence of his action even though he's been a permanent resident for many, many years, since 1968, his mistake or his commission or conviction of this offense unfortunately does render him removable. And because it's such a serious offense he has no relief from removal. Accordingly, in light of the foregoing, and after considering all of the evidence presented, whether or not specifically referenced in this decision, the court will hereby enter the following order:

It is hereby ordered that the respondent shall be removed from the United States to Germany pursuant to the charge contained in the Notice to Appear.

Please see the next page for electronic signature

MARIA LOPEZ-ENRIQUEZ
Immigration Judge

//s//

Immigration Judge MARIA LOPEZ-ENRIQUEZ

lopezenm on May 8, 2017 at 12:39 PM GMT