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

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DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925

Name: LEE, BYUNG KUN

A037-078-031

Date of this notice: 9/6/2011

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:
Pauley, Roger

U.S. Department of Justice

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5107 Leesburg Pike, Suite 2000
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LEE, BYUNG KUN
A# 037-078-031
P.O. BOX 430
SIERRA BLANCA, TX 79851

DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925

Name: LEE, BYUNG KUN **A037-078-031**

Date of this notice: 9/6/2011

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:
Pauley, Roger

File: A037 078 031 - El Paso, TX

Date: SEP - 6 2011

In re: BYUNG KUN LEE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marienell B. Sapida, Esquire

ON BEHALF OF DHS: Corine Dominguez
Assistant Chief Counsel

APPLICATION:

The respondent, a native and citizen of Korea, has filed a timely appeal of the Immigration Judge's decision dated April 20, 2011. The Department of Homeland Security seeks summary affirmance. The appeal will be dismissed.

The factual findings of the Immigration Judge are reviewed to determine whether they are "clearly erroneous." 8 C.F.R. § 1003.1(d)(3). All other issues in appeals from decisions of Immigration Judges, including legal and discretionary determinations and applications of law to fact, are reviewed *de novo*. *Id.*; *see also Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). As the respondent's application was filed after May 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

The Immigration Judge in a decision dated April 20, 2011, found the respondent not eligible for relief and incorporated his decision dated February 22, 2011, conducting a categorical analysis of the charge of removability before denying the motion to withdraw the respondent's prior admissions and concessions. On appeal, the respondent contests the Immigration Judge's denial of his withdrawal request, argues the Immigration Judge's finding that the conviction was for an aggravated felony, and asserts that the Immigration Judge did not allow the respondent to seek available relief.

Upon our *de novo* review of the respondent's removability, we find that the respondent was properly charged with and found removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A), for conviction of an aggravated felony as defined in sections 101(a)(43)(K), (U) of the Act, 8 U.S.C. §§1101(a)(43)(K), (U). Section 101(a)(43)(U) defines an aggravated felony as "an attempt or conspiracy to commit an offense described in this paragraph," while the underlying substantive offense at section 101(a)(43)(K) of the Act defines an aggravated felony, in part, as "an offense that -- (i) relates to the owning, controlling, managing or supervising of a prostitution business." Sections 101(a)(43)(K)(i), (U) of the Act.

The respondent conceded that he was convicted in United States District Court for conspiracy to "use facilities in interstate commerce with intent to promote, manage, establish, carry on, and to

facilitate the promotion, management, establishment, and carrying on, of illegal prostitution activities in violation of Illinois law, in violation of 18 U.S.C. § 1952(a)(3)," a conviction that is supported by the record (February 22, 2011 I.J. at 1; Tr. at 5-6; Exhs. 1, 2, 2A). 18 U.S.C. § 1952(a)(3) at the relevant time read:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to--
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform--
>
> (A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>
> (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

"Unlawful activity' is defined to include "any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States." 18 U.S.C. § 1952(b)(1). While we are aware of no precedent addressing whether a conviction under this statute constitutes an aggravated felony, the statute is divisible because it proscribes promoting or facilitating the promotion of a business involving prostitution offenses, which actions would not necessarily be considered "owning, controlling, managing, or supervising" such a business under section 101(a)(43)(K) of the Act. *See Smalley v. Ashcroft*, 354 F.3d 332, 336 (5th Cir. 2003) (finding 18 U.S.C. § 1952 to be divisible).

As a divisible statute is involved, the Immigration Judge and the Board are authorized to use a "modified categorical approach" to determine whether the respondent's offense was under a portion of the statute relating to an aggravated felony. *See Taylor v. United States*, 495 U.S. 575, 602 (1990); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007) (referencing the "categorical" and "modified categorical" approaches in the context of an aggravated felony "theft" offense). Thus, we look to the record of conviction to determine whether the respondent's offense involved such a violation. *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 463 (5th Cir. 2006).[1]

The record reflects that the respondent was found guilty of count 1 of the Superseding Indictment for conspiracy "to use interstate facilities in order to profit from illegal prostitution activities" in violation of 18 U.S.C. § 371, Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises ((February 22, 2011 I.J. at 1; Exhs. 2, 2A). Specifically, count 1 indicates that the

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[1] The certain additional documents from the record of conviction that may be examined, in addition to the language of the statute, include "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information." *Larin-Ulloa v. Gonzales*, 462 F.3d at 468, *citing Shepard v. United States*, 544 U.S. 13, 26 (2005).

respondent, and his fellow co-dependants, were found guilty of conspiring to commit such acts as "operat[ing] the [businesses] as fronts for illegal prostitution activities," "hir[ing] and employ[ing] prostitutes to staff the businesses and to engage in sex acts for money," "chang[ing] and rotat[ing] the prostitution staff of the businesses," "set[ting] and establish[ing] fees to be charged," "process[ing] credit card payments and caus[ing] others to process individual credit card payments," "direct[ing] that the funds from credit card payments at [the businesses] be deposited into the . . . business checking accounts," and "issu[ing] checks from the . . . business checking accounts to pay for the expenses of the [businesses], *including rent*, utilities, advertising, and wages" (Exh. 2A).

The count does not distinguish between the three defendants and states that "the defendants" engaged in each described act. Thus, the indictment indicates that the respondent's criminal activities for which he was convicted include the controlling, managing, or supervising of a prostitution business, which corresponds to the language of 101(a)(43)(K)(i) and constitutes an aggravated felony. We therefore find the respondent removable as charged.[2]

To the extent the respondent argues that the Immigration Judge did not fully consider the respondent's eligibility for relief, we are not persuaded. *See* Notice of Appeal. The Immigration Judge twice continued proceedings for the respondent and his attorney to present respondent's eligibility for adjustment of status, which relief was not pursued (Tr. at 15-16, 19-21). The Immigration Judge continued proceedings a third time for the attorney to present what, if any, relief for which the respondent was eligible (Tr. at 24). The respondent's attorney below stated that no relief was currently available to the respondent (I.J. at 1; Tr. at 23-24, 27). Although the respondent on appeal asserts possible eligibility for cancellation of removal, his conviction for an aggravated felony renders him statutorily ineligible (Tr. at 13). Section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C).

To the extent that the respondent argues that the Immigration Judge predetermined the respondent's eligibility for adjustment of status, we disagree. *See* Respondent's Appellate Brief at 10. The Immigration Judge took time to discuss with the respondent his possible eligibility for adjustment, and twice continued proceedings for the respondent and his attorney to explore adjustment eligibility (Tr. at 13-16, 19-21). Requesting that the respondent provide the approved Form I-130 falls within the respondent's obligation to demonstrate eligibility for the requested relief. *See* section 240(c)(4) of the Act; 8 C.F.R. § 1240.8(d). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[2] In light of our disposition, we need not now address the respondent's appellate arguments regarding his concession of removability.

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
El Paso, Texas

File A 037 078 031

April 20, 2011

In the Matter of

BYUNG KUN LEE,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii), aggravated felony

APPLICATION:

ON BEHALF OF THE RESPONDENT:
Rebecca Roblado, Esquire

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Corine Dominguez, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

On February 19, 2010, the Department of Homeland Security issued a Notice to Appear charging the respondent with being deportable as articulated above. In a written decision issued by this Court on February 22, 2011, the Court found the respondent deportable from the United States. The case was returned to the Court's master calendar to announce what, if any, relief from removal may be available to the respondent. During the course of the master calendar hearing on April 20, counsel for respondent announced that there was no apparent relief from removal available to the respondent, although they might be trying to conduct some type of post-conviction relief application

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which is outside the jurisdiction of this Court.

And that being said, the respondent is deportable as charged and is not eligible or does not apply for any relief from removal, the Court must issue the following orders.

ORDER

The respondent is hereby ordered deported and removed from the United States to South Korea.[1]

WILLIAM LEE ABBOTT
Immigration Judge

[1]The Court hereby incorporates its written decision issued February 22, 2011, into this oral decision as though fully set forth.

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM LEE ABBOTT in the matter of:

BYUNG KUN LEE

A 037 078 031

El Paso, Texas

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

Maria Kimball

Maria Kimball (Transcriber)

Deposition Services, Inc.
12321 Middlebrook Road, Suite 210
Germantown, Maryland 20874
(301) 881-3344

June 9, 2011
(Completion Date)