U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - SAJ
7 Tabonuco St., Suite 300 (Rm 313)
Guaynabo, PR 00968

Name: GARAY-GARCIA, LESTER EMILIO **A 099-240-872**

Date of this notice: 4/30/2015

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:
Holmes, David B.

Userteam: Docket

File: A099 240 872 – Guaynabo, PR

Date: APR 30 2015

In re: LESTER EMILIO GARAY-GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Pedro J. Espinal
Assistant Chief Counsel

ORDER:

This Board has been advised that the Department of Homeland Security's ("DHS") appeal has been withdrawn. *See* 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
GUAYNABO, PUERTO RICO

IN THE MATTER OF:

GARAY-GARCIA, LESTER EMILIO	)	
A 099-240-872	)	**In Removal Proceedings**
Respondent	)	
	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"or "Act"), as amended, in that, at any time after admission, respondent was convicted of an aggravated felony as defined in section 101(a)(43)(M) of the Act, a law relating to an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in the Internal Revenue Code of 1986, Section 7201 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

ON BEHALF OF RESPONDENT
Elle L. Diaz-Fina, Esq.
P.O. Box 11532
San Juan, PR 00922

ON BEHALF OF DHS
Vivian Reyes, Esq.
Chief Counsel
Immigration and Customs Enforcement
7 Tabonuco Street, Suite 100
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DECISION ON REMOVABILITY

I. RELEVANT FACTS AND PROCEDURAL HISTORY

Lester Emilio Garay-Garcia ("Respondent") is a native and citizen of Venezuela. See [Exh. 1]. Respondent was admitted to the United States at San Juan, Puerto Rico on or about November 5, 2004 as a non-immigration K-1. See id. On August 21, 2007, Respondent's status was adjusted to that of a Lawful Permanent Resident under section 245 of the Act.

On May 2, 2013, Respondent pleaded guilty to one count of Theft of Government Property in the U.S. District Court of Puerto Rico, in violation of 18 U.S.C. § 641. See id. at 3. For such offenses, Respondent was sentenced to two years of probation and a monetary penalty restitution amount in the amount of $35,408. See id.

IMMIGRATION JUDGE C. GUILLOTY
EXH # 4
I.D. #
DATE: 12/11/14

On July 7, 2014, Respondent was served in person with a Form I-862, Notice to Appear ("NTA"). See id. The NTA charges Respondent with one charge of removability pursuant to INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony as defined in section 101(a)(43)(M) of the Act (fraud or deceit in which the loss to the victim or victims exceeds $10,000 or related to tax evasion in which the revenue loss to the Government exceeds $10,000). See [Exh. 1].

On September 18, 2014, DHS filed a Form I-261 adding factual allegations that Respondent committed an offense that involves fraud or deceit and that Respondent committed an offense in which the loss to the victim exceeded $10,000.00.

II. LEGAL STANDARDS AND ANALYSIS

A. Aggravated Felony under Section 101(a)(43)(M)

1. Categorical Approach

Section 237(a)(2)(A)(iii) authorizes the removal of "[a]ny alien who is convicted of an aggravated felony at any time after admission" into the United States. Because the list of aggravated felonies enumerated in the Act does not precisely correspond to state criminal codes, the First Circuit has "adopted, with slight modification, the two-step test that courts use to determine whether a state conviction qualifies as a 'violent felony' under the Armed Career Criminal Act, 18 U.S.C. § 924(e), and similar sentencing statutes." Lecky v. Holder, 723 F.3d 1, 4-5 (1st Cir. 2013) (internal citations omitted).

Under the First Circuit approach, the first inquiry is whether "the statute underlying the prior conviction necessarily involves every element of [an aggravated felony]." Conteh v. Gonzales, 461 F.3d 45, 54-56 (1st Cir. 2006). If the underlying statute covers both conduct that fits within a category of aggravated felonies as well as conduct falling outside the category, the statute is "divisible" and the modified categorical approach applies. See Lecky, 723 F.3d at 4. Under the modified categorical approach, "the government bears the burden of proving, by clear and convincing evidence derived solely from the record of the prior proceeding, that (i) the alien was convicted of a crime and (ii) that crime involved every element of one of the [aggravated felony] offenses." Conteh, 461 F.3d at 55.

The term "aggravated felony" includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." INA § 101(a)(43)(M)(i). Although the INA does not define "fraud", the BIA has directed that the term should be used in its "commonly accepted legal sense," meaning "false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party" that are "believed and acted upon by the party deceived to his disadvantage." Matter of G-G-, 7 I&N Dec. 161, 164 (BIA 1956).

Here, Respondent was convicted of one count of Theft of Government Property, in violation of 18 U.S.C. § 641. [Exh. 2.] at 7. Under 18 U.S.C. § 641, two types of conduct are criminalized and each conduct includes an element of "knowingly converting" and the "intent to convert" property. In addition, the statute criminalizes "embezzlement" which by definition is

the "fraudulent appropriation of property by a person to whom such property has been entrusted." See Black's Law Dictionary, 522 (6th ed. 1990). Thus, because all criminalized conduct that would arise to a violation under 18 U.S.C. § 641 include a requisite *scienter* element of fraud or deceit, this Court finds that of Theft of Government Property under 18 U.S.C. § 641 categorically constitutes a crime involving fraud or deceit. See INA § 101(a)(43)(M)(i); see Conteh, 461 F.3d at 54-56.

2. Circumstance-specific Approach

The $10,000 loss provision in INA § 101(a)(43)(M)(i), however, is not subject to the categorical approach but to the "circumstance-specific approach" articulated in Nijhawan v. Holder. 557 U.S. 29, 30 (2009). Unlike the categorical approach, the circumstance-specific approach allows the fact-finder to look at "the specific circumstances surrounding an offender's commission of a fraud and deceit crime" to determine whether the conviction involved the required amount of loss. Id. at 40; see also Campbell v. Holder, 698 F.3d 29, 34 (1st Cir. 2012) (the "Supreme Court in Nijhawan endorsed Conteh's exception as to INA provisions phrased in fact-specific terms such as the amount-of-loss clause in INA § 101(a)(43)(M)(i)").

The First Circuit requires that to sustain removability under INA § 101(a)(43)(M)(i), DHS must establish "that the conspiratorial objective encompassed an offense involving both fraud or deceit and a loss to the victim or victims in excess of $10,000." Conteh, 461 F.3d at 57. Contrary to the categorical approach, the evidentiary parameters of the "circumstance-specific approach" extend broader in that the Court may examine documents from the Respondent's record of conviction as well as the pre-sentence report. See Nijhawan, 557 U.S. at 41 (permitting sentencing-related material to prove the loss amount). Nonetheless, according to the tethering requirement, the loss amount must be "tied to the specific counts covered by the conviction," and not based on general conduct. Nijhawan, 557 U.S. at 42 (citing Alaka v. Attorney Gen. of U.S., 456 F.3d 88, 106-07 (3d Cir. 2006)).

Here, because Respondent was convicted under a statute that does not contain a monetary provision, the amount of loss is to be determined by a circumstance-specific approach. See Nijhawan, 557 U.S. at 30. This Court will therefore analyze evidence relevant to Respondent's conviction, which include the indictment, plea agreement, and record of criminal monetary penalties to determine the loss amount for his conviction for Theft of Government Property. See [Exh. 2].

a. Indictment

As a threshold matter, this Court finds important that Respondent pled guilty to one count among the four that he was charged. See id. at 5.[1] Counts One, Three, and Four were dismissed and Respondent pled guilty to Count two. See id. The indictment states that for Count Two, on or about May 31, 2011, Respondent "did knowingly and willfully steal and purloin $9,000 of good sand property of the United States, that is, a United States Treasury check issued by the

[1] The plea agreement states "Count One" but contains the factual allegations from Count 2 of the indictment. For purposes of this decision, this Court considers Respondent to have pled guilty to Count 2 of his indictment. See [Exh. 2] at 13-14.

Internal Revenue Service in connection with a fraudulent tax return filed in the name of G.A.O." See id. at 14. Thus, the amount that was tethered to Count 2 is explicitly listed and does not meet the $10,000 threshold to meet the requirements of INA § 101(a)(43)(M)(i). Therefore, the Court finds that the indictment fails to establish that Respondent's violations for Theft of Government Property is tethered to a loss to the victim exceeding $10,000.

b. Plea Agreement

Next, the plea agreement incorporates the values of the property involved in Respondent's criminal activities. Here, the plea agreement states that Respondent "did knowingly and willfully steal and purloin $9,000 of goods and property of the United States." As this was the only charge to which Respondent pled guilty, no other part of the plea agreement references loss to the victim. Therefore, based on the facts in this document, the plea agreement does not establish that Respondent's conviction for Theft of Government Property is tethered to a loss to the victim exceeding $10,000 as required under INA § 101(a)(43)(M)(i).

c. Criminal monetary penalties

Lastly, the record of criminal monetary penalties reflects that Respondent was ordered to pay a total of $35,408 for his violations. See [Exh. 2] at 4. This record shows that Respondent's monetary penalties were ordered for restitution. Nonetheless, this amount also reflects amounts tethered to activity for which Respondent was not convicted. The amount that is tethered to Count 2 in the plea agreement and the indictment is $9,000, and thus, the excess amount is tethered to the three counts that were dismissed. Therefore, this Court finds that under Alaka, the amount of restitution ordered as a monetary penalty cannot be determinative of the loss amount to the victim because it includes "conduct that was neither admitted nor proven beyond a reasonable doubt." See Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007) (citing Alaka, 456 F.3d at 107-08). Thus, this document fails to prove that Respondent's conviction for Theft of Government Property is tethered to a loss to the victim exceeding $10,000.

Therefore, none of the document that DHS submitted satisfies the tethering requirement in Nijhawan to show that loss amount tethered to any of Respondent's violations exceeded $10,000. See Nijhawan, 557 U.S. at 42. Thus, this Court finds that DHS has not met its burden of establishing removability by clear and convincing evidence under INA § 101(a)(43)(M)(i). See INA § 240(c)(3)(A).

Accordingly, this Court does not sustain the charge of removability pursuant to INA § 237(a)(2)(A)(iii) for an aggravated felony under section 101(a)(43)(M).

III. ORDERS

In light of the foregoing analysis, the following orders shall enter:

IT IS HEREBY ORDERED that Respondent's charge for removability under INA § 237(a)(2)(A)(iii) be **NOT SUSTAINED** pursuant to section 101(a)(43)(M);

IT IS HEREBY FURTHER ORDERED the proceeding be **TERMINATED**.

CRIMILDA GUILLOTY
Immigration Judge
Date signed: 12/11/14

CC: *CHIEF COUNSEL*
COUNSEL FOR RESPONDENT/APPLICANT
RESPONDENT/APPLICANT

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL (P)
TO: ( ) ALIEN ( ) ALIEN c/o custodial officer ( ) ALIEN'S ATTY/REP ( ) DHS
DATE: 12/11/14 *BY: COURT STAFF* EUC
ATTACHMENTS: ( ) EOIR-33 ( ) EOIR-28 ( ) LEGAL SERVICES LIST ( ) OTHER