



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
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Name: C [REDACTED], T [REDACTED]

A [REDACTED]-430

Date of this notice: 5/15/2020

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:
Liebowitz, Ellen C
Morris, Daniel
Malphrus, Garry D.

Userteam: Docket

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Falls Church, Virginia 22041

File: A [REDACTED]-430 – New York, NY

Date: MAY 15 2020

In re: T [REDACTED] C [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Valerie K. Mitchell, Esquire

ON BEHALF OF DHS: Ji Jahng
Assistant Chief Counsel

APPLICATION: Termination; cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, appeals from the Immigration Judge's November 19, 2019, decision finding him removable and denying his application for cancellation of removal.¹ Sections 237(a)(2)(C) and 240A(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(C), 1229b(a). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained, and these proceedings will be terminated.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge found the respondent removable under section 237(a)(2)(C) of the Act as a result of his 2013 conviction for criminal possession of a weapon in the third degree in violation of section 265.02(3) of the New York Penal Law (Exh. 5). On appeal, the respondent contends that the Immigration Judge erred by applying the realistic probability test because a conviction under section 265.02(3) of the New York Penal Law encompasses weapons outside the scope of the federal definition of firearm (Respondent's Br. at 4-7). The respondent further contends that even if the realistic probability test applies, he has met his burden in that regard.

To determine whether the respondent's conviction constitutes a firearms offense under section 237(a)(2)(C) of the Act, we apply the categorical approach. See *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013); *Matter of Chairez* ("Chairez IIF"), 26 I&N Dec. 819, 825 n. 2 (BIA 2016) (reaffirming our conclusion in *Matter of Chairez* ("Chairez I"), 26 I&N Dec. 349 (BIA 2014)), that the respondent was removable under section 237(a)(2)(C) of the Act for having

¹ The Immigration Judge's analysis with respect to the charges of removability is included in his July 22, 2019, decision denying the respondent's motion to terminate. The Immigration Judge did not sustain charges of removability under sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), and 237(a)(2)(B)(i) of the Act.

been convicted of a “categorical firearms offense”). The categorical approach focuses only on whether the elements of the statute of conviction match the elements of the generic offense. See *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). We do not look to the underlying conduct which resulted in the conviction. *Id.* In this case, we examine whether the elements of section 265.02(3) of the New York Penal Law match the generic removable offense described in section 237(a)(2)(C) of the Act.

Section 237(a)(2)(C) of the Act provides that an alien who has been convicted under any law involving the purchase, sale, exchange, use, ownership, possession, or carrying of a firearm as defined by 18 U.S.C. § 921(a) is removable. Section 921(a)(3) of Title 18 of the United States Code provides that a firearm is any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device. 18 U.S.C. § 921(a)(3). Antique firearms are explicitly excluded. *Id.*

At the time of the respondent’s conviction, section 265.02(3) provided: “A person is guilty of criminal possession of a weapon in the third degree when: Such person knowingly possesses a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun.” N.Y. Penal Law § 265.02(3) (2013). Under New York law, firearm is defined as “(a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon...” N.Y. Penal Law § 265.00(3) (2013). Antique firearms are explicitly excluded. *Id.*

The respondent argues that his offense does not constitute a firearms offense because of a difference in the definition of “antique firearm” between the federal and New York definitions. Specifically, he asserts that the state definition encompasses weapons outside the scope of the federal definition, i.e., loaded antique firearms.² However, because the state and federal statutes appear to be a categorical match, it is the respondent’s burden to establish a realistic probability of being convicted under this statute for cases involving loaded antique firearms. *Matthews v. Barr*, 927 F.3d 606, 618 (2d Cir. 2019) (citing *Moncrieffe v. Holder*, 569 U.S. 184 and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 562 (BIA 2019). *Cf. Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (finding that when the wording of a state statute on its face extends to conduct beyond the definition of the

² Under federal law, an antique firearm is defined as any firearm manufactured in or before 1898, any replica of a firearm manufactured in or before 1898 if it does not use fixed ammunition, or any replica manufactured in or before 1898 which uses fixed ammunition which is not readily available in the ordinary channels of commercial trade. 18 U.S.C. § 921(a)(16). Under the New York Penal Law, an antique firearm is defined as “[a]ny *unloaded* muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.” N.Y. Penal Law § 265.00(14) (emphasis added).

corresponding federal offense, the need for the realistic probability test is obviated). Accordingly, it is the respondent's burden to show that there is a realistic probability that section 265.02(3) of the New York Penal Law would be used to prosecute conduct beyond that which is included in the federal definition of a firearms offense, that is, conduct involving the use of loaded antique firearms.

We conclude that the respondent has met his burden in this regard. In addition to the two cases he cited in his motion to terminate, on appeal he has cited another New York state court case of a prosecution which involved loaded antique firearms. This is an adequate showing to demonstrate that there is a realistic probability of prosecution of antique firearms under section 265.02(3) of the New York Penal Law. Therefore, the respondent's appeal will be sustained and these proceedings will be terminated. Accordingly, we do not reach the respondent's challenge to the Immigration Judge's denial of his application for cancellation of removal.

We note that the Immigration Judge did not sustain the charges of removability under sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), and 237(a)(2)(B)(i) of the Act because the respondent's conviction on which they were based was not final for immigration purposes. *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018). Our decision terminating these proceedings does not preclude the DHS from instituting removal proceedings anew if the respondent's conviction becomes final for immigration purposes.

ORDER: The appeal is sustained, and these removal proceedings are terminated.



FOR THE BOARD