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 - ORL
3535 Lawton Road, Suite 100
Orlando, FL 32803

Name: THOMPSON, CRAIG HANUSH **A 044-854-402**

Date of this notice: 10/1/2014

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:
Greer, Anne J.
Guendelsberger, John
Pauley, Roger

Userteam: Docket

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5107 Leesburg Pike, Suite 2000
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THOMPSON, CRAIG HANUSH
A044-854-402
BAKER COUNTY
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MACCLENNY, FL 32063

DHS/ICE Office of Chief Counsel - ORL
3535 Lawton Road, Suite 100
Orlando, FL 32803

Name: THOMPSON, CRAIG HANUSH **A 044-854-402**

Date of this notice: 10/1/2014

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:
Greer, Anne J.
Guendelsberger, John
Pauley, Roger

Userteam:

File: A044 854 402 – Orlando, FL

Date: OCT - 1 2014

In re: CRAIG HANUSH THOMPSON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shahzad Ahmed, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The respondent has appealed from the Immigration Judge's decision dated May 1, 2014. The Immigration Judge found the respondent removable from the United States and ineligible for any form of relief from removal. The respondent's appeal will be sustained.

We review an Immigration Judge's findings of fact for clear error; but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The Immigration Judge concluded using the modified categorical approach that the respondent is removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), for commission of an aggravated felony, as defined in section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(G) (theft offense). On appeal, the respondent argues that his conviction is not an aggravated felony.

The record reflects that the respondent was convicted for the offense of Grand Theft from a person 65 years of age or older under Florida Statutes § 812.0145(2)(b). Grand Theft is defined by Florida Statutes § 812.014(1), which provides in pertinent part:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

In *Jaggernaugth v. U.S. Atty. Gen.*, 432 F.3d 1346, 1353-55 (11th Cir. 2005), the United States Court of Appeals for the Eleventh Circuit, the jurisdiction in which this case arises, held that Florida Statutes § 812.014(1) is divisible for purposes of determining whether an alien's conviction constitutes an aggravated felony "theft offense," inasmuch as subpart (b) of the statute does not necessarily involve the intent to deprive another person of the rights and benefits of ownership, as required for a "theft offense." *See also Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066 (11th Cir. 2013).

We find that the Immigration Judge erroneously relied upon the Order of Restitution, in determining that the respondent's conviction was for an aggravated felony under the modified categorical approach (Exh. 2A). A restitution order does not properly form a portion of the record of conviction. *See Shepard v. United States.* 544 U.S. 13 (2005) (providing that the record of conviction is comprised of the charging document, written plea agreement, transcript of the plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented); *Jaggernaugth v. U.S. Atty. Gen, supra*, at 1355. The information contained in a restitution order does not require proof beyond a reasonable doubt and only need be proven by a preponderance of the evidence. *See Obasohan v. Gonzales*, 479 F.3d 785, 789-90 (11th Cir. 2007), *rev'd on other grounds, Nijhawan v. Holder,* 557 U.S. 29 (2009). Under these circumstances, we find that the Department of Homeland Security has not met its burden of proof to demonstrate by "clear and convincing evidence" that the respondent was convicted of an aggravated felony. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained, the Immigration Judge's decision is vacated, and removal proceedings are terminated.

FOR THE BOARD

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

File: A044-854-402 May 1, 2014

In the Matter of

CRAIG HANUSH THOMPSON	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended and at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act a law relating to a theft defense for which a term of imprisonment is at least one year imposed.
Section 237(a)(2)(A)(iii) of the Act in that any time after admission convicted of an aggravated felony is defined as Section 101(a)(43)(M) of the Act a law relating to an offense that involves fraud or deceit in which loss of the victim or victim exceeds $10,000.
Section 237(a)(2)(A)(iii) of the Act in that any time after admission if you have been convicted of an aggravated felony as defined in Section 101(a)(43)(M) or 101(a)(43)(G) of the Act.
Section 237(a)(2)(A)(iii) in any time after admission convicted of an aggravated felony as defined in Section 101(a)(43) of the Act. No specific subparagraph set forth on the fourth charge.

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT: SHAHZAD AHMED, Esquire

ON BEHALF OF DHS: JOHN GIHON, Senior Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male native and citizen of Jamaica, ~~a male~~ who was admitted to the United States as a lawful permanent resident on ~~on~~ an immigrant visa on August 23, 1995. See Notice to Appear (NTA), ~~and~~ Exhibit 1 in the record of proceedings. The Notice to Appear was issued on August 20, 2013 and filed with the Court on February 21, 2014, commencing removal proceedings. See Exhibit 1. The Government subsequently filed ~~a~~Additional ~~c~~Charges of ~~i~~Inadmissibility/~~d~~Deportability, ~~f~~Form I-261, on April 14, 2014, adding two additional aggravated felony charges.

The respondent, through counsel, did admit allegations one through five as set forth on the NTA~~otice to Appear~~, but denied that he was deportable for all four of the charges lodged by the Government. The parties were provided an opportunity to file written and/or oral arguments or memorandums as to their respect~~ed~~ive positions. The Court received written memorandums as well as oral argument at prior master calendar hearings. The respondent provided that if, in fact, he were found removable on any of the four charges, ~~that~~ there would be no relief application available to him to file or none would be filed, and that he would reserve his right to appeal the Court's decision, arguing that his convictions did not constitute a basis for deportability.

As to the issue of deportability, the Court would provide the following: Exhibit 1 in the record of proceeding is the Notice to Appear, and Exhibit 1A the ~~a~~Additional ~~c~~Charges of ~~i~~Inadmissibility/~~d~~Deportability. The Government also provided a ~~n~~Notice of ~~f~~Filing on March 11, 2014, which contains the respondent's judgment and conviction record, and includes a police report. That portion of Exhibit 2 containing the police report was objected to by respondent's counsel, and the Court did not consider any part of that police report for purposes of removability. The Government subsequently filed an ~~o~~Order for ~~r~~Restitution, received into the record as Exhibit 2A as it

supplements the conviction record, setting forth the same case number and, in fact, apparently, ordered on the same date as the respondent's disposition in the case.

According to the charging information and the judgment in Exhibit 2, the respondent did enter pleas of guilty to counts 1, 3, and 4 as set forth in Exhibit 2. Specifically the Court refers to counts 3 and 4 as the basis for its finding that the respondent is deportable.

Count 3 sets forth that between January 22, 2010, and August 19, 2010, that the respondent did knowingly obtain or use or endeavor to obtain or use U.S. currency of a value of $10,000 or more but less than $50,000 which was the property of Aaron Barr, a person 65 years of age or older, knowing or having reason to believe that Aaron Barr was 65 years of age or older, with the intent to permanently or temporarily deprive Aaron Barr of the property or benefit therefrom, or to appropriate the property to the use of Craig Hanush Michael Thompson, the respondent.

Count 4 is more or less a mirror image of count 3, the only difference being that the victim in that case was Joyce Barr, apparently the wife of Aaron Barr, the other victim in Count 3, it is unclear.

As argued by respondent's counsel, the Florida statute that the respondent was convicted under, Section 812.0145(2)(b), a second degree felony under in a Florida law, is a divisible statute. The judgment and conviction record produced by the Department of Homeland Security and contained at Exhibit 2 does indicate that the respondent entered pleas of guilty to the three counts, third and second degree felonies under Florida law.

The Eleventh Circuit Court of Appeals reviewed the same theft statute in the case of Jaggernauth v. U.S. Attorney General, 432 F.3d 1346 (11th Cir. 2005). Although the respondent was convicted of a specific portion of that theft statute

involving persons 65 years of age or older, the theft statute is the same as that reviewed and interpreted by the Eleventh Circuit.

In Jaggernauth, the Eleventh Circuit was faced with whether or not a conviction under Florida Statute Section 812.014 constitutes a theft defense that is an aggravated felony pursuant to the definition at Section 101(a)(43)(G) of the Act. The burden of proof for that charge would be for the Government to prove by clear and convincing evidence that removability has been established.

In Jaggernauth, the Eleventh Circuit did find that the grand theft statute is a divisible one that includes temporary appropriation of the use of property and, therefore, did not necessarily constitute theft under the common-law definition because it lacked the intent to deprive the owner of the rights and benefits of ownership.

In Jaggernauth, since the Court found the Florida statute was divisible, it utilized a modified categorical approach, the same as the Court will do in this particular case. As indicated, ~~c~~Counts 3 and 4 do include language indicating that the respondent may have temporarily appropriated property, which under the Jaggernauth decision would not be an aggravated felony. But utilizing the modified categorical approach allows and compels the Court to use any conviction information that is available to determine whether the respondent's conviction constitutes an aggravated felony. In that effort, the Court is restricted to the evidence of criminal convictions set forth at 8 C.F.R Section 1003.41. D~~ a d~~ocument's admissible as evidence and provin~~gen~~ a criminal conviction include a record of judgment and~~,~~ conviction, a record of plea~~,~~ ~~-~~ verdict, and sentence~~,~~ a ~~of~~ docket entry from Court records that~~and~~ indicates the existence of a conviction~~,~~ and the minutes of the Court proceeding or transcript of a hearing that indicates the existence of a conviction.

In the respondent's specific case, Exhibit 2, in the Court's opinion, did not

go far enough in establishing that the respondent had in fact been convicted of a theft offense as that is defined in Section 101(a)(43)(G) of the Act, as there was insufficient evidence to indicate that the taking was "permanent." However, the Court notes that had Exhibit 2A, the ~~o~~Order for ~~r~~Restitution, been admissible as evidence of a criminal conviction, resolution of the charge can be determined. Consequently, as that ~~o~~Order of ~~r~~Restitution was issued in the same case, 2011-CF-10021, issued on the same date as the respondent's disposition, October 26, 2012, it is indicated that the respondent was ordered to pay restitution to one of the victims as set forth on Exhibit 2A. Andrew Barr, the victim in ~~c~~Count 3 of the conviction record at Exhibit 3, was to receive and recover from the respondent $14,627.74.

Based on the supplementary information to Exhibit 2, that being the ~~o~~Order for ~~r~~Restitution, which the Court does find constitutes evidence of a criminal conviction, the Court ~~does~~ finds that the theft committed by the respondent constituted a permanent taking as the respondent was, in fact, ordered by the Circuit Court of Palm Beach County, Florida to pay restitution of $14,627.74.

Utilizing the modified categorical approach and considering evidence of the criminal conviction, not relying whatsoever on the police report that runs for 14 pages and is attached to Exhibit 2, the Court ~~does~~ finds that the respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act.

In addition, although not binding on the Court, the Court also finds persuasive the Board of Immigration Appeals findings in ~~the~~ Matter of Grazley, 14 I&N Dec. 330 (BIA 1973). In that case, the Court does concede that the Board was interpreting whether or not theft involving cash was a crime involving moral turpitude. The Board was not looking to determine whether or not an aggravated felony had been committed.

However, as persuasive to the Court and as an alternative finding, the Board is holding that the taking of cash in a criminal act constitutes a reasonable assumption that there is an intention to retain the cash permanently, and does provide this Court with an alternative basis of finding that the respondent's conviction is also a theft defense due to the permanent taking and the presumption thereof, and is an aggravated felony under Section 101(a)(43)(G) of the Act.

As to the remaining three charges, the Court cannot find that the respondent is removable for having been convicted of an aggravated felony that involved fraud or deceit, although, admittedly, in the respondent's conviction record, again found in Exhibit 2, there is evidence that the respondent did, by deception, knowingly obtain funds from his victims. However, as that statute is divisible to the point where deception was only one element and it could have been, in fact, a theft offense that led to the restitution, the Court will not sustain on this record that the respondent has been convicted of a fraud offense and the loss was over $10,000.

In the same respect, the Court cannot sustain the third charge set forth on the fForm I-261. The Government lodged the charge that the respondent has been convicted of either the fraud or theft defense pursuant to Sections 101(a)(43)(M) or (G). Given the Court's above findings, that charge is also not sustained.

And lastly the Government's fourth charge, that the respondent has been convicted of an aggravated felony as defined in any Section under 101(a)(43), is also not sustained. The Court does not sustain this charge because the Government would have to prove by clear and convincing evidence what provision or definition under Section 101(a)(43) of the Act ~~that~~ pertains to the respondent's conviction. As none is alleged, the Court will not sustain the aggravated felony charge~~s~~ set forth.

Given ~~that~~ the Court's findings that the respondent is removable for an

aggravated felony pursuant to Section 101(a)(43)(G) of the Act, the following order will enter.

ORDER

Based upon the above it is ordered that the respondent is removable pursuant to Section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a law relating to a theft offense for which the~~to~~ term imprisonment ordered is at least one year.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Jamaica pursuant to that aggravated felony charge.

Please see the next page for electronic signature

JAMES K. GRIM
Immigration Judge

//s//

Immigration Judge JAMES K. GRIM

grimj on July 16, 2014 at 12:26 PM GMT