**U.S. Department of Justice**

Executive Office for Immigration Review

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**Name: H[redacted], E[redacted]**

**A [redacted]-689**

**Date of this notice: 5/20/2015**

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

schwarzA
Userteam: Docket

File: [redacted] 689 - Atlanta, GA

Date: MAY 20 2015

In re: E[redacted] H[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kristina M. Campbell, Esquire

ON BEHALF OF DHS: Gene P. Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

APPLICATION: Cancellation of removal

The Department of Homeland Security ("DHS") has appealed from an Immigration Judge's May 13, 2014, decision granting the respondent cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).[1] The respondent has filed a brief on appeal. The appeal will be dismissed.

The respondent, a native and citizen of Bosnia-Herzegovina, was admitted to the United States as a lawful permanent resident. On August 17, 2009, he pleaded guilty to theft by shoplifting in violation of section 16-8-14 of the Georgia Code and was sentenced to 12 months in prison. On November 23, 2009, the respondent pleaded guilty to pedestrian under the influence in violation of Ga. Code § 40-6-95 and underage possession of alcohol in violation of Ga. Code § 3-3-23. The respondent also has convictions for obstruction of a law enforcement officer, driving under the influence, aggravated assault, and public drunkenness.

The DHS argues on appeal that the respondent is not eligible for cancellation of removal because he has not met his burden of showing that his conviction for theft by shoplifting is not an

[1] On October 27, 2014, we returned this case to the Immigration Judge because the record did not include a separate oral or written Immigration Judge decision. The Immigration Judge subsequently prepared a written decision dated December 3, 2014, which was served on the parties on December 4, 2014. Hereinafter, references to the Immigration Judge's decision relate to the written decision issued in December 2014.

aggravated felony theft offense. *See* section 240(c)(4)(A)(i) of the Act; 8 C.F.R. § 1240.8(d). The Immigration Judge held that the statute of conviction, which sets forth alternative mens rea of intent to appropriate and intent to deprive is divisible. *See Ramos v. U.S. Att'y General*, 709 F.3d 1066, 1070 (11th Cir. 2013) (holding that Ga. Code § 16-8-14, theft by shoplifting, is divisible and not categorically an aggravated felony). Thus, the Immigration Judge conducted a modified categorical approach to determine whether the record of conviction shows which element of the statute the respondent's conviction falls under (I.J. at 3-4). The Immigration Judge determined that the charging document accuses the respondent of "unlawfully intentionally conceal[ing] and tak[ing] possession of . . . goods and merchandise being the property of Walmart, in violation of O.C.G.A. 16-8-14(a)(1)" (I.J. at 4). Because there is no indication that the respondent committed the crime with intent to deprive, the Immigration Judge found that the respondent's conviction does not fall into the element of the statute that qualifies as an aggravated felony and that he is eligible for cancellation of removal (I.J. at 3-4).

We agree with the Immigration Judge that the respondent has met his burden of showing that his conviction for theft by shoplifting is not an aggravated felony barring him from eligibility for cancellation of removal. In this case, the record of conviction is inconclusive whether the respondent was convicted under the element of theft by shoplifting requiring a mens rea of intent to deprive the owner of possession of the merchandise, which would constitute an aggravated felony theft offense. *See Ramos v. U.S. Att'y General, supra*, at 1070-71. Under *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687 (2013), to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish all of the elements of the generic offense. Where the statute involved, as here, is divisible, and the record of conviction is ambiguous or inconclusive regarding which element the respondent was convicted under, the conviction does not necessarily involve facts that correspond to an aggravated felony. As such, we find that the respondent has met his burden to show that his conviction for theft by shoplifting does not constitute an aggravated felony and does not bar him from eligibility for cancellation of removal.

The DHS also argues that the respondent's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21 constitutes a crime of violence aggravated felony under section 101(a)(43)(F) of the Act. The respondent argues on appeal that the conviction does not amount to a "crime of violence" as defined in 18 U.S.C. § 16 because the record of conviction is silent as to whether it involves either: (1) the use, attempted use, or threatened use of physical force against the person or property of another; or (2) a substantial risk that physical force would be used against a person or property.

As the DHS argues, the Immigration Judge decided that the respondent's conviction is not an aggravated felony because his sentence was for 90 days to be served in confinement followed by 4 years 9 months to be served on probation, which he indicated does not constitute a term of imprisonment of at least 1 year required under section 101(a)(43)(F) of the Act (Tr. at 19-20, 24-25). We agree with the Immigration Judge. The respondent's sentence was 90 days of imprisonment followed by 4 years and 9 months of probation, not 12 months of incarceration. Thus, his conviction does not constitute an aggravated felony because he did not receive a "term of imprisonment" of at least one year. *See, e.g., United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000).

The Immigration Judge granted the respondent cancellation of removal in the exercise of discretion. He found the respondent's testimony regarding remorse for his convictions to be credible. In addition, he found that the respondent's testimony about his past and the changes he will make in the future weighs in favor of granting relief. Further, the Immigration Judge cited the respondent's residence in the United States since 2000 when he was 10 years old, his employment history, payment of taxes, United States citizen parents and other close family members who are supportive, and the fact that he has not had a conviction for over 2 years (I.J.at 4-5).

The DHS argues on appeal that the respondent's long term residence and family ties in the United States do not outweigh his arrest record, his lack of acceptance of responsibility for his actions, his prior marijuana use, and his admission that he violated the terms of his probation in August 2012 by smoking marijuana (Tr. at 91).

The "clearly erroneous" standard for reviewing the Immigration Judge's assessment of a witness's credibility is "significantly deferential," *see Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1993), and therefore this Board is precluded from reversing the Immigration Judge's findings of fact simply because we are convinced that we would have decided the case or weighed the evidence differently. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985). Indeed, where there are two permissible views of the evidence, the Immigration Judge's choice between them cannot be deemed clearly erroneous. *Id.* Moreover, great deference should be paid to findings regarding the credibility of witnesses because of the fact finder's observational advantages. *Id.* Thus, while a reasonable Immigration Judge could certainly have weighed the evidence differently with regard to the respondent's rehabilitation and remorse, the DHS has not established that the Immigration Judge's positive credibility determination in that regard was based on an impermissible view of the evidence. Accordingly, we will defer to the Immigration Judge's findings.

The respondent has also adduced a number of significant equities, including his family connection to United States citizens, his presence in this country for 15 years, and his employment history. Moreover, the Immigration Judge found that the respondent has support from his parents and siblings and a fiancée (I.J. at 5).

The respondent's criminal record is of very serious concern to us. However, taking into account the Immigration Judge's positive credibility findings, we find no clear error in the factual determinations underlying the Immigration Judge's favorable exercise of discretion, and we conclude upon de novo review that such discretion was correctly exercised given the findings of fact, to which we must defer on appeal. Thus, the DHS's appeal will be dismissed, and the record will be remanded for required background and security investigations..

Accordingly, the following orders are entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the

opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

File: [redacted] 89 – Atlanta, GA

Date: MAY 20 2015

In re: [redacted] H[redacted] a.k.a. Edin Edo Hindic

DISSENTING OPINION: Roger A. Pauley

The majority opinion is at odds with the overwhelming weight of authority in finding that an alien meets his or her burden of proof that a conviction does not bar the alien from eligibility for relief by demonstrating an inconclusive record. *See, e.g., Mondragon v. Holder*, 706 F.3d 535, 545 (4th Cir. 2013)("an inconclusive record of conviction ... is insufficient to meet an alien's burden of demonstrating eligibility for cancellation of removal"). The majority rely on *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), but nothing in that decision addresses the issue of who prevails in the event of an inconclusive record of conviction where the alien has the burden to show eligibility for relief. *Moncrieffe* indeed involved removability, not eligibility for relief, and did not even involve a divisible statute. *See Garcia v. Holder*, 756 F.3d 839, 846-50 (Garza, J. concurring)(finding that the alien failed to meet his burden of proof for eligibility for relief through an inconclusive record with regard to an aggravated felony and distinguishing *Moncrieffe* as involving removability where the government has the burden of proof). Under the regulations, aliens clearly have the burden of proof to establish eligibility for relief. 8 C.F.R. § 1240.8(d).

The Eleventh Circuit appears never to have precedentially decided the question at issue here. *See Omoregbee v. U.S. Atty. Gen.*, 323 Fed. Appx. 820 (11th Cir. 2009). In the absence of controlling circuit authority, the majority fundamentally err in not following the regulation at 1240.8(d) and binding Board precedent. *Matter of Almanza*, 24 I&N Dec. 774 (BIA 2009).[1]

I therefore respectfully dissent.

BOARD MEMBER

[1] I also strongly disagree with the majority's favorable exercise of discretion, given the respondent's significant criminal history.