U.S. Department of Justice

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Name: OZOUGWU, CHUKWUEBUKAE **A 079-003-777**

Date of this notice: 4/9/2020

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:
Donovan, Teresa L.

Userteam: Circuit Court Remand

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File: A079-003-777 – Houston, TX

Date: APR – 9 2020

In re: Chukwuebukae OZOUGWU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Velia E. Rosas, Esquire

ON BEHALF OF DHS: Nelson Echevarria-Tolentino
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's October 23, 2019, decision granting the respondent's motion to terminate and terminating removal proceedings. The respondent, a native and citizen of Nigeria and a lawful permanent resident of the United States, opposes the appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On August 17, 2006, the respondent's status was adjusted to that of a lawful permanent resident (IJ at 1; DHS's Statement of Position Regarding Removability, Attachment A, Record of Deportable/Inadmissible Alien (Form I-213) [hereinafter "DHS's Statement"]). On July 9, 2007, he was convicted of the offense of theft of property greater than $1,500 but less than $20,000 in violation of TEX. PENAL CODE § 31.03 (IJ at 1; DHS's Statement, Tabs A-B; Motion to Terminate Removal Proceedings filed on Oct. 17, 2019, Tab E; Motion to Terminate Removal Proceedings filed on Oct. 3, 2019, Tab E).[1] On October 11, 2011, the respondent was convicted of the offense of theft of property greater than $50 but less than $500 in violation of TEX. PENAL CODE § 31.03 (IJ at 1; DHS's Statement, Tab A; Motion to Terminate Removal Proceedings filed on Oct. 17, 2019, Tab E; Motion to Terminate Removal Proceedings filed on Oct. 3, 2019, Tab E).

On August 28, 2019, the respondent applied for admission to the United States as a returning lawful permanent resident, and the next day, the DHS served him with a notice to appear charging him with removability under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i)(I),

[1] The Immigration Judge appears to have made two harmless typographical errors in his decision, stating that the respondent was convicted of theft in 2001 and in 2007 and that in 2007, he was convicted of theft of property greater than $15,000 but less than $20,000 (IJ at 1). The record reflects, and the parties do not dispute, that the respondent was convicted of theft in 2007 and in 2011 and that the 2007 amount was $1,500 to $20,000.

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as an alien who has been convicted of a crime involving moral turpitude (IJ at 1; Exh. 1; DHS's Statement, Tab A). The respondent filed a motion to terminate, which the Immigration Judge granted on October 23, 2019 (IJ at 2, 5). This appeal followed.

On appeal, the DHS argues that the respondent's theft convictions are categorical crimes involving moral turpitude because the statute requires an intent to permanently deprive an owner of his or her property, that the respondent is removable under section 212(a)(2)(A)(i)(I) of the Act, and the Immigration Judge erred in terminating proceedings (DHS Br. at 3-12). The respondent maintains that termination was proper because a theft conviction under TEX. PENAL CODE § 31.03 is not categorically a crime involving moral turpitude (Respondent's Br. at 4-10; Respondent's Response Br. at 1-2).

At all relevant times, the statute defining the respondent's offense of conviction has provided, in pertinent part, that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." TEX. PENAL CODE § 31.03(a). The term "deprive" means:

> (A) to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner;
> (B) to restore property only upon payment of reward or other compensation; or
> (C) to dispose of property in a manner that makes recovery of the property by the owner unlikely.

TEX. PENAL CODE § 31.01(2).

Pursuant to Texas law, the term "intent to deprive" includes withholding property from its owner either permanently or "for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner" (IJ at 4). *Griffin v. State*, 614 S.W.2d 155, 158 (Tex. Crim. App. 1981) (explaining that "[t]he statutory level of harm to ownership rights has been lowered to include prolonged withholdings as well as permanent ones"). A defendant who takes the property of another temporarily and with the intention of returning it undamaged to the owner cannot be convicted of theft in Texas. *See id.*; *see also Flores v. State*, 888 S.W.2d 187, 190-91 (Tex. App. 1994) (stating that "the 'intent to deprive' element of auto theft is not proved when the evidence indicates that the automobile was taken for temporary use") (citation omitted).

The Board has held that theft offenses involving the exercise of dominion or control over the property of another without consent and with the intent to permanently deprive the rightful owner of the property's value are categorical crimes involving moral turpitude. *See Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *see also Okoro v. INS*, 125 F.3d 920, 926 (5th Cir. 1997) (concluding without analysis that theft convictions under Delaware law constituted crimes involving moral turpitude). We have also long recognized, however, that moral turpitude does not inhere in "joyriding" and similar offenses, i.e., unauthorized takings of property which involve only *de minimis* deprivations of no significant harm to the owners' property rights. *See, e.g.*, *Matter of H-*, 2 I&N Dec. 864, 865 (BIA 1947); *Matter of D-*, 1 I&N Dec. 143, 145 (BIA 1941).

Cite as: Chukwuebukae Ozougwu, A079 003 777 (BIA April 9, 2020)

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In *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847, 853 (BIA 2016), the Board held that a theft offense constitutes a crime involving moral turpitude "if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are substantially eroded." Subsequently, the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, held that the definition of a crime involving moral turpitude set forth in *Matter of Diaz-Lizarraga* may not be applied retroactively and could only apply to crimes committed after that decision was issued. *Monteon-Camargo v. Barr*, 918 F.3d 423, 430-31 (5th Cir. 2019).

Under pre-*Matter of Diaz-Lizarraga* law, the categorical approach required us to determine whether the elements of the offense defined by TEX. PENAL CODE § 31.03 correspond to the generic meaning of the phrase "crime involving moral turpitude," which for theft offenses we previously defied as the exercise of dominion or control over the property of another without consent and with the intent to permanently deprive the rightful owner of the property's value. *See Matter of Jurado*, 24 I&N Dec. at 33-34. Since Texas law defines the "intent to deprive" element as withholding property from its owner either permanently or "for so extended a period of time that a major portion of the value of enjoyment of the property is lost to the owner," we conclude that TEX. PENAL CODE § 31.03 defines theft more broadly than the former generic "theft offense" definition (IJ at 4). *See* § 31.03(2)(A). Theft under Texas law is not categorically a crime involving moral turpitude under our jurisprudence prior to *Matter of Diaz-Lizarraga*.

Applying pre-*Matter of Diaz-Lizarraga* law to the present case because the respondent's convictions occurred before 2016, we agree with the Immigration Judge that the respondent has not been convicted of a categorical crime involving moral turpitude (IJ at 4). The DHS did not argue before the Immigration Judge, and does not argue on appeal, that the statute is divisible (IJ at 4, n.2). Accordingly, we conclude that the Immigration Judge properly determined that the respondent is not removable as charged and terminated proceedings. The following order will be entered.

ORDER: The appeal is dismissed.

Terri L Donovan

FOR THE BOARD

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