



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

**PENA-ROJAS, SMITH DE JESUS  
A041-588-479  
SAN LUIS REGIONAL DET. CENTER  
406 N. AVENUE D, P.O. BOX 7710  
SAN LUIS, AZ 85349**

**DHS/ICE Office of Chief Counsel - IMP  
1115 N. Imperial Ave.  
El Centro, CA 92243**

**Name: PENA-ROJAS, SMITH DE JESUS**

**A 041-588-479**

**Date of this notice: 10/19/2016**

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:  
Pauley, Roger

Userteam: Docket

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*DS*

Falls Church, Virginia 22041

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File: A041 588 479 – Calexico, CA

Date:

OCT 19 2016

In re: SMITH DE JESUS PENA-ROJAS a.k.a. Smith Dejesus Penarojas  
a.k.a. Smith Dejesus Pena Rojas

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Kathryn Stuever  
Senior Attorney

APPLICATION: Termination of proceedings

The respondent, a native and citizen of the Dominican Republic, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated June 24, 2016. The Immigration Judge found the respondent removable and found him ineligible for relief from removal based on his criminal conviction. The respondent challenges removability on appeal. The record will be remanded.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Notice to Appear alleges that, on December 23, 2005, the respondent was convicted of Robbery Second Degree, in violation of California Penal Code section 211, and sentenced to two years in prison. A record of this conviction was entered into the record of proceedings (Exh. 2). *See* section 240(c)(3)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a). *Cf. United States v. Snellenberger*, 548 F.3d 699, 701-02 (9th Cir. 2008) (*en banc*). In addition, the respondent admitted the conviction (Tr. at 7-8; I.J. at 2). *See* 8 C.F.R. §§ 1003.41(d), 1240.10(c). *Cf. Pagayon v. Holder*, 675 F.3d 1182, 1189-1190 (9th Cir. 2011). Based on this evidence, the Immigration Judge found the conviction proved (I.J. at 2). We do not find this factual finding to be clearly erroneous.

The respondent was charged with being removable for having been convicted of an aggravated felony involving theft. The term "aggravated felony" includes a theft offense for which the term of imprisonment is at least one year. *See* section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). *See also Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez-Valencia v. Lynch*, 798 F.3d 863 (9th Cir. 2015). A crime constitutes a generic theft offense if it has the following elements: (1) a taking of property or an exercise of control over property, (2)

without consent, and (3) with the criminal intent to deprive the owner of the rights and benefits of ownership, even if the deprivation is less than total or permanent. *See Lopez-Valencia v. Lynch, supra*, at 868. *See also Gonzales v. Duenas-Alvarez, supra*, at 189.

California Penal Code defines Robbery to be: (1) the defendant took property not his own, (2) the property was in the possession of another person, (3) the property was taken from the other person or his immediate presence, (4) the property was taken against the other person's will,<sup>1</sup> (5) the defendant used force or fear to take the property or to prevent the other person from resisting, (6) when the defendant used force or fear, he intended to deprive the owner of the property permanently, and (7) the defendant's intent to take the property was formed before or during the time he used the force or fear. *See Cal. Penal Code § 211; United States v. Dixon*, 805 F.3d 1193, 1198 (9th Cir. 2015). California caselaw establishes that the taking element of California Penal Code section 211 has two aspects: gaining possession of the property and carrying it away. *See People v. Hill*, 17 Cal. 4th 800, 852 (1998). Liability for carrying away the property (asportation) is based on aiding and abetting of the robbery. No aspect of a generic theft offense covers conduct limited solely to participation in the asportation of the stolen property, which continues until all acts constituting the robbery have ceased. *See People v. Cooper*, 53 Cal. 3d 1158, 1161, 1165 (Sup. Ct. Cal. 1991). *See also People v. Dryden*, 2005 WL 1231732 at 5-6 (Cal. Ct. App. 2005) (unpublished). Due to this asportation aspect of California Penal Code section 211, we conclude that the statute punishes conduct broader than the conduct covered by a generic theft offense. *See United States v. Alonso-Sepulveda*, 2016 WL 1223355 (S.D. Cal.); *United States v. Bernal-Sanchez*, 2016 WL 727070 (S.D. Cal.). Consequently, California Penal Code section 211 is not categorically a theft offense.

Consequently, we will remand the record to enable the Immigration Judge to determine whether the statute is divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and, if so, to make the necessary factual findings.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and entry of a new decision.

  
FOR THE BOARD

<sup>1</sup> Because California Penal Code section 211 requires the property to be taken against the victim's will, it is without the consent of the victim. *See United States v. Becerril-Lopez*, 541 F.3d 881, 891 n.8 (9th Cir. 2008).

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
IMPERIAL, CALIFORNIA

File: A041-588-479

June 24, 2016

In the Matter of

SMITH DE JESUS PENA-ROJAS

RESPONDENT

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)  
)

IN REMOVAL PROCEEDINGS

**CHARGES:** Section 212(a)(6)(A)(iii) of the Act, as an alien who has been convicted of an aggravated felony under Section 101(a)(43)(G) of the Act, a law relating to a theft offense or burglary for which the term of imprisonment of at least one year was imposed.

**APPLICATIONS:** Motions to terminate.

**ON BEHALF OF RESPONDENT: PRO SE**

In Care of DHS Custody  
1572 Gateway Road  
Calexico, California 92231

**ON BEHALF OF DHS: KATHRYN STUEVER, Assistant Chief Counsel**

ICE  
880 Front Street, Suite 2246  
San Diego, California 92101

**ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE**

The respondent is a native and citizen of the Dominican Republic who was admitted into the United States as a lawful permanent resident on December 13, 1987.

On December 23, 2005, respondent was convicted in the Superior Court of California

for a violation of California Penal Code Section 211, robbery, for which he was sentenced to a period of confinement for two years.

At a master calendar session, the respondent admitted the allegations but denied the charge of removability. Since the respondent is a lawful permanent resident, the burden would be on the Government to establish that he is removable as charged. To support the denied charge of removability, the Government submitted certified conviction records, which have been marked as Exhibit 2. These records include an abstract of judgment, which indicates respondent was convicted for a violation of Penal Code Section 211 by a jury, which he was sentenced to the long term of two years, and, additionally, there was an enhancement to that under Penal Code Section 12022.53(b) for an enhancement of 10 years for use of a firearm during the commission of that offense. Also in Exhibit 2 are the minute orders, as well as the information which indicates with regard to count 1, which states, "on or about September 3, 2005, in the County of Los Angeles, the crime of second degree robbery, in violation of Penal Code Section 211, a felony was committed by Smith De Jesus Pena-Rojas, who did unlawfully, and by means of force and fear take the personal property from the person, possession, and immediate presence of Nicholas Casillas." Additionally, it is further stated that Smith De Jesus Pena-Rojas personally used a firearm, a handgun within the meaning of Penal Code Section 12022.53(b). Also in Exhibit 2 is the minutes from the sentencing session of the prison.

The respondent filed a motion to terminate the proceedings and submitted documents in Exhibit 3, indicating that his robbery conviction was not an aggravated felony for Immigration purposes under either Sections 101(a)(43)(F) or (G).

The Government issued a response in Exhibit 5 opposing the respondent's motion to terminate on the basis that he was only charged with an

aggravated felony under Section 101(a)(43)(G) for the theft offense, and was not charged under (F) for the crime involving violence.

During a subsequent master calendar, an issue was raised that the respondent's mother might have been a United States citizen and he could have acquired citizenship through his mother. The DHS did a brief on analysis of his derivative citizenship claim, both under the Child Citizenship Act of 2000, as well as the former Sections 320 and 321 of the Act. The respondent also submitted a motion to the Government's response, which has been marked as Exhibit 8. In arriving at my decision, I have considered Exhibits 1 through 8, as well as the limited testimony today of the respondent regarding the status of his mother and stepfather.

First, with regard to the issue of derivative citizenship through his mother. The respondent does appear to have turned 18 after the enactment of the Child Citizenship Act of 2000. So if analyzing his case under the Child Citizenship Act of 2000, to derive citizenship, he would have to have at least one parent who was a United States citizen, that he would be under the age of 18, and that he would be residing lawfully in the United States in the legal custody and presence of the child. Based on the analysis and the information provided, respondent was born on April 15, 1982, in the Dominican Republic, and, at that time, his mother he believes to be single, and he does not know any information regarding his biological father. He indicates that he became a lawful permanent resident in the United States on December 13, 1987, and that he believed that his mother may have been a lawful permanent resident at the time of his birth, but he is not certain. He does not know how his mother obtained lawful residence. Respondent's mother naturalized as a United States citizen on April 26, 2001, which is unfortunately nine days after he turned 18. Respondent does have a stepfather who married his mother who, apparently, was a lawful permanent resident at the time of

respondent's birth, but, apparently, the stepfather never adopted the respondent before his 18th birthday, as would have been required under Section 101(c) of the Act, which defines the term child for purposes of Title 3, which is the citizenship section.

Therefore, analyzing his claim under the Child Citizenship Act of 2000, his stepfather did not formally adopt him prior to age 18. There is no claim there, and his mother was about nine days late in getting the citizenship, so she cannot transmit that to him under that section. Analyzing the respondent's claim under the former Section 320 of the Act, the respondent would have had to have at least one parent who was a citizen at the time of his birth, and that an alien parent would have naturalized and, if the child was under age 18 when the naturalization took place and the child then residing in the United States, under that Section, respondent's mother is not a citizen of the United States at that time. ~~It is uncertain.~~ For his biological father, he does not know what his status is, and he is not sure of when his mother naturalized. Although he says it might have been at the time he was born. His date of lawful residence was December 13 of 1987, and, without any proof that the mother had naturalized and that his stepfather had adopted him, it does not look like he is going to derive citizenship under former Section 320 because the mother was not naturalized, in any event, while the respondent was under age 18. Again, she was about nine days too late.

Analyzing the derivative claim under former Section 321, the respondent would have to establish that either both parents naturalized or a naturalization of surviving parent, if one is deceased, or the naturalization of the parent having legal custody takes place under the age of 18, and, again, respondent's mother did not naturalize while he was under age 18, and the stepfather never formally adopted him. So he does not qualify as a child under Section 101(c) of the Act, and, therefore, I do not find that the respondent currently has any colorable claim to derivative citizenship

under either the Child Citizenship Act of 2000 or former Sections 320 or 321 of the Act, and I continue to find that allegation 1, that he is not a citizen or resident of the United States, is still sustained.

Additionally, respondent was informed that, at any time and any place, he can always request a certificate of citizenship through Citizenship and Immigration Services or a passport through the State Department, and those can be issued if he meets the criteria of derivative citizenship, regardless of any decision today with removal. So I continue to find that allegation 1 of his NTA is sustained.

With regard to whether or not he is removable as charged as an aggravated felon for a theft offense for the robbery where he was given a two-year sentence without considering the enhancement, I do find that, had the respondent been charged under Section 101(a)(43)(F) as a crime of violence, it could have been possible to sustain under that section if the robbery was considered to be a crime of violence and a violent felony under Title 18 United States Code Section 16(a) because only Title 18 Section 16(b) was found to be unconstitutional for a crime of violence, but there still is the other prong, but since the Government has not charged crime of violence, I will not go into analysis on that.

With regard to whether or not robbery is still a theft offense, under the Immigration and Nationality Act Section 101(a)(43)(G), the generic definition of theft includes: (1) a taking; (2) of property; (3) without the consent, and with the intent to criminally deprive the owner or the rights and benefits of ownership, even if such deprivation is less than total or permanent. See United States v. Alvarado-Pineda, 774 F.3d 1198 (9th Cir. 2014).

In Alvarado-Pineda, the Ninth Circuit held that a conviction for second degree robbery under a Washington revised code statute Section 9A.56.190 was a



categorical match to that of a theft offense under INA Section 843(d). The Washington revised code had six elements, that being: (1) a taking; (2) of personal property; (3) from another person or another person's immediate presence; (4) against his or her will; (5) by force or threatened force; and (6) with the specific intent to steal. California Penal Code Section 211 has seven elements: (1) that there is a taking of property of another; (2) that is in the possession of another; (3) the taking is from another person or in his immediate presence; (4) that it is against his or her will; (5) that it is used force or fear to take the property or to prevent resisting; (6) that when the force or fear that he intended to deprive the owner of the property permanently; and (7) with the intent to take the property of another was performed before or during the use of fear of force. Because the felonious taking under Section 211 must be without the consent of the property owner and against his will, the victim cannot be conceived of having consent because of this requirement.

Also PC 11 is a categorical theft offense because the generic definition of extortion, even though on its face might appear overbroad, it does constitute a generic theft offense because with the consent element is induced by the defendant's threats, thereby vitiating the victim's consent to the unlawful taking. In this case, I do find that the respondent's conviction for the unlawful taking with force or violence with a handgun to be a categorical match to the generic definition of theft offense, and I do not find that the respondent, in this case, or the charging document or the 211 indicates any aiding or abetting, and I distinguish Brucel-Lopez (phonetic sp.) as cited by the defendant, because here, under 211, the unlawful use of force or violence does vitiate any consent and, therefore, I do find it is a categorical match. Based on the current case law, I do find that the respondent's conviction for Penal Code Section 211 is a theft offense and I do find, because he had a two-year sentence, it is an aggravated felony for Immigration

purposes under Section 101(a)(43)(G), and I deny his motion to terminate and sustain the charge on that basis.

With regard to possible relief, I have questioned the respondent regarding potential relief available, and I find that he has no fear of return to the Dominican Republic, and, based on my holding that his conviction is an aggravated felony, I do not see that there is any relief available to him. It is potential that the respondent's citizen mother or over-21 citizen sibling could petition for him, but those petitions are not immediately available, and it is questionable, even though I know the law has recently changed, that he would be eligible for any waiver because he did adjust his status through a visa. In any event, at this point, respondent is detained, and there is no immediate relief available to him, and I have no choice, at this point, but to order his removal from the United States to the Dominican Republic.

**Please see the next page for electronic**

**signature**

RENEE L. RENNER  
Immigration Judge

This is a transcript of the oral decision, which was rendered in the presence of all parties. Any corrections are made in accordance with OPPM 93-01.

//s//

Immigration Judge RENEE L. RENNER

rennerr on August 25, 2016 at 7:29 PM GMT