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

Starr, Lance C.
Lance C. Starr, LLC.
125 E. Main St. Ste. 148
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DHS/ICE Office of Chief Counsel - SLC
2975 Decker Lake Dr. Stop C
West Valley City, UT 84119

Name: PALAU, ANI SALESI

A 042-689-094

Date of this notice: 2/2/2017

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:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

PALAU, ANI SALESI
A042-689-094
ETOWAH COUNTY DET. CENTER
827 FORREST AVE
GADSDEN, AL 35901

DHS/ICE Office of Chief Counsel - SLC
2975 Decker Lake Dr. Stop C
West Valley City, UT 84119

Name: PALAU, ANI SALESI

A 042-689-094

Date of this notice: 2/2/2017

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:
Guendelsberger, John
Malphrus, Garry D.
Pauley, Roger

Userteam:

File: A042 689 094 – Salt Lake City, UT Date: FEB - 2 2017

In re: ANI SALESI PALAU a.k.a. Ani S. Palau a.k.a. Ani Palau

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lance C. Starr, Esquire

ON BEHALF OF DHS: P. Michael Truman
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(G)

APPLICATION: Removability

The respondent, a native and citizen of Tonga, appeals from the Immigration Judge's November 17, 2015, decision finding him removable as charged. We review questions of law, discretion, and judgment arising in appeals from decisions of Immigration Judges de novo, whereas we review findings of fact in such appeals under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i), (ii). The appeal will be sustained, and proceedings will be terminated.

The respondent is charged with being removable as an alien convicted of an aggravated felony under section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), i.e., an offense that involves theft and for which the respondent was sentenced to at least 1 year of imprisonment.[1] A theft offense within the definition of section 101(a)(43)(G) of the Act requires the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *United States v. Vasquez-Flores*, 265 F.3d 1122, 1125 (10th Cir. 2001); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008).

The respondent was convicted in 2015 of violating Utah Code Ann. § 76-6-404.5 (Exhs. 1, 2), which reads in pertinent part:

[1] The respondent does not dispute that he was sentenced to imprisonment of at least 1 year.

> (1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.

Whether the respondent was found by the state court to have acted with one type of intent and not another is critical. If the respondent was convicted of having the intent to deprive the owner of the property when he acted, it would qualify as theft under *United States v. Vasquez-Flores*, *supra*, and *Matter of Garcia-Madruga*, *supra*, which define "theft" as the taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. However, if the respondent was convicted of violating Utah Code Ann. § 76-6-404.5 "with intent to temporarily appropriate, possess, or use the property," we agree with the respondent that it would not qualify as theft, for such an intent does not necessarily mean that the actor intended to deprive the owner of the rights and benefits of ownership to any meaningful degree.[2] For example, the intent to use the property of another, with only a de minimis deprivation of the owner's interests in the property, such as by a "glorified borrowing," would not qualify as theft. *See Matter of V-Z-S-*, 22 I&N Dec. 1338, 1346 (BIA 2000); *see also Castillo v. Holder*, 776 F.3d 262, 270 (4th Cir. 2015).[3]

To determine whether the respondent has been convicted of a "theft" aggravated felony, we employ the "categorical approach" and focus only on the elements of the offense, and not on the facts surrounding the commission of the crime. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). If the statute is divisible – i.e., it defines multiple crimes in the alternative, each of which requires a different set of elements to be proven for conviction – and if at least one, but not all, of these offenses qualifies as an aggravated felony within the meaning of section 101(a)(43)(G) of the Act, we must attempt to identify the respondent's actual crime of conviction for the purpose of determining whether it falls within section 101(a)(43)(G) of the Act. *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2281; *Matter of Chairez*, *supra*, at 821-22. To do so, we would employ the "modified categorical approach" by looking to a limited class of documents in the record of conviction, such as a charging document, jury instructions, a plea agreement, or a transcript of the plea

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[2] Our research has revealed few cases involving the application of Utah Code Ann. § 76-6-404.5, and none that specifically involved only the "intent to temporarily appropriate, possess, or use the property."

[3] The type of intent involved is the critical fact that distinguishes "wrongful appropriation" under Utah Code Ann. § 76-6-404.5 from "theft" under Utah Code Ann. § 76-6-404. The latter statute provides: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." However, a conviction under the wrongful appropriation statute can be found if there is only an intent "to temporarily appropriate, possess, or use the property." The language of these statutes makes clear that the Utah legislature intended the various types of intent to be meaningful in terms of the crime committed when an actor obtains or exercises control over the property of another without consent.

colloquy between the defendant and the judge. *See Mathis v. United States*, *supra*, at 2249; *Descamps v. United States*, *supra*, at 2283-86.

We find that Utah Code Ann. § 76-6-404.5 is divisible. It distinguishes between offenses committed with the intent to deprive and offenses committed with the other listed types of intent. We therefore apply the modified categorical approach to attempt to identify the respondent's actual crime of conviction.

Count 1 of the amended Information (Exh. 2 at 26) to which the respondent pled guilty states only that the respondent pled guilty to wrongful appropriation under Utah Code Ann. § 76-6-404.5. It provides no language that might assist in determining the elements of the crime of which the respondent was convicted.[4] The only other document in the record of conviction that is cognizable under the modified categorical approach is a Statement of Defendant in Support of Guilty Plea and Certificate of Counsel (Exh. 2 at 28). That document includes an acknowledgment that the elements of the crime to which the respondent agreed to plead guilty are: "The Defendant obtained unauthorized control over the property of another with the intent to temporarily appropriate or deprive temporarily the owner of the property" (Exh. 2 at 29). This statement reveals that the respondent only admitted, at a minimum, to an intent to appropriate temporarily, and the Department of Homeland Security (DHS) has not shown that such an intent under Utah law would involve more than a de minimis deprivation of ownership rights, as is required to support a finding of theft.[5] It follows that the respondent's removability under section 101(a)(43)(G) of the Act for having been convicted of a "theft" aggravated felony has not been established by clear and convincing evidence. *See Matter of Chairez*, *supra*, at 825.

Accordingly, the following order will be entered.

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

FOR THE BOARD

[4] The Information maintains the language from the prior charge, receiving stolen property in violation of Utah Code Ann. § 76-6-408 (Exh. 2 at 23).

[5] The Statement of Defendant in Support of Guilty Plea and Certificate of Counsel contains a statement of facts by which the respondent admitted that he had "the intent to temporarily deprive the owner" of property (Exh. 2 at 29). However, we consider only the elements of the offense; we do not consider the facts surrounding the commission of the crime. *See Mathis v. United States*, *supra*, at 2248; *Descamps v. United States*, *supra*, at 2281; *Matter of Chairez*, *supra*, at 821. We are prohibited from determining what the respondent and the convicting court "must have understood as the factual basis of the prior plea." *See Mathis v. United States*, *supra*, at 2252 (citation removed). In pleading guilty to his crime, the respondent waived his right to a jury determination of the offense's elements; whatever the respondent said about "superfluous facts" cannot be considered later in determining his offense. *See Descamps v. United States*, *supra*, at 2288.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2975 S. DECKER LAKE DR., #200
WEST VALLEY, UT 84119

Lance C. Starr, LLC.
Starr, Lance C.
125 E. Main St. Ste. 148
American Fork, UT 84003

IN THE MATTER OF
PALAU, ANI SALESI

FILE A 042-689-094 DATE: Nov 17, 2015

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
2975 S. DECKER LAKE DR., #200
WEST VALLEY, UT 84119

X OTHER: Order

COURT CLERK
IMMIGRATION COURT

FF

CC:

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SALT LAKE CITY, UTAH

In the Matter of: **ANI SALESI PALAU** Respondent.	**File No: A042-689-094** Date: November 17, 2015 **IN REMOVAL PROCEEDINGS** WRITTEN DECISION OF THE IMMIGRATION JUDGE DENYING THE RESPONDENT'S MOTION TO TERMINATE PROCEEDINGS AND ORDERING THE RESPONDENT REMOVED FROM THE UNITED STATES.

CHARGES:	INA Section 237(a)(2)(A)(iii), as amended, in that at any time after admission, the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year was imposed.
APPLICATIONS:	The respondent has made no applications for relief.

ON BEHALF OF THE RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Lance C. Starr Lance C. Starr, LLC 125 E. Main St., Suite 148 American Fork, UT 84003	Jonathan Stowers Assistant Chief Counsel 2975 S. Decker Lake Dr., Stop C West Valley City, Utah 84119

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

The respondent is a 43-year old (DOB: 07/14/1972), native and citizen of Tonga. (Exh. 1.) The United States Department of Homeland Security (DHS) brought these removal proceedings against the respondent under the authority of the Immigration and Nationality Act (INA or Act) pursuant to the filing of a Notice to Appear (NTA), which is marked in the record as Exhibit 1. 8 C.F.R. § 1003.14(a). The NTA is dated August 11, 2015. (*Id.*)

The NTA contains four (4) allegations. The allegations set forth in the NTA are: (1) the

respondent is not a citizen or national of the United States; (2) the respondent is a native and a citizen of Tonga; (3) the respondent was admitted to the United States at Los Angeles, California on or about February 3, 1993 as a LB2 immigrant; (4) on May 08, 2015, the respondent was convicted in the Third District Court – Salt Lake, Salt Lake County, State of Utah, for the offense of Wrongful Appropriation, in violation of Utah Code Annotated 76-6-404.5, a 3rd Degree Felony, for which the respondent was sentenced to an indeterminate term not to exceed five years in the Utah State Prison, Case No. 141904854.

The NTA contains one charge of removability. The respondent is charged with removability pursuant to section 237(a)(2)(A)(iii) of the Act, as amended, in that, at any time after admission, the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, a law relating to a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year was imposed. (*Id.*) The Court sustained the charge at the October 21, 2015, hearing. (Digital Audio Recording, 10/21/2015.)

The respondent is before the Court seeking to have his proceedings terminated. (Digital Audio Recording, 9/16/2015; Digital Audio Recording 10/21/2015.) DHS opposes terminating the proceedings, arguing that the respondent is removable because his Wrongful Appropriation conviction is a theft offense and, therefore, an aggravated felony. (*Id.*)

At issue in this case is whether the respondent's conviction for Wrongful Appropriation qualifies as an Aggravated Felony, making the respondent removable.

For the reasons set forth below, the Court DENIES the respondent's motion to terminate proceedings and orders the respondent removed from the United States.

II. SUMMARY OF EVIDENTIARY RECORD

The record comprises four (4) exhibits. All of the exhibits were admitted into evidence, and the Court has considered all exhibits and evidence in the record of proceeding whether referred to in this decision or not.

Exhibit 1 is the NTA. Exhibit 2 is the DHS' submission of evidence. Exhibit 3 is a comparison of Utah Code section 76-6-404.5(1), which proscribes Wrongful Appropriation, and *U.S. v. Venzor-Granillo*, 668 F.3d 1224 (10th Cir. 2012), which proscribes the generic definition of a theft offense. Exhibit 4 is the text of Utah Code section 76-6-404.5, which

proscribes Wrongful Appropriation.

The respondent's motion to terminate proceedings was also admitted subsequent to the fourth exhibit, and was not officially marked as an exhibit by the Court.

III. STATEMENT OF LAW

A. INA Section 101(a)(43)(G): Theft Offense Aggravated Felonies

Aggravated felonies for immigration purposes include convictions for theft offenses (including receipt of stolen property) or a burglary offense for which the term of imprisonment is at least one year.

B. General Definition of Theft

The generic definition of theft offense, as it is used in INA Section 101(a)(43)(G), is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *See U.S. v. Venzor-Granillo*, 668 F.3d 1224, 1232 (10th Cir. 2012).

C. Utah's Wrongful Appropriation Statute

Wrongful Appropriation is defined as:

(1) A person commits wrongful appropriation if he obtains or exercises unauthorized control over the property of another, without the consent of the owner or legal custodian and with intent to temporarily appropriate, possess, or use the property or to temporarily deprive the owner or legal custodian of possession of the property.
(2) The consent of the owner or legal custodian of the property to its control by the actor is not presumed or implied because of the owner's or legal custodian's consent on a previous occasion to the control of the property by any person.
(3) Wrongful appropriation is punishable one degree lower than theft, as provided in Section 76-6-412, so that a violation which would have been:
    (a) a second degree felony under Section 76-6-412 if it had been theft is a third degree felony if it is wrongful appropriation;
    (b) a third degree felony under Section 76-6-412 if it had been theft is a class A misdemeanor if it is wrongful appropriation;
    (c) a class A misdemeanor under Section 76-6-412 if it had been theft is a class B misdemeanor if it is wrongful appropriation; and
    (d) a class B misdemeanor under Section 76-6-412 if it had been theft is a class C misdemeanor if it is wrongful appropriation.
(4) Wrongful appropriation is a lesser included offense of the offense of theft under Section 76-6-404.

Utah Code Ann. § 76-6-404.5

D. Categorical and Modified Categorical Approaches

In determining whether a state court conviction matches the immigration definition of a conviction that serves as grounds of removal or a bar to relief, the Court first utilizes a categorical approach by examining the statute of conviction. *See Taylor v. United States*, 495 U.S. 575 (1990); *Efagene v. Holder*, 642 F.3d 918, 921 (10th Cir. 2011). Only if the Court finds that the statute is not a categorical match to the immigration definition can the Court engage in step two of the analysis, in which the Court would examine the records of conviction. *See Shepard v. United States*, 544 U.S. 13 (2005). Pursuant to *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) and *Descamps v. United States*, 133 S. Ct. 2276 (2013), if the state statute comprises a single, indivisible, grouping of elements (i.e. no disjunctives), and it is overly-broad (i.e. prohibits both conduct that is within the federal generic definition and conduct broader than the immigration definition), the analysis must stop at the categorical stage. However, if the statute is disjunctive and contains discrete elements, some of which fall within the immigration definition, and some of which do not, then the modified categorical approach can be utilized.

At the relief phase of removal proceedings, when the respondent is applying for cancellation of removal, for example, it is the respondent's burden to prove eligibility; and failure to do so—even if the statute and conviction documents are ambiguous by no fault of the respondent's—works against the respondent. *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009).

IV. ANALYSIS

At issue in this case is whether the respondent's proceedings should be terminated. For the reasons set forth below, the Court denies the respondent's motion to terminate proceedings.

A. The Respondent's Conviction for Wrongful Appropriation is a Theft Offense.

The respondent's conviction for wrongful appropriation under Utah Code section 76-6-404.5 is a theft offense. When looking at the Wrongful Appropriation statute on its face, the statute is categorical because it requires that, 1) the individual obtains or exercises unauthorized control over the property of another; 2) the control must be done without the consent of the owner or legal custodian; and 3) the defendant must have intent to temporarily appropriate, possess or use the property. Utah Code § 76-6-404.5(1). Comparing this to the generic definition of a theft offense, both require the same elements, which are: 1) the taking of property; 2) that the taking be done without consent; and 3) that the defendant have intent to

deprive the owner, even if deprivation is less than total or permanent. The Court finds that the Utah Wrongful Appropriation statute is a categorical match to the immigration definition of a theft offense. Since the statute and definition are categorical matches, the Court need not utilize the modified categorical approach. Therefore, the respondent's conviction for Wrongful Appropriation constitutes a theft offense.

B. The Respondent's Conviction for Wrongful Appropriation is an Aggravated Felony

The respondent's conviction for Wrongful Appropriation is a theft offense, and the respondent was sentenced to 5 years at the Utah State Prison. As such, the requirements of Section 101(a)(43)(G) of the INA are met, and the respondent's conviction qualifies as an Aggravated Felony for immigration purposes.

It is the ruling of the Court that the respondent's motion to terminate proceedings be denied, and the respondent be removed from the United States to Tonga.

Accordingly, the following orders are entered:

V. ORDERS

IT IS HEREBY ORDERED that the respondent be **REMOVED** from the United States to Tonga, without Voluntary Departure, based upon the charges contained in the Notice to Appear.

Appeal has been reserved for both parties. Both parties have 30 days from the issuance of this decision to file an appeal.

11/17/15
DATE

David C. Anderson
Immigration Judge