



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: MONTES DE OCA, ARNOLDO B... A 093-322-719

Date of this notice: 5/15/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Malphrus, Garry D.
Liebowitz, Ellen C

Userteam: Docket

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Falls Church, Virginia 22041

File: A093 322 719 – Phoenix, AZ

Date: **MAY 15 2017**

In re: ARNOLDO BALTAZAR MONTES DE OCA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Salvador Ongaro, Esquire

ON BEHALF OF DHS: Victoria Levin
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] -
Present without being admitted or paroled

APPLICATION: Cancellation of removal

This matter was last before the Board on August 22, 2014, when we dismissed the respondent's appeal from an Immigration Judge's January 8, 2013, decision ordering him removed from the United States. The respondent thereafter sought judicial review before the United States Court of Appeals for the Ninth Circuit, which has remanded the record to us in light of the Supreme Court's intervening decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016). Upon further consideration, the appeal will be sustained and the record will be remanded to the Immigration Judge.

The respondent, a native and citizen of Mexico, concedes removability as charged but challenges the Immigration Judge's decision denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). To qualify for cancellation of removal, the respondent must prove that he "has not been convicted of an offense under section ... 237(a)(2)." See section 240A(b)(1)(C) of the Act.

In 1995 the respondent was convicted of "misconduct involving weapons" in violation of Ariz. Rev. Stat. § 13-3102(a)(1) (West 1989 & 1995 Supp.) (hereafter "section 13-3102(a)(1)"). Based on that conviction, the Immigration Judge found the respondent ineligible for cancellation of removal because he had not demonstrated the absence of a conviction under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C), which pertains to certain offenses involving "firearms" (as defined by 18 U.S.C. § 921(a)). To be precise, the Immigration Judge found that section 13-3102(a)(1) is "divisible" vis-à-vis section 237(a)(2)(C) because it encompasses offenses involving the carrying of firearms as well as weapons other than firearms, but that the respondent had not carried his burden of proving that his conviction was for carrying a weapon other than a firearm.

We affirmed the Immigration Judge's divisibility determination in our prior decision, but the issue is now before us once again because of the Supreme Court's intervening decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), which clarified and narrowed the circumstances under which a statute may be deemed divisible. Specifically, *Mathis* clarifies that a statute phrased in the alternative is divisible only if each statutory alternative defines a discrete "element" of the offense, as opposed to a mere "brute fact" or factual "means" by which an element may be proven. *Id.* at 2248. Applying *Mathis*, we now conclude that section 13-3102(a)(1) is an indivisible statute vis-à-vis section 237(a)(2)(C).

In 1995, section 13-3102(a)(1) made it a crime for any person to knowingly carry a concealed "deadly weapon" other than a pocketknife without a permit. The term "deadly weapon" was then defined as "anything designed for lethal use ... includ[ing] a firearm." See Ariz. Rev. Stat. § 13-3101(1) (West 1989 & 1995 Supp.). This definition is categorically overbroad (because it encompasses weapons that are not firearms), but it is not phrased in the alternative or defined by reference to a finite list of items. Instead, "deadly weapon" is employed as an "umbrella term" to encompass a disparate range of objects. Further, although the definition specifies that it "includes firearms," firearms are used here merely as one "illustrative example" of an object subsumed within the broader definition. As *Mathis* made clear, these sorts of "umbrella terms" and "illustrative examples" are not sufficient to render a statute divisible. *Mathis v. United States*, 136 S. Ct. at 2256 (citing *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014), and *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)).

As section 13-3101(1)'s definition of "deadly weapon" is overbroad vis-à-vis the federal "firearm" definition and indivisible under *Mathis*, it follows that the Immigration Judge was not permitted to employ the modified categorical approach to find that the respondent's conviction was for a firearm offense under section 237(a)(2)(C) of the Act. Consequently, we will sustain the respondent's appellate challenge to the Immigration Judge's decision denying his application for cancellation of removal.

In conclusion, the respondent is removable as charged but is not ineligible for cancellation of removal as an alien convicted of a firearm offense. Accordingly, the appeal will be sustained and the record will be remanded for further proceedings. We express no present opinion as to whether the respondent is otherwise eligible for (or deserving of) relief from removal.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.



FOR THE BOARD