U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: G[redacted] H[redacted]

A[redacted]-149

Date of this notice: 12/20/2019

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:
Greer, Anne J.
Noferi, Mark
O'Connor, Blair

Userteam: Docket

File: A[redacted]-149 – York, PA Date: DEC 20 2019

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

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Disha Chandiramani, Esquire

APPLICATION: Cancellation of removal under 240A(a) of the Act

The respondent, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, appeals the Immigration Judge's determination that he is removable under section 237(a)(2)(B)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(B)(iii), rendering him ineligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The record will be remanded.

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

The respondent was convicted three times of possession of a controlled substance, to wit: crack cocaine, in violation of N.Y. Penal Law § 220.03 on May 1, 2007, July 18, 2007, and June 15, 2011. On May 29, 2015, the respondent was convicted of conspiracy to interfere with commerce by threats of violence in violation of 18 U.S.C. § 1951 (Hobbs Act), and carrying a firearm in connection with that offense in violation of 18 U.S.C. § 924(c)(1)(A)(i), (2) (Exhs. 1, 2). Based on these convictions, the Department of Homeland Security (DHS) charged the respondent as removable under section 237(a)(2)(B)(i) of the Act for having violated any law or regulation relating to a controlled substance, and section 237(a)(2)(C) of the Act, as an alien who has been convicted under any law involving the purchase, sale, exchange, use, ownership, possession, or carrying of a firearm as defined by 18 U.S.C. § 921 (a) (Exh. 1). The DHS also charged the respondent as removable under section 237(a)(2)(A)(iii) of the Act for having committed aggravated felonies as described in section 101(a)(43)(F) of the Act, 8 U.S.C. 1101(a)(43)(F), crimes of violence, and section 101(a)(43)(U), an attempt or conspiracy to commit an aggravated felony (Exh. 1, 1A).[1]

[1] On the Notice to Appear (NTA), the DHS initially charged the respondent as removable for having committed an "aggravated felony as defined in section 101(a)(43)(U) of the Act as it related to a crime of violence" (Exh. 1). To clarify, the DHS issued a Form I-261 on June 5, 2019, charging the respondent as removable for having committed an aggravated felony as defined in "section 101(a)(43)(F) of the Act, a crime of violence . . . for which a term of imprisonment is at least one year," and clarified on the record that the charge of removability relating to section 101(a)(43)(U) of the Act is for an attempt or conspiracy to commit an aggravated felony

The respondent conceded that he is removable under section 237(a)(2)(B)(i) of the Act, but contested removability under sections 237(a)(2)(C)[2] and 237(a)(2)(A)(iii) of the Act (Tr. at 30-33). The Immigration Judge found the respondent removable under all charges, and the respondent relayed that he would not pursue relief in light of the Immigration Judge's findings (IJ at 1-8; Tr. at 33). The respondent now appeals, arguing that his convictions are not for aggravated felonies as described under sections 101(a)(43)(F) and (U) of the Act, rendering him eligible for cancellation of removal for certain permanent residents under section 240A(a) of the Act.

First, the respondent claims that his due process rights were violated because the DHS made errors on the NTA in describing the charges of removability (Respondent's Br. at 3 n.3). However, any errors were remedied when DHS filed a Form I-261, and DHS clarified the charges on the record to the Immigration Court and the respondent. The respondent, who was represented before the Immigration Court, contested these charges and had a full and fair opportunity to respond to the allegations. *See Li Hua Yuan v. U.S. Att'y Gen.*, 642 F.3d 420, 427 (3d Cir. 2011) (viewing "an error as harmless and not necessitating a remand . . . when it is highly probable that the error did not affect the outcome of the case"). Therefore, the respondent was not prejudiced by any initial error made by the DHS, and his assertions that his due process right were violated are not availing. *See Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984) (stating a respondent must demonstrate that he has been prejudiced in order to establish that he has suffered a denial of due process).

We now turn to the respondent's assertions that his convictions are not for aggravated felonies under section 237(a)(2)(A)(iii) of the Act. The Immigration Judge determined that the respondent's conviction under 18 U.S.C. § 1951 for conspiracy to interfere with commerce by threats of violence was for an aggravated felony under section 101(a)(43)(F) of the Act, crime of violence (IJ at 4-8). A crime of violence under this section is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16(a); *see also* section 101(a)(43)(F) of the Act (cross-referencing 18 U.S.C. § 16 as providing the definition for a crime of violence). In order to be an aggravated felony, the crime of violence must have been for a term of imprisonment of at least 1 year. *See* section 101(a)(43)(F) of the Act.

We agree with the Immigration Judge that Hobbs Act robbery under 18 U.S.C. § 1951(b)(1) is an offense that contains as an element the use, attempted use, or threatened use of physical force against the person or property of another. *See United States v. Robinson*, 844 F.3d 137, 150 (3d Cir. 2016) (Fuentes, J., concurring); *see also Al-Sharif v. USCIS*, 734 F.3d 207, 210 n.3 (3d Cir.

(IJ at 2-3; Tr. at 31; Exh. 1A). The DHS additionally charged the respondent as removable under section 237(a)(2)(A)(iii) of the Act for having committed an aggravated felony as described in section 101(a)(43)(G), theft offenses, but withdrew that charge on June 24, 2019 (Tr. at 32; Exh. 1A).

[2] The respondent does not appeal the Immigration Judge's determination that he is removable under section 237(a)(2)(C) of the Act, and thus we find the issue to be waived. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (recognizing that failure to substantively address on appeal an issue addressed in the Immigration Judge decision results in waiver of the issue).

2013) (quoting *Matter of S-I-K-*, 24 I&N Dec. 324, 326 (BIA 2007), to state that the necessary analysis to determine if a conviction is for an aggravated felony under section 101(a)(43)(U) of the Act is to assess if "at least one of the unlawful acts that was the object of the conspiracy," even if not consummated, is described in section 101(a)(43) of the Act). However, we do not agree with the Immigration Judge that the respondent's conviction is for an aggravated felony, crime of violence, as defined by section 101(a)(43)(F) of the Act. As the Immigration Judge found, based on the record of conviction, the respondent received a sentence for 1 month's imprisonment for his conviction under 18 U.S.C. § 1951, and 60 months' imprisonment for carrying a firearm in the commission of that crime under 18 U.S.C. § 924(c)(1)(A)(i), (2) (Exh. 2 at 10).

Case law indicates that 18 U.S.C. § 924(c)(1)(A)(i) is not merely a sentencing enhancement, but rather it is a separate and discrete offense presented to the jury. *See Abbott v. United States*, 562 U.S. 8, 12 (2010) ("As one of several measures to punish gun possession by persons engaged in crime, Congress made it a *discrete offense* to use, carry, or possess a deadly weapon in connection with 'any crime of violence or drug trafficking crime.'") (emphasis added). Accordingly, the respondent's sentence for 18 U.S.C. § 924(c)(1)(A)(i) is distinct from the respondent's sentence for his conviction under 18 U.S.C. § 1951(b)(1), and the two sentences cannot be calculated together. Therefore, the respondent's conviction under section 18 U.S.C. § 1951 is not for an aggravated felony as defined by section 101(a)(43)(F) of the Act, as the term of imprisonment for the offense was less than 1 year.

We additionally conclude that the Respondent's conviction under 18 U.S.C. § 924(c)(1)(A)(i) lacks as an element the use, attempted use, or threatened use of physical force against the person or property of another. 18 U.S.C. § 16(a). To determine whether the respondent's offense is a crime of violence, we employ the categorical approach and consider solely the elements of the offense rather than the facts underlying the respondent's conviction. *Matter of Chairez*, 26 I&N Dec. 819, 821 (BIA 2016). Under the categorical approach, we examine the statute of conviction to determine whether every element of the state statute corresponds to the elements of the federal crime. *Singh v. U.S. Att'y Gen.*, 839 F.3d 273, 278 (3d Cir. 2016). An "element" is a fact that must be agreed upon by the jury in order to sustain a conviction. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016).

The statute at the time of the respondent's conviction applied, in relevant part, to "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . " 18 U.S.C. § 924(c)(1)(A) (2015). Because the statute lists various ways to commit the offense in the alternative, our first task is "to determine whether its listed items are elements or means." *Mathis v. United States*, 136 S.Ct. at 2256. In order to do this, we may take a "peek" at the record documents, "for the sole and limited purpose of determining whether the listed items are elements of the offense." *Id.* A look at the respondent's judgment of conviction states that he pled guilty to count 3 of the grand jury indictment for "use or carrying" a firearm in the commission of 18 U.S.C. § 1951 (Exh. 2 at 9). In turn, count 3 of the grand jury indictment, to which the respondent pled, states that the respondent "knowingly did use and carry a firearm, and in furtherance of such crime, did possess a firearm, and did aid and abet the use, carrying, and possession of a firearm" (Exh. 2 at 77). As such, we determine that 18 U.S.C. § 924(c)(1)(A) is not divisible, as the statute lists various means of committing the offense, all of which were

included in the charging document to which the respondent pled guilty. *Cf. id.* (stating that "an indictment . . . could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements").

As 18 U.S.C. § 924(c)(1)(A) is not divisible, we must determine if the statute criminalizes conduct beyond the federal definition of a crime of violence under 18 U.S.C. § 16(a). *Matter of Chairez*, 26 I&N Dec. at 821 (BIA 2016). A survey of case law shows that the respondent need not have used, attempted to use, or threatened to use the firearm in order to have been convicted under 18 U.S.C. § 924(c)(1)(A). First, the term "carry" is not limited to carrying a firearm directly on a person, but also applies when an individual has a firearm locked in the glove compartment or trunk of a car during the commission of the crime. *United States v. Williams*, 344 F.3d 365, 370 (3d Cir. 2003) (holding that a defendant who had a firearm in his getaway car during his flight from the commission of the crime was "carrying" a firearm for purposes of 18 U.S.C. § 924(c)(1)(A)(i)) (citations omitted); *see also Bailey v. United States*, 516 U.S. at 146 ("[A] firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing through a drug transaction."). Additionally, to be convicted under 18 U.S.C. § 924(c)(1)(A), the defendant need only possess a firearm, but that firearm does not need to be immediately accessible. *See United States v. Sparrow*, 371 F.3d 851, 853 (3d Cir. 2004) (affirming a defendant's conviction under 18 U.S.C. § 924(c)(1)(A) when the police discovered the firearm underneath the floor tiles in his apartment). Therefore, because a violation of the offense can simply involve carrying or possessing the firearm, the respondent's conviction under 18 U.S.C. § 924(c)(1)(A)(i) is overbroad as to a crime of violence under section 101(a)(43)(F) of the Act, as it does not necessarily have an element of the use, attempted use, or threatened use of physical force against the person or property of another.

We thus determine that the respondent's convictions under 18 U.S.C. § 1951 and 18 U.S.C. § 924(c)(1)(A)(i) are not for aggravated felonies, as the respondent did not conspire to commit an aggravated felony under section 101(a)(43)(U) of the Act as defined by a crime of violence under section 101(a)(43)(F) of the Act. Therefore, we remand the record to provide the respondent an opportunity to apply for relief, including cancellation of removal under section 240A(a) of the Act. On remand, the Immigration Judge should determine if the respondent is eligible for such relief, and if he is deserving of the relief sought in an exercise of discretion. Accordingly, the following order will be entered.

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

FOR THE BOARD