U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: GONZALEZ, FILIBERTO ROSAL... **A 041-276-712**

Date of this notice: 8/14/2017

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

Sincerely,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly
Pauley, Roger
Guendelsberger, John

Userteam: Docket

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GONZALEZ, FILIBERTO ROSALES
A041-276-712
C/O JOHNSON COUNTY JAL
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125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: GONZALEZ, FILIBERTO ROSAL... **A 041-276-712**

Date of this notice: 8/14/2017

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,

Cynthia L. Crosby
Deputy Chief Clerk

Enclosure

Panel Members:
Kendall Clark, Molly
Pauley, Roger
Guendelsberger, John

Userteam:

File: A041 276 712 – Dallas, Texas Date: AUG 14 2017

In re: Filiberto ROSALES GONZALEZ a.k.a. Filiberto Rosales a.k.a. Filiberto Rosales Gonzalez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Arash Varshosaz, Esquire

APPLICATION: Cancellation of removal

By a decision of an Immigration Judge of March 16, 2017, the respondent was found to be removable as charged pursuant to Sections 237(a)(2)(A)(iii), (B)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i). The respondent's application for cancellation of removal pursuant to section 240A(a) of the Act, 8 U.S.C. § 1229b, was pretermitted by the Immigration Judge and the respondent was ordered removed to Mexico. The respondent appealed. The Department of Homeland Security (DHS) has not responded to the appeal.

By a Notice to Appear issued on September 27, 2016, the DHS charged the respondent with being subject to removal on the basis of his August 16, 2016, convictions of the crimes of Possession of a Controlled Dangerous Substance with Intent to Distribute, to wit: Cocaine, in violation of 63 Oklahoma Statutes ("O.S.") §§ 2-401–2-420 and Possession of a Controlled Drug without a Tax Stamp Affixed, in violation of 68 O.S. § 450.1.[1] Contained in the Plea of Guilty are the respondent's handwritten words stating the factual basis for the plea: "On 6/8/15, in Tulsa County I possessed cocaine & intended to distribute it. The cocaine had no tax stamp affixed to it . . ."[2] (Exh. 2). The respondent challenges the conclusion that his conviction is an aggravated felony.[3] The appeal will be sustained.

The Board reviews questions of law, discretion and judgment and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii). Accordingly, we review de novo the respondent's removability as charged.

[1] The disposition reached in this appeal rests on our discussion of the respondent's conviction of Possession of a Controlled Dangerous Substance with Intent to Distribute, to wit: Cocaine. For purposes of this decision, we need not reach the respondent's conviction of Possession of a Controlled Drug without a Tax Stamp Affixed.

[2] It appears from other documentation of record that the offenses took place on June 8, 2016, not 2015.

[3] The respondent does not challenge his removability under section 237(a)(2)(B)(i) of the Act, and we deem the issue waived.

Under the Act, "[a]ny alien who is convicted of an aggravated felony at any time after admission" is removable from the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). To determine whether the respondent's conviction renders him removable as charged, we first look to the "categorical approach." *See Moncrieffe v. Holder*, 133 S.Ct. 678, 684 (2013). Under the categorical approach, "we look not to the facts of the particular prior case," but instead to whether the statute at issue "categorically fits within the 'generic' federal definition of the offense. *Moncrieffe v. Holder*, 133 S.Ct. at 684 (citation omitted) (internal quotation marks omitted). We must presume that the respondent's conviction rested upon nothing more than the least of the acts criminalized by the state statute. *Id.*

However, we are permitted to apply a "modified categorical approach" in a narrow class of cases, if the state statute of conviction is broader than the generic federal offense and is also "divisible," meaning that it "comprises multiple, alternative versions of the crime," at least one of which "correspond[s] to the generic offense." *Mathis v. United States*, 136 S.Ct. 2243, 2248-49 (2016); *Descamps v. United States*, 133 S.Ct. 2276, 2284-85 (2013). This modified categorical approach is a tool to identify, from among several alternatives, the crime of conviction to compare it to the generic offense. Under the modified categorical approach, we consider a limited class of judicially noticeable documents to determine which of a statute's alternative elements formed the basis of the respondent's conviction. *Descamps v. United States*, 133 S.Ct. at 2284; *see also Ibanez-Beltran v. Lynch*, 858 F.3d 294 (5th Cir. 2017) (citing *United States v. Hinkle*, 832 F.3d 569, 575 (5th Cir. 2016)).

Turning to the case before the Board, we must determine whether to apply the modified categorical approach to ascertain whether the respondent was convicted of an offense that matches the corresponding federal offense. *Descamps v. United States,* 133 S.Ct. at 2281. To do so, it is necessary to determine whether 'listed items' in the statute under which the respondent was convicted are 'elements or means.' *United States v. Hinkle*, 832 at 575 (quoting *Mathis v. United States*, 136 S.Ct. at 2256). Absent state court decisions determinative of whether jury unanimity is required to agree on whether a defendant completed the action, we are permitted to look to the record of conviction for "the sole and limited purpose of determining whether the listed items are elements of the offense." *Ibanez-Beltran v. Lynch,* 858 F.3d at 297-298 (citing *Mathis v. United States*, 136 S.Ct. at 2256-57). We do so here.

The respondent pled guilty in the following terms: "I possessed cocaine & intended to distribute it." The use of one alternative term from the statute, cocaine, to the exclusion of all others, is one indication that the terms within the statute are individual elements. *Mathis v. United States*, 136 S.Ct. at 2257. Further, reinforcing the plea agreement's treatment of possession of cocaine with intent to distribute as a separate offense are the Oklahoma Uniform Jury Instructions. *Mathis v. United States*, 136 S.Ct. at 2257 (mentioning jury instructions as a source to determine divisibility); *see also United States v. Martinez–Vidana*, 825 F.3d 272, 274 (5th Cir. 2016) (considering a pattern jury instruction to determine the divisibility of a statute). By the terms of those instructions, "[n]o person may be convicted of distributing a controlled dangerous substance unless the State has proved beyond a reasonable doubt each element of the crime. These elements are: "First, knowingly/intentionally; Second, distributing/(transporting with the intent to distribute)/([soliciting the use]/[using the services] of a person less than 18 years of age to cultivate/distribute/manufacture/(attempt to manufacture); Third, the controlled dangerous

substance of [Name of Substance]. *Oklahoma Uniform Jury Instructions,* OUJI-CR 6-2; 63 O.S. Supp. 1995, § 2-401(A)(1).

The plea agreement and instructions are enough, without settled state law to the contrary, to find that 63 O.S. 2-401-2-420 is divisible. Because the statute is divisible, the modified categorical approach narrows the respondent's offense to Possession of a Controlled Dangerous Substance with Intent to Distribute, to wit: Cocaine. Whether that offense is analogous to the federal offense of possession of a controlled substance with intent to distribute, a felony violation of the Controlled Substances Act, *See* 21 U.S.C. §§ 841(a)(1), 841(b), is to be determined. It is the position of the respondent that Possession of a Controlled Dangerous Substance with Intent to Distribute, to wit: Cocaine, under 63 Oklahoma Statutes ("O.S.") §§ 2-401–2-420 does not constitute a conviction for "illicit trafficking" because the state conviction is not for a completed commercial transaction and thus does not comport with the definition of "illicit trafficking" in a controlled substance (Respondent's Br. at 14).

Section 21 U.S.C. § 841(a)(1) provides that "it shall be unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Under this provision, "distribute" means "to deliver," cocaine is classified as a controlled substance, and cocaine distribution is punishable as a felony. But, merely possessing a controlled substance, even if one were to draw the inference of an intent to distribute it, does not constitute "unlawful trading or dealing" within the meaning of our precedents. *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014). Acts of manufacture, delivery, possession with intent to manufacture and possession with intent to deliver are not commercial and therefore do not qualify as "illicit trafficking." *Matter of L-G-H-*, 26 I&N Dec. at 365. Accordingly, we do not find that the crime of Possession of a Controlled Dangerous Substance with Intent to Distribute, to wit: Cocaine, under 63 Oklahoma Statutes ("O.S.") §§ 2-401–2-420 constitutes "illicit trafficking" per section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).[4]

Further, federal law is clear that, to be convicted under 21 U.S.C. § 841(a)(1), the prosecutor must prove beyond a reasonable doubt that the defendant knew that the substance he manufactured, distributed, dispensed, or possessed was a controlled substance of some kind. *Sarmientos v. Holder*, 742 F.3d 624, 629 (5th Cir. 2014). It is the position of the respondent on appeal that "there is no Oklahoma jury instruction or case law that say [sic] the prosecution must prove beyond a reasonable doubt the defendant had knowledge of the illicit nature of the controlled substance, as is need for a conviction under the federal statute" (Respondent's Br. at 8). To the contrary, the Immigration Judge, citing *Carpenter v. State*, 668 P.2d 347 (Okl. Cr. 1983), held that "knowledge of the illicit nature of the controlled substance is implied through the knowing and intentional possession of a controlled substance" (IJ at 6). We decline to rely on the fact-specific finding of that case to conclude that Oklahoma requires that it be proven beyond a reasonable doubt that the defendant knew that the substance he manufactured, distributed, dispensed, or possessed was a

[4] Nor would it appear to constitute attempted trafficking, although in any event we note that no such charge was alleged. *See Pierre v. Holder,* 588 F.3d 767 (2d Cir. 2009).

controlled substance of some kind, as is required under federal law. *Carpenter v. State*, 668 P.2d at 50; *Sarmientos v. Holder*, 742 at 629.

Accordingly, we conclude that the respondent's conviction under 63 O.S. §§ 2-401–2-420 does not constitute a conviction for "illicit trafficking" and does not constitute a conviction for an aggravated felony "drug trafficking crime" as defined under section 101(a)(43)(B) or (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(B) and (U). *See Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275(11th Circ. 2013); compare *Matter of L-G-H-*, 26 I&N Dec. 365 (BIA 2014). We therefore reverse the Immigration Judge's decision finding the respondent removable under section 237(a)(2)(A)(iii) of the Act, and we remand the record to the Immigration Judge for a hearing on the respondent's eligibility for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a) and for any other matters necessary to the resolution of the respondent's proceedings.

ORDER: The respondent's appeal is sustained, and the record is remanded to the Immigration Judge for further proceedings consistent with this order.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: A041-276-712
Detained Alien

Date: March 16, 2017

In the Matter of

FILIBERTO ROSALES GONZALEZ A/K/A ROSALES FILIBERTO A/K/A ROSALES GONZALEZ FILIBERTO RESPONDENT	)	IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act) as amended, in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, a law relating to illicit trafficking in a controlled substance.

Section 237(a)(2)(B)(i) of the Act, as amended, in that any time after admission you have been convicted of a violation of (or a conspiracy or an attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802) other than a single offense involving the possession for one's own use of 30 grams or less of marijuana.

APPLICATIONS: Request for cancellation of removal for certain permanent residents pursuant to Section 240A(a)(1) of the Immigration and Nationality Act, as amended.

ON BEHALF OF RESPONDENT: ARASH VARSHOSAZ Esquire
712 Westridge Drive
Yukon, Oklahoma 73099

ON BEHALF OF DHS: CHRISTIAN STRINGER Esquire
Assistant Chief Counsel
Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico. He was admitted to the United States at Laredo, Texas on or about September 17, 1987 as a lawful permanent resident. On August 16, 2016, he was convicted in the District Court in and for Tulsa County, State of Oklahoma for the offense of possession of a controlled dangerous substance with intent to distribute, to wit: cocaine, in violation of 63 Oklahoma Statute Section 2-401-2-420, and on August 16, 2016, he was convicted in the District Court in and for Tulsa County, State of Oklahoma for the offense of possession of a controlled drug without a tax stamp affixed in violation of 68 Oklahoma Statute Section 450.1. Consequently, the Department of Homeland Security (hereafter referred to as the Government) charged the respondent with removal pursuant to Sections 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act) as amended, in that at any time after admission he has been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the Act, a law relating to illicit trafficking in a controlled substance, and Section 237(a)(2)(B)(i) of the Act, as amended, in that it at any time after admission, he has been convicted of or violation of (or conspiracy or attempt to violate) any law or regulation of a state, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. 802) other than a single offense involving possession for one's own use of 30 grams or less of marijuana. Exhibit 1.

On November 29, 2016, before Immigration Judge James Nugent the respondent acknowledged service of the Notice to Appear and it was placed in this record as Exhibit No.1.

On that same date before that same Immigration Judge, the respondent, via counsel, admitted to the factual allegations contained in the Notice to Appear and

conceded to the charge pursuant to Section 237(a)(2)(B)(i) of the Act, and that the respondent has been convicted of violating a controlled substance law for his conviction for possession of a controlled dangerous substance with intent to distribute cocaine and possession of a controlled drug. However, the respondent, through counsel, denied the charge pursuant to Section 237(a)(2)(A)(iii) of the Act, as it relates to Section 101(a)(43)(B) of the Act, an aggravated felony that relates to illicit trafficking in a controlled substance or a drug trafficking crime.

The Government has the burden of proof to establish the respondent's removal by clear and convincing evidence. See Section 240(c)(3)(A) of the Act. To support the charges of removal, the Government has submitted a copy of the respondent's conviction record, which Judge Nugent placed in the record as part of Group Exhibit No. 2.

On or about November 29, 2016, Immigration Judge Nugent, based upon the evidence in this case, concluded that the charge of removability under Section 237(a)(2)(B)(i) of the Act had been established by clear and convincing evidence in that the respondent may have to leave the United States because he has been convicted of violating the controlled substance law.

The remaining issue is whether or not the respondent's conviction in the Oklahoma Statute relates to a aggravated felony, a drug trafficking or illicit trafficking controlled substance.

The Act defines aggravated felony as, among other offenses, illicit trafficking in a controlled substance (as defined in Section 802 of Title 21) including a drug trafficking crime (as defined in Section 924(c) of Title 18). The term drug trafficking crime is defined under 18 U.S.C. Section 924(c) to encompass any felony punishable under the Controlled Substances Act. A felony under federal law is an offense for which the

maximum term of imprisonment authorized is more than one year. An offense punishable under the Controlled Substances Act by more than one year imprisonment will be treated as an aggravated felony for Immigration purposes. The Act's definition of an aggravated felony further provides that the term applies to an offense described in this paragraph whether in violation of federal or state law. The Supreme Court has explained that a conviction under state law may qualify, but a state offense constitutes a felony punishable under the Controlled Substances Act only if the proscribed conduct is punishable as a felony under federal law.

As the Supreme Court explained in Moncrieffe v. Holder, we generally apply a categorical approach to determine whether a state offense proscribes conduct punishable as a felony under the Controlled Substance Act. Under the categorical approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony. A state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involves facts equating to the generic federal offense. Accordingly, because an examination of what the state conviction necessarily involved, not the facts underlying the case. The Courts must presume that the conviction rested upon nothing more than the least of the acts criminalized and then determine if whether even those acts are encompassed by the generic federal offense. The Supreme Court identified qualifications to this approach, which includes modifying the categorical approach when a state statute contains several different crimes, and recognizing that when focusing on the minimal conduct criminalize by the state statute, there must be a realistic probability, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime.

In Descamps v. United States, the Supreme Court made it clear that the modified categorical approach described above may only be applied when the state of conviction contains multiple crimes set forth as alternative elements. In such a case, the Court may look to a limited class of documents to determine which of the alternative offenses was the basis of the defendant's conviction. When a prior conviction is based on an indivisible statute meaning one not containing alternate elements that criminalize a broader swath of conduct than the relative generic offense, a court cannot look beyond the elements set forth in the statute. See Sarmientos v. Holder, 742 F.3d (5th Cir. 2014).

Here the respondent was convicted of possession of a controlled dangerous substance with intent in violation of 63 Oklahoma Statute, Section 2-401-420. Although the face of the judgment is unclear, Oklahoma case law and jury instructions make clear that the statute lists several different crimes with alternative phase elements. As the statute is clearly divisible with the alternative phase elements, the Court may apply the modified categorical approach to examine the conviction records to determine which section the respondent was convicted under. The summary of the facts for respondent's guilty plea state that he possessed cocaine and attempted to distribute it, which fits under Section 2-401(a)(1), as Oklahoma courts have examined a charge of possession with intent to distribute a controlled substance as a discrete offense. The summary of the facts was signed by the respondent under oath that these answers were correct, thus, he has sufficiently attested to them as the basis for his plea.

The analogous felony punishable under the Federal Controlled Substances Act is 21 U.S.C. Section 841(a)(1), which states it shall be unlawful for any person knowingly or intentionally, one, to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance. Federal case law similarly

treats the alternative phase acts as distinct elements and separate offenses recognizing the separate offense of knowingly or intentional possession with intent to distribute a controlled substance. Oklahoma case law requires a knowing and intentional possession of a controlled substance encompasses the federal statute's requirement of knowing or intentional possession. There is no dispute that cocaine is included on both the state drug schedule and the federal schedule as a controlled substance. Both statutes require an intent to distribute, thus, the Court finds that respondent's Oklahoma conviction is for a drug trafficking crime and aggravated felony under Section 101(a)(43)(B).

The Court is not convinced by respondent's arguments under Sarmientos v. Holder, 742 F.3d 624, that Section 2-401(a)(1) is not a category match to Section 841(a)(1) because Oklahoma does not require a finding that the defendant knew of the illicit nature of the controlled substance as required for the federal crime. This is an interesting argument, but the limited Oklahoma case law on this point suggests the knowledge of the illicit nature of the controlled substance is implied through the knowing and intentional possession of a controlled substance.

The primary distinction between Oklahoma Statute with the Florida Statute at issue in Sarmientos is that the Florida Supreme Court held that the statute required guilty knowledge for the crime mental state, that the defendant knew he possessed the substance, and, two, knew of the illicit nature of the substance. The Florida legislature responded and expressly limited knowledge of the illicit nature of the substance as an element, stating that the Florida Supreme Court decision was contrary to the legislative intent. Also, Florida allows for an affirmative defense that the defendant did not have knowledge of the illicit nature of the controlled substance. Oklahoma, however, has seemingly not addressed these issues, yet its case law suggests that it treats the

knowing and intentional element of Oklahoma law as encompassing both of the Florida Supreme Court's elements.

In one Oklahoma case, a defendant convicted for unlawful cultivation of mushrooms and unlawful possession of psilocybin mushrooms with intent to distribute argued that the state failed to prove he was aware of the illicit nature of the psilocybin mushrooms. Carpenter v. State, 1983 OK CR 120, 688 P.2d 347, 348. The Court looked to the record to find that the defendant had positively identified them as psilocybin mushrooms and his admissions that the mushroom growing operation belonged to him. The Court found that the state met its burden of proof in light of the circumstantial evidence that the defendant's own statements of knowingly and willfully cultivating psilocybin. Although this case did not directly discuss the possession with intent to distribute conviction, unlawful cultivation includes a knowing element without an expressed requirement to prove knowledge of the illicit nature of a substance. Thus, this Court reads the language of Carpenter as indicative of the broader understanding of knowingly in Oklahoma that would match the federal definition.

The respondent focuses primarily on the language for constructive possession in which Oklahoma requires that the state prove the accused to have been in a constructive possession of the contraband material by showing that he had knowledge of its presence and the power and intent to control its disposition or use. Staples v. State, 1974 OK CR 208, 528 P.2d 1131, 1133. The respondent's reading of presence would essentially allow for a conviction if a defendant is in knowing possession of any item, but where the state later proves that item to be a controlled substance, and in Florida, a defendant could raise the affirmative defense of lack of knowledge of the illicit nature of the item to defeat his prosecution. However, the Staples court goes on the fact that the accused knew of the presence of the contraband and had the right to

control his disposition or its use may be established by circumstantial evidence. This language indicates that defining a conviction in Oklahoma, the defendant must know more than the presence of any item. Rather, the defendant must know of the specific presence of the contraband, that what he possessed was illicit in nature. By now the Florida Statute and its case law appear to be more akin to the strict liability, whereas Oklahoma has a higher culpability definition of knowledge. Thus, given the Oklahoma's knowledge requirement matches both the elements for a conviction under Section 841, the respondent's conviction under 63 Oklahoma Statute Section 2-401(a)(1) is categorically a match for a drug trafficking crime, and, therefore, is an aggravated felony and the Government has met its burden of proof by clear and convincing evidence that the charge under 237(a)(2)(A)(iii) and 101(a)(43)(B) of the Act has been established by clear and convincing evidence.

Because the respondent has been convicted of an aggravated felony, the Court finds that the respondent is ineligible for cancellation of removal for certain permanent residence under Section 240A(a)(3) of the Act in that he has been convicted of an aggravated felony. A person who has been convicted of an aggravated felony cannot seek cancellation of removal for certain permanent residence.

After reviewing all the available evidence and arguments, the Court finds the respondent is not eligible for any other relief from removal. Accordingly, the following orders shall be entered:

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation for certain permanent residents pursuant to Section 240A(a)(1) of the Immigration and Nationality Act be pretermitted.

IT IS FURTHER ORDERED that the respondent shall be deported from the United States to Mexico based on the two charges contained upon the Notice to Appear.

Dated this 16th day of March 2017

DEITRICH H. SIMS
United States Immigration Judge
Dallas, Texas

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DEITRICH H. SIMS, in the matter of:

FILIBERTO ROSALES GONZALEZ

A041-276-712

DALLAS, TEXAS

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Amy D. Lane

AMY D. LANE (Transcriber)

FREE STATE REPORTING, Inc.-2

APRIL 29, 2017

(Completion Date)