U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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180 Ted Turner Dr. SW, Suite 332
Atlanta, GA 30303

Name: AJAELU, CHARLES BORROMEO **A 058-739-058**

Date of this notice: 9/3/2015

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:
Geller, Joan B

Userteam: Docket

File: A058 739 058 – Atlanta, GA

Date: SEP - 3 2015

In re: CHARLES BORROMEO AJAELU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Gene P. Hamilton
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 as defined in section 101(a)(43)(G) of the Act

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals the Immigration Judge's May 5, 2014, decision finding that the respondent was not removable as charged and terminating the proceedings. The appeal will be dismissed.

We review for clear error the Immigration Judge's findings of fact, including the determination of credibility. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues de novo, including whether the parties have met the relevant burden of proof and issues of discretion. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008); 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS charged the respondent with removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act based on a conviction for an aggravated felony theft offense. Specifically, the DHS argues that the respondent's conviction for theft by taking under Ga. Code § 16-8-2 constitutes an aggravated felony under 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G).[1] We affirm the Immigration Judge's conclusion that the DHS did not meet its burden of proof.

The Georgia statute is overly broad and punishes offenses not included in the generic definition of theft. *See Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (finding that a "theft offense" under section 101(a)(43)(G) of the Act requires the taking of, or exercise of

[1] We note that the conviction documents do not provide a citation to a Georgia statute. The statute of conviction does not appear to be in dispute however, and given our disposition we find it unnecessary to determine if the record sufficiently establishes the respondent's conviction.

control over, property without consent). Ga. Code § 16-8-2 extends to offenses that fall outside the definition of "theft" for the purposes of section 101(a)(43)(G) of the Act. The Georgia statute states that a person commits the offense of theft by taking "when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated." The Georgia courts have stated that the final phrase of the statute, "regardless of the manner in which the property is taken or appropriated," is a catch-all phrase rendering the statute broad enough to encompass theft by conversion, theft by deception, or any of the "myriad and even yet-to-be-concocted schemes for depriving people of their property." *Spray v. State*, 476 S.E.2d 878, 880 (Ga. App. 1996). In addition, the courts have sustained convictions under the statute in cases that involved fraud or deception rather than a lack of consent of the victim. *See, e.g., Ray v. State*, 299 S.E.2d 584 (Ga. App. 1983).

Further, the statute is not divisible, it is simply overbroad. *See Descamps v. United States*, 133 S.Ct. 2276 (2013). Accordingly, we cannot apply the modified categorical approach and look to the record of conviction to determine whether the respondent was convicted under that portion of the statute that does define a theft for the purposes of section 101(a)(43)(G) of the Act. *Id.* We instead must conclude, in agreement with the Immigration Judge, that the respondent's offense is not categorically a theft offense for the purposes of section 101(a)(43)(G) of the Act.

The following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File: A058-739-058 May 5, 2014

In the Matter of

CHARLES BORROMEO AJAELU	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act.

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT: PRO SE

ON BEHALF OF DHS: JOY LAMPLEY

ORAL DECISION OF THE IMMIGRATION JUDGE

This case came before the Court as a result of a Notice to Appear that was issued by the Department of Homeland Security. The charging document alleges that the respondent is a native and citizen of Nigeria and that he is removable from the United States pursuant to Section 237 of the Immigration and Nationality Act.

The Government bears the burden of showing that the respondent is removable in this case. At today's hearing, the Government served the Court and the respondent with a copy of the respondent's conviction. The Government takes the position that respondent has been convicted of a theft offense based on his conviction

under OCGA 16-8-2. The Court finds that the respondent's conviction is not a theft offense. The Court relies largely on an unpublished decision by the Board in Matter of Reyes, A 091 156 708 (BIA 2013). In that case, the Court addressed the issue of respondent's conviction in the context of a crime involving moral turpitude. Largely, the Court noted in that decision, that under 16-8-2, a person commits an offense of theft by taking when he unlawfully takes or being in unlawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of his property, regardless of the manner in which the property was taken or appropriated. Respondent is convicted under a statute that is overly broad. The statute criminalizes not only taking, but also appropriating of property. That is not within the common law definition of theft by taking. The respondent's conviction is therefore not a theft offense. Regardless of whether the respondent was sentenced to more than one year in prison, the fact is he has not been convicted of a theft offense in the generic sense of the word. The Court therefore finds that the respondent's conviction under a statute that allows for convictions where the State shows only appropriating, is not a theft offense. The respondent is therefore not removable. The Court will therefore not sustain the charge of removal in this case and the Court will terminate the proceedings.

ORDER

IT IS HEREBY ORDERED that the proceedings against the respondent be, and hereby is, terminated.

Please see the next page for electronic signature

EARLE B WILSON
Immigration Judge

//s//

Immigration Judge EARLE B WILSON

wilsone on July 31, 2014 at 11:46 AM GMT