U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: F[redacted], M[redacted] A[redacted]... **A [redacted]-925**

Date of this notice: 3/26/2019

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:
Malphrus, Garry D.

Userteam: Docket

File: A[redacted]-925 – Oakdale, LA Date: MAR 2 6 2019

In re: M[redacted] A[redacted] F[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bernal Peter Ojeda, Esquire

ON BEHALF OF DHS: Trina T. Chu
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent, a native of Kuwait, a citizen of Jordan, and a lawful permanent resident of the United States, appeals the Immigration Judge's October 2, 2018, decision finding the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), and pretermitting his application for cancellation of removal.[1] *See* section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security ("DHS") requests summary affirmance of the Immigration Judge's decision. The appeal will be sustained in part and dismissed in part.

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 a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge concluded that the respondent was removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony money laundering offense as defined in section 101(a)(43)(D) of the Act, 8 U.S.C. § 1101(a)(43)(D), and for an attempt to commit a money laundering offense under section 101(a)(43)(U) of the Act (IJ at 1, Oct. 2, 2018; IJ at 2-6, Sept. 20, 2018). The Immigration Judge also pretermitted the respondent's application for cancellation of removal on this basis (IJ at 2, Oct. 2, 2018; IJ at 6-7, Sept. 20, 2018).

On appeal, the respondent argues that that the Immigration Judge erred in determining that the criminal statute of his conviction, Tenn. Code. Ann. § 39-14-903, is divisible by its subsections (Respondent's Br. at 6-10). The respondent also argues that his criminal statute of conviction is categorically not for an aggravated felony attempt offense under section 101(a)(43)(U) of the Act because his Tennessee statute of conviction does not require an overt act (Respondent's Br. at 12-15). The respondent also argues that, because he was not convicted of the underlying crime of money laundering, the Immigration Judge erred in finding that he had been convicted of an

[1] The Immigration Judge's October 2, 2018, decision incorporates the findings and conclusions of his September 20, 2018, decision.

aggravated felony money laundering offense under section 101(a)(43)(D) of the Act (Respondent's Br. at 15-17).

As a preliminary issue, the record evidence includes a judgment of the Criminal Circuit Court for Hickman County, Tennessee, dated February 21, 2018, which states that the respondent was convicted of attempted money laundering under Tenn. Code Ann. §§ 39-12-101, 39-14-903 (Exh. 3, Tab B). The evidence clearly indicates that the respondent was only convicted of attempted money laundering, and not for the underlying money laundering offense. Accordingly, we conclude that the Immigration Judge erred in sustaining the charge that the respondent was convicted of a money laundering offense under section 101(a)(43)(D) of the Act, because such an underlying substantive offense is not necessarily included in an attempt under section 101(a)(43)(U) of the Act. *See Matter of Richardson*, 25 I&N Dec. 226, 227 (BIA 2010); *Pierre v. Holder*, 588 F.3d 767 (2d Cir. 2009).

However, we affirm the Immigration Judge's determination that the respondent was convicted of an aggravated felony attempt offense under section 101(a)(43)(U) of the Act. We employ the categorical approach to determine whether the respondent's conviction is for an aggravated felony under section 237(a)(2)(A)(iii) of the Act. *See Matter of Chairez*, 26 I&N Dec. 819, 819-20 (BIA 2016); *see also Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (stating that a conviction is regarded as a categorical match if its elements are "the same as, or narrower than, the relevant generic offense"). We also determine whether there is a "realistic probability" that the state would apply its statute to conduct that falls outside the generic offense. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

We must first determine whether the underlying money laundering statute, Tenn. Code Ann. § 39-14-903, constitutes an aggravated felony under section 101(a)(43)(D) of the Act. *See* section 101(a)(43)(U) of the Act (defining the aggravated felony attempt offense as an attempt to commit any of the offenses described in section 101(a)(43) of the Act). The Immigration Judge determined that Tenn. Code Ann. § 39-14-903 is divisible such that subsection (b) is a separate offense (IJ at 5-6, Sept. 20, 2018). A review of the plain language of the statute indicates that each subsection carries its own sentencing structure. *See* Tenn. Code Ann. § 39-14-903. For this reason, we agree with the Immigration Judge and conclude that Tenn. Code Ann. § 39-14-903 is divisible by subsection. *See Mathis v. United States*, 136 S. Ct. at 2256 (holding that a statute is divisible if "statutory alternatives carry different punishments").

Because we conclude that Tenn. Code Ann. § 39-14-903 is divisible as to its subsections, we proceed to the modified categorical approach to determine which subsection corresponds to the respondent's conviction. In this case, the record of conviction includes an indictment indicating that the respondent was charged under subsection (b) of Tenn. Code Ann. § 39-14-903 (Exh. 3, Tab B). *See Shepard v. United States*, 544 U.S. 13, 26 (2005). Thus, we conclude that the respondent was convicted of attempted money laundering under subsection (b) of Tenn. Code Ann. § 39-14-903.

We turn now to whether subsection (b) of Tenn. Code Ann. § 39-14-903 is a categorical match to the generic money laundering aggravated felony offense under section 101(a)(43)(D) of the Act, which is defined as an offense "described in" 18 U.S.C. §§ 1956, 1957 that involves an amount of

funds in excess of $10,000. Under Tennessee law, it is a criminal offense "to knowingly use proceeds derived directly or indirectly from a specified unlawful activity with the intent to promote, in whole or in part, the carrying on of a specified unlawful activity." Tenn. Code Ann. § 39-14-903(b). Likewise, the generic federal money laundering offense prohibits someone who, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i).[2]

The respondent's conviction under Tenn. Code Ann. § 39-14-903(b) is a categorical match of the generic federal money laundering offense under 18 U.S.C. § 1956(a)(1)(A). *See Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016) (holding that state criminal offenses that match their federal counterparts except for federal jurisdictional elements are categorically aggravated felonies under section 101(a)(43) of the Act). We reach this conclusion despite the presence of one incongruity between the two statutes, namely that the Tennessee offense defines "specified unlawful activity" as any act "committed for financial gain that is punishable as a felony" and the generic federal offense defines this same term as an enumerated list of offenses. *Compare* Tenn. Code Ann. § 39-14-902(6), *with* 18 U.S.C. § 1956(c)(7).

Specifically, the respondent has not demonstrated that there is a realistic probability that Tenn. Code Ann. § 39-14-903(b) has been used to prosecute conduct under Tennessee's definition of "specified unlawful activity" that does not also fall under the federal definition of "specified unlawful activity." *See Gonzales v. Duenas-Alvarez*, 549 U.S. at 193 (holding that, to meet his burden under the realistic probability test, an applicant must point to his own case or other cases in which the state courts "in fact did apply the statute in the special (nongeneric) manner for which he argues."); *see also Matter of Ferreira*, 26 I&N Dec. 415, 421-22 (BIA 2014) (holding that the applicant bears the burden of demonstrating a realistic probability of prosecution in a nongeneric manner to defeat a charge of removability and terminate proceedings).

In addition, we agree with the Immigration Judge's determination that the respondent's money laundering offense involved an amount of funds in excess of $10,000 (IJ at 6, Sept. 20, 2018). We employ a circumstance-specific approach to determine the amount of funds laundered for purposes of a money laundering aggravated felony under section 101(a)(43)(D) of the Act. *See Matter of Babaisakov*, 24 I&N Dec. 306, 309-10 (BIA 2007) (holding that if a removal charge is not tied solely to the elements of an earlier conviction, then "something more is demanded by the terms of the removal provision" and "the categorical and modified categorical approaches will not apply to this additional aspect of the removal statute."); *see also Hakim v. Holder*, 628 F.3d 151, 154 (5th Cir. 2010) (holding that the record contained clear and convincing evidence that the

[2] We note that the Immigration Judge erred in determining that Tenn. Code Ann. § 39-14-903(b) is a categorical match to 18 U.S.C. § 1957(a) because the federal offense is limited to monetary transactions through a financial institution and the Tennessee offense has not such limitation (IJ at 6). *Compare* 18 U.S.C. § 1957(f)(1) (defining the term "monetary transaction"), *with* Tenn. Code Ann. § 39-14-903(b).

applicant's crime involved more than $10,000 of illegal drug money to constitute a money laundering aggravated felony under section 101(a)(43)(D) of the Act).

As indicated in the Immigration Judge's decision, the record in this case includes a Tennessee Electronic Crime Report, which indicates that the amount seized from the respondent in connection with his attempted money laundering offense was $391,643 (IJ at 6, Sept. 20, 2018; Exh. 3, Tab B). We therefore conclude that the respondent's money laundering offense involved the requisite amount of money to constitute a money laundering aggravated felony under section 101(a)(43)(D) of the Act. *See Hakim v. Holder*, 628 F.3d at 154 (holding that the $10,000 threshold for a money laundering aggravated felony under section 101(a)(43)(D) of the Act does not require proof that all of the money was gained through unlawful activity).

Based on the foregoing, we conclude that the respondent's underlying money laundering offense, Tenn. Code Ann. § 39-14-903(b), constitutes a money laundering aggravated felony under section 101(a)(43)(D) of the Act. We turn now to whether the respondent's conviction for attempted money laundering under Tenn. Code Ann. § 39-12-101 constitutes an aggravated felony attempt offense under section 101(a)(43)(U) of the Act.

The respondent argues that his Tennessee conviction for attempted money laundering is categorically overbroad because, unlike the generic federal attempt offense, it does not require proof of an overt act (Respondent's Br. at 12-15). Under section 101(a)(43)(U) of the Act, an attempt offense requires the presence of criminal intent and the completion of a substantial step toward committing the crime. *Matter of Onyido*, 22 I&N Dec. 552, 554 (BIA 1999); *Garcia v. Holder*, 756 F.3d 839, 844-46 (5th Cir. 2014); *see also Sui v. INS*, 250 F.3d 105, 115 (2d Cir. 2001). Moreover, attempt under Tenn. Code Ann. § 39-12-101 also requires proof of a substantial step towards the commission of the underlying crime.

Although only subdivision (a)(3) of the offense explicitly requires a "substantial step," the other two iterations of the offense also require conduct that constitutes the completion of a substantial step toward committing an offense. Specifically, subdivision (a)(1) attaches criminal attempt liability when an individual intentionally engages in a course of conduct that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be. Similarly, subdivision (a)(2) attaches criminal attempt liability at the point when the individual has done everything believed necessary to accomplish the intended criminal result. We therefore conclude that all three subdivisions of Tenn. Code Ann. § 39-12-10(a) necessarily involve the presence of criminal intent and the completion of a substantial step toward committing a crime such that an attempt offense under Tennessee law is categorically for an aggravated felony attempt offense under section 101(a)(43)(U) of the Act.

Thus, we conclude that the respondent's attempted money laundering conviction under Tenn. Code Ann. §§ 39-12-101, 39-14-903 constitutes an aggravated felony under section 101(a)(43)(U) of the Act. We therefore agree with the Immigration Judge that the respondent's removability from the United States has been established based on his attempted money laundering conviction. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A); *Arguelles–Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008). We also agree with the Immigration Judge that the respondent is therefore statutorily ineligible for cancellation of removal for having been convicted of an

aggravated felony (IJ at 2, Oct. 2, 2018; IJ at 6-7, Sept. 20, 2018). *See* section 240A(a)(3) of the Act. Accordingly, the following orders will be entered.

ORDER: The appeal as to the charge of removability under section 237(a)(2)(A)(iii) of the Act, as defined in section 101(a)(43)(D) of the Act, is sustained.

FURTHER ORDER: The appeal as to the charge of removability under section 237(a)(2)(A)(iii) of the Act, as defined in section 101(a)(43)(U) of the Act, is dismissed.

FOR THE BOARD