U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: BELMAN-CANO, JOSE CRUZ

A 057-433-239

Date of this notice: 9/21/2017

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:
Pauley, Roger
Greer, Anne J.
Cole, Patricia A.

Userteam: Docket

File: A057 433 239 – Aurora, CO

Date: SEP 21 2017

In re: Jose Cruz BELMAN-CANO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Garrett James Wilkes, Esquire

ON BEHALF OF DHS: Christine L. Longo
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The Department of Homeland Security (DHS) appeals from the Immigration Judge's January 31, 2017, decision terminating removal proceedings. The respondent has not responded to the appeal.[1] The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On September 7, 2016, the respondent was convicted of providing a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 924(a)(1)(A) (I.J. at 2; Unmarked Exh. (DHS Evidence Submission, filed on December 13, 2016)). The only issue on appeal is whether the Immigration Judge properly determined that the respondent's conviction does not constitute a conviction for a firearms offense under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C), which renders the respondent removable (IJ at 2-5).

On appeal, the DHS argues, inter alia, that the Immigration Judge erred in determining that the respondent's conviction under 18 U.S.C. § 924(a)(1)(A) did not trigger removability pursuant to section 237(a)(2)(C) of the Act, given the broad application of the firearms offense as a ground of removability (DHS's Brief at 4-10). We disagree.

18 U.S.C. § 924(a)(1)(A) provides, in relevant part, that a person violates the statute if he or she "knowingly makes any false statement or representation with respect to the information required [ ] to be kept in the records" of a federally-licensed firearms dealer. Section 237(a)(2)(C) of the Act provides the following:

[1] The record reflects that the respondent was released from custody on April 13, 2017.

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

Pursuant to the categorical approach, the Board analyzes "whether the elements of the statute of conviction are the same as or narrower than those of the generic offense." *Matter of Francisco-Alonzo*, 26 I&N Dec. 594, 596-97 (BIA 2015) (citing *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013)). While this matter was pending on appeal, we issued a precedential decision, *Matter of Flores-Abarca*, 26 I&N Dec. 922 (BIA 2017), recognizing the broad scope of firearms offenses under section 237(a)(2)(C) of the Act. However, the respondent's statute of conviction, even if broadly construed as in *Matter of Flores-Abarca*, does not constitute a firearms offense. 18 U.S.C. § 924(a)(1)(A) has been held to apply to federally-licensed firearms dealers who falsify their own records, e.g., to conceal the fact that a buyer purchased more than one handgun in a 5-day period. *See, e.g., United States v. Al-Muqsit*, 191 F.3d 928, 932 (8th Cir. 1999), *vacated in part on other grounds*, *United States v. Logan*, 210 F.3d 820 (8th Cir. 2000) (en banc); *see also United States v. Carney*, 387 F.3d 436, 441 (6th Cir. 2004).[2] Such conduct, even if section 237(a)(2)(C) contained a "relating to" phrase, which it does not, would not fall within that provision, which involves purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying (or as in *Matter of Flores-Abarca*, transporting), a firearm. While a dealer's falsification of records is likely designed to further his business in selling firearms, it does not directly involve any of the acts encompassed in section 237(a)(2)(C) of the Act.

Thus, upon de novo review, we affirm the Immigration Judge's determination that the respondent's conviction for providing a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 924(a)(1)(A) is not a categorical firearms offense under section 237(a)(2)(C) of the Act (IJ at 2-5).[3]

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[2] We note that the scope of 18 U.S.C. § 924(a)(1)(A) in the context of the firearms offense as a ground of removability has not been directly addressed by the United States Court of Appeals for the Tenth Circuit, in whose jurisdiction this case arises. *See generally United States v. Prince,* 647 F.3d 1257, 1268 (10th Cir.2011) (stating that under § 924(a)(1)(A), the government must establish the following elements beyond a reasonable doubt: (1) the firearms dealer was a federally licensed firearms dealer when the offense occurred; (2) the defendant made a false statement in a record that federal law requires the dealer to maintain; and (3) the defendant made the false statement knowing it was false).

[3] In light of our disposition, we decline to address any other issues raised by the DHS on appeal. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "[a]s a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

Board Member Patricia A. Cole respectfully dissents. I would sustain the DHS appeal and remand these proceedings. Given the broad application of the firearms offense as a ground of removability, the record must be further developed to determine whether the respondent has established that there is not a realistic probability that individuals may be prosecuted under 18 U.S.C. § 924(a)(1)(A) for conduct beyond the generic definition of a firearms offense set forth in section 237(a)(1)(C) of the Act.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3130 NORTH OAKLAND STREET
AURORA, CO 80010

In The Matter Of:	)	**Date:** Jan. 31, 2017
BELMAN-CANO, Jose Cruz	)	IN REMOVAL PROCEEDINGS
Respondent.	)	**DETAINED**
File No.: A# 057-433-239	)	

CHARGE: Section 237(a)(2)(C) of the Immigration and Nationality Act (INA, or Act), as amended, as in alien who at any time after admission, was convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, in violation of any law, any weapon, part, or accessory which is a firearm or destructive device, as defined in section 921(a) of title 18, United States Code.

ON BEHALF OF THE RESPONDENT:
Pro se

ON BEHALF OF THE DEPARTMENT:
Christine Longo, Assistant Chief Counsel
Office of the Chief Counsel
U.S. Department of Homeland Security
12445 East Caley Avenue
Centennial, CO 80111

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Jose Cruz Belman-Cano (Respondent) is a twenty-five-year-old native and citizen of Mexico. Respondent was admitted to the United States on November 22, 2004, as a child of an alien resident. On September 7, 2016, Respondent pled guilty to section 924(a)(1)(A) under title 18 of the United States Code (USC), for knowingly providing false information to an individual licensed under the federal firearms statutes. The Department of Homeland Security (DHS, or the Department) alleges that Respondent's conviction constitutes a certain firearm offense, as described in INA section 237(a)(2)(C). Based on this allegation, DHS served Respondent with a

Notice to Appear (NTA), charging him as removable from the United States. The Department filed the NTA on December 12, 2016, thereby vesting jurisdiction with the Court.

As the Court finds the Department has not met its burden to prove the charge of removability by clear and convincin evidence, the Court will, therefore, terminate removal proceedings against Respondent. INA § 240(c)(3)(A).

II. Termination of Removal Proceedings

An alien can be charged with an applicable ground of removability under section 237(a) of the INA; however, the Department has the burden of proving the charge of removability by clear and convincing evidence. INA § 240(c)(3)(A). Here, the Department avers that Respondent's conviction under 18 U.S.C § 924(a)(1)(A) is a certain firearm offense as described in INA section 237(a)(2)(C), rendering Respondent removable. There is no question that Respondent was convicted for an offense under 18 U.S.C § 924(a)(1)(A), for which he was incarcerated for one year. Department of Homeland Security Submission of Documents at 1. However, the Department must also prove by clear and convincing evidence that a conviction under 18 U.S.C § 924(a)(1)(A) is a certain firearm offense that warrants removal under INA section 237(a)(2)(C). The Court must determine whether the elements of the crime of conviction match the elements under the generic, statutory crime described in the INA. *Taylor v. United States*, 495 U.S. 575, 600 (1990).

In applying the categorical approach, the Court must compare the statute of conviction and the generic statutory crime, which, here, is the firearms provision in INA section 237(a)(2)(C). If the statute of conviction has the same elements as the generic offense, or if the minimum conduct that has a realistic probability of prosecution under the statute fits within that generic offense, the conviction is a categorical match for immigration purposes. *Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013); *see also Matter of Chairez*, 26 I&N Dec. 819, 823 (BIA 2016). In order to determine the minimum conduct prosecuted, 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." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *see also Matter of Silva-Trevino,* 26 I&N Dec. 826, 831 (BIA 2016). However, if the statute is defined more broadly than the generic offense, the conviction is overbroad and not a categorical match. *Moncrieffe*, 133 S. Ct. at 1685.

In a limited set of cases, the Court uses the modified categorical approach to determine whether a respondent was convicted of violating a divisible statute. The Court can look to the record of conviction to determine which of the divisible elements of the statute formed the basis for the conviction. *See Mathis v. United States,* 136 S. Ct. 2243, 2253 (2016) (holding that the modified categorical approach can only be used to determine which elements played a part in the defendant's conviction); *see also Matter of Introcaso*, 26 I&N Dec. 304, 308 n.4 (BIA 2014) ("the record of conviction includes the charging document (indictment, complaint, or information), jury instructions, written plea agreement, transcript of plea colloquy, judgment of conviction, jury verdict, a comparable judicial record, and any explicit factual finding by the trial judge to which the defendant assented"); *accord Shepherd v. United States*, 544 U.S. 13, 25 (2005).

In this case, Respondent was convicted of violating 18 U.S.C § 924(a)(1)(A), which penalizes:

> knowingly mak[ing] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter.

The statute is contained in chapter 44 of title 18 of the United States Code, which is entitled "Firearms." The Court, therefore, makes the inference that the reference to "a person licensed under this chapter" is referring to an individual licensed, in some way, relating to firearms.

The Department avers that Respondent's conviction mandates that he is removable for having been convicted of a firearms offense as described in INA § 237(a)(2)(C), which states:

> Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying, or of attempting or conspiring to purchase, sell, offer for sale, use, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device in violation of any law is deportable.

To determine whether a conviction under 18 U.S.C § 924(a)(1)(A) renders Respondent removable, the Court first must compare the two statutes, to determine if 18 U.S.C § 924(a)(1)(A) has the same elements of the generic offense, INA §237(a)(2)(C). *Descamps v. U.S.*, 133 S. Ct. 2276, 2283 (2013); *see also Matter of Chairez*, 26 I&N Dec. 819, 823 (BIA 2016). In order to do this, the Court must decide if 18 U.S.C §924(a)(1)(A) is divisible. The Court concludes that the statute is indivisible, as knowingly making a false statement is a "single set of elements to define a single crime." *Mathis* 136 S. Ct. at 2248 (describing when a statute is indivisible). Therefore, the Court must then "[line] up that crime's elements alongside those of the generic offense and see if they match." *Id.* If the crime sweeps more broadly than the generic crime, the crimes are not a categorical match. *Id.*

The generic statute in INA § 237(a)(2)(C) lists the types of laws an individual may be convicted under that would render him deportable under the section: laws for purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying any weapon, part, or accessory which is a firearm or destructive device, or attempting or conspiring to do any of the aforementioned actions. However, the INA is silent as to whether a person is deportable for providing false information to an individual licensed under a firearms statute. While INA § 237(a)(2)(C) describes a broad range of conduct, the Court finds that conduct constituting a conviction under 18 U.S.C § 924(a)(1)(A) is not a categorical match, as it sweeps more broadly than the litany of circumstances enumerated in the INA. The Court finds that section 924(a)(1)(A) does not mention that the offensive conduct has to be connected to the purchase or sale of a gun—the only reference to firearms, other than the fact that the statute appears in a chapter titled "firearms," is to the licensed individual itself. The statute does not limit the

"providing of false information" to merely the purchase and sale of firearms, but leaves the conduct open to any instance in which false information is given to a licensed individual. Additionally, the Ninth Circuit has addressed the scope of 18 U.S.C § 924(a)(1)(A), stating that the statute "unambiguously describes which false statements and representations it prohibits—simply those that are made with respect to information that is required to be kept by federally licensed firearms dealers." *U.S. v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012). The court in *Johnson* determined that Congress acted intentionally in leaving the statute vague by not specifically providing a "materiality" element, such as one directly linked to the purchase or sale of a firearm. *Id.* Furthermore, the Tenth Circuit, in a case regarding jury instructions, affirmed a conviction under 18 U.S.C §924(a)(1)(A) for providing a false address, and approved jury instructions that only required the government to prove that the defendant made a false statement, not necessarily one in relation to the sale or purchase of a firearm. *U.S. v. Prince*, 647 F.3d 1257, 1266 (10th Cir. 2011).

The Department seemingly argues that the only instance in which an individual could be convicted under 18 U.S.C § 924(a)(1)(A) is if the individual was attempting to acquire a firearm. However, the Court is not convinced by this argument. The Department, in its Brief in Support of Removability, assumes that "in order to make a false statement or representation to a firearms dealer under 18 U.S.C § 924(a)(1)(A), one must be attempting to purchase a firearm." Department Brief at 4. However, the Department has not given any examples to support this conclusion, and has not shown through clear and convincing evidence that the federal statute solely serves to prosecute conduct described in the INA.

The Department also argues that the lack of a "formal" element relating conduct described in 18 U.S.C. § 924(a)(1)(A) to the actual purchase of a firearm does not undermine the offense as one considered under the INA. The Department determines this by arguing that the offense "necessarily" involves the purchase of a firearm. Department Brief at 5. Furthermore, the Department avers that the INA refers to "any law" with regards to purchasing a firearm, which should include the statute in question. *Id.* The Department cites *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012), in which the respondents were convicted of "willfully making any statement...which he does not believe to be true and correct" under 26 U.S.C. § 7206(1). The Department argued that this conviction made the respondents deportable for committing an aggravated felony that involves "fraud or deceit" under INA § 101(a)(43)(L)(i). *Id.* at 1172. The Court, in *Kawashima*, was able to compare the conduct required by the statute of conviction of providing statements that were not "true and correct" with the generic meaning of "fraud and deceit," and found the statutes to be a categorical match. *Id.* Here, the Court has no touchstone, no generic definition the Court can reference to, as the Court did in *Kawashima*. There is no language within the federal statute that lets the Court infer that Respondent's conduct under 18 U.S.C § 924(a)(1)(A) could *only* have been for the purchase of a firearm. The Court is not convinced that the statute of conviction at hand "necessarily" involves only the purchase of the firearm, and the comparison to the case at hand does not directly correlate with the issues in *Kawashima.*

Furthermore, the Department argues that if the Court looks at Respondent's record of conviction and underlying documents in support of Respondent's conviction, the Court will find that Respondent was attempting to purchase firearms when he presented false information. However, this is beyond the Court's authority—it is clear that the court can only look at the

underlying facts of the case when applying the modified categorical approach, and only then in order to determine if a statute consists of elements or means. *Mathis* 136 S. Ct. at 2252 (stating a judge can only look to the elements of the offense, not to the facts of the defendant's conduct). The Court cannot use the factual particulars of Respondent's conviction to guide its categorical analysis; doing so would be the legal equivalent of putting the cart before the horse, as it were.

As Respondent's statute of conviction could apply to conduct in a broader fashion than the generic crime described in INA, the Court finds that the Department has not met its burden in proving by clear and convincing evidence that Respondent is removable as charged. Furthermore, the Department cannot show that Respondent has been convicted an offense that requires mandatory detention under INA § 236(c).

Accordingly, the Court will enter the following order:

ORDER

IT IS HEREBY ORDERED that Removal Proceedings be TERMINATED, without prejudice to either party.

IT IS FURTHER ORDERED that appeal is RESERVED on behalf of both parties.

1-31-17
Date

Alison R. Kane
Immigration Judge