



U.S. Department of Justice

Executive Office for Immigration Review

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Name: FRANCO-LOPEZ, ESMERALDA

A 047-310-529

Date of this notice: 8/17/2018

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.

Userteam: Docket

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Falls Church, Virginia 22041

File: A047-310-529 – Jena, LA

Date: **AUG 17 2018**

In re: Esmeralda FRANCO LOPEZ a.k.a. Esmeralda Lopez Franco

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Luke H. Abrusley, Esquire

ON BEHALF OF DHS: Diana Alvarez
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals the Immigration Judge's February 27, 2018, decision to terminate the respondent's removal proceedings. The respondent is a native and citizen of Mexico and lawful permanent resident of the United States. The respondent, through counsel, filed an opposition. The appeal will be dismissed.

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).

On May 5, 2017, the respondent was convicted of "making a false statement to a firearms dealer" in violation of 18 U.S.C. § 924(a)(1)(A) (IJ at 1-2; Exhs. 1 and 3). On that basis, the DHS charged the respondent with removability pursuant to sections 237(a)(2)(C) and (a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(C) and (a)(2)(A)(iii), 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) and an alien who, at any time after admission, has been convicted of an aggravated felony as defined in section 101(a)(43)(C) of the Act, 8 U.S.C. § 1101(a)(43)(C) (IJ at 1).¹ The Immigration Judge terminated the respondent's removal proceedings on February 27, 2018, after determining that she was not removable as charged (IJ at 6). The DHS now appeals.

To determine whether the respondent's conviction constitutes a firearms offense under section 237(a)(2)(C) of the Act, we apply the categorical approach. *See Moncrieffe v. Holder*, 569 U.S. 184, 190, (2013); *Matter of Chairez* ("Chairez IIP"), 26 I&N Dec. 819, 825 n.2 (BIA 2016) (reaffirming conclusion in *Matter of Chairez* ("Chairez P"), 26 I&N Dec. 349 (BIA 2014), that the respondent was removable under section 237(a)(2)(C) of the Act for having been convicted of a

¹ The DHS does not challenge the Immigration Judge's determination that a conviction under 18 U.S.C. § 924(a)(1)(A) is not an aggravated felony as defined by section 101(a)(43)(C) of the Act, and thus we do not address it.

“categorical firearms offense”). The categorical approach focuses only on whether the elements of a statute of conviction match the elements of a generic offense. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). We do not look to the underlying conduct that resulted in the conviction. *Id.* In this case, we examine whether the elements of 18 U.S.C. § 924(a)(1)(A) match those of the generic removable offense described in section 237(a)(2)(C) of the Act.

An alien is removable under section 237(a)(2)(C) of the Act if he or she has been:

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. . . .

18 U.S.C. § 924(a)(1)(A) punishes whomever: “knowingly makes 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.” “This chapter” refers to 18 U.S.C. Ch. 44 and its accompanying regulations at 27 C.F.R. § 478, which describe records that must be maintained by licensed firearms dealers. *See, e.g.*, 18 U.S.C. § 923(g)(1)(A) (“Each . . . licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe”).

We agree with the Immigration Judge’s determination that 18 U.S.C. § 924(a)(1)(A) is not categorically a firearms offense under the Act, as the elements of the statute of conviction are a categorical mismatch to the elements of the generic offense (IJ at 3-5). *See Descamps v. United States*, 570 U.S. 254, 275-76 (2013) (“Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime.”). The DHS points out that the statutes and regulations referenced by 18 U.S.C. § 924(a)(1)(A) largely describe information that firearms dealers must record involving “sales or other disposition” of firearms (DHS’s Br. at 19-22).²

Making a false statement or representation about the kind of information required by Chapter 44 may often be in the context of a firearm sale or other disposition. However, as stated by the Immigration Judge, the categorical approach, which looks only to an offense’s *elements*, does not permit us to address the circumstances under which an individual made the false statement or representation where it is not an element of the offense (IJ at 4). *See Moncrieffe v. Holder*, 569 U.S. at 205-06; *Descamps v. United States*, 570 U.S. at 275-76. Although 18 U.S.C. § 924(a)(1)(A) references information that may pertain to the sale or other disposition of a firearm,

² The DHS recognizes that not all records required to be kept under Chapter 44 pertain to firearms (DHS’s Br. at 21-22). For example, 27 C.F.R. § 478.93 requires licensed collectors to record the disposition of armor piercing ammunition.


the statute does not require proof of the purchase, sale, offer for sale, exchange, use, ownership, possession, carrying, or related conduct as an element.

Contrary to the DHS's arguments on appeal (DHS's Br. at 17-18), the present case is distinguishable from our decision in *Matter of Flores-Abarca*, where we determined that a statute which proscribed "transporting" a loaded firearm was a firearms offense, even though that term is not enumerated in section 237(a)(2)(C) of the Act. 26 I&N Dec. 922, 924 (BIA 2017). We reasoned that Congress intended section 237(a)(2)(C) of the Act to apply to "all varieties of conduct relating to firearms transactions." *Id.* at 923 (internal citations and quotations omitted). Additionally, we determined that transporting a firearm necessarily involved constructive "possession," a term that is enumerated in section 237(a)(2)(C) of the Act. *Id.* at 924. In *Matter of Flores-Abarca*, transportation – the term that was sufficiently related to a firearms transaction and necessarily required constructive possession – was a required element of the offense at issue. By contrast, 18 U.S.C. § 924(a)(1)(A) does not include any conduct related to section 237(a)(2)(C) as an element.

Additionally, 18 U.S.C. § 924(a)(1)(A) has been held to apply to federally-licensed firearms dealers who falsify their own records. *See, e.g., United States v. Al-Muqsit*, 191 F.3d 928, 932 (8th Cir. 1999) (firearms dealers convicted of conspiracy to violate 18 U.S.C. § 924(a)(1)(A) where they falsified their own records regarding the number of firearms they had sold) (persuasive authority), *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) (persuasive authority). Such conduct does not involve purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, a firearm, or similarly related conduct. The DHS argues that these cases fall under section 237(a)(2)(C) of the Act because the facts of each case include a sale (DHS's Br. at 23). However, while a dealer's falsification of his own 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. Additionally, if a firearms dealer falsifies his records such that they do not correlate to actual sales or dispositions, as in *Al-Muqsit*, the violation is insulated from the conduct proscribed under section 237(a)(2)(C). Thus, 18 U.S.C. § 924(a)(1)(A) does not define a categorical firearms offense.

Based on the foregoing, we agree with the Immigration Judge's decision to terminate the respondent's removal proceedings. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.



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