U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] [redacted]-069

Date of this notice: 8/23/2013

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:
Pauley, Roger

TranC
Userteam: Docket

Rec'd 8/24/13

File: [redacted]069 - Lumpkin, GA

Date: AUG 23 2013

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas Hutchins, Esquire

ON BEHALF OF DHS: Anthony M. Cacavio
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: 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)(F)) (not sustained)

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Jamaica, is a lawful permanent resident of the United States. The Department of Homeland Security ("DHS") appeals the March 11, 2013, decision of the Immigration Judge granting his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The respondent has filed a brief in response. The record will be remanded.

On June 25, 2007, the respondent was convicted of making a terroristic threat in violation of Ga. Code Ann. § 16-11-37(a), and sentenced to 1 year of confinement and 4 years of probation (I.J. at 3; Exh. 2). The respondent's eligibility for cancellation of removal turns on whether he has proven that this conviction was not for an aggravated felony, as defined in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). *See* section 240A(a)(3) of the Act; 8 C.F.R. § 1240.8(d).[1]

Section 101(a)(43)(F) of the Act states that an offense is an aggravated felony if it is "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." In turn, 18 U.S.C. § 16 defines a "crime of violence" as:

[1] The DHS has not challenged the holding that the respondent has demonstrated that he merits relief in the exercise of discretion (I.J. at 6-7; Tr. at 102-03).

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The statute of conviction provides that:

> A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience.

Ga. Code Ann. § 16-11-37(a).

The Immigration Judge determined that Ga. Code Ann. § 16-11-37(a) is a divisible statute because it encompasses some acts that meet the definition of a crime of violence and others that do not (I.J. at 5). In particular, he found that a mens rea of "reckless disregard" does not support finding a crime of violence (I.J. at 5). *See Leocal v. Ashcroft*, 543 U.S. 1 (2004). Concerning 18 U.S.C. § 16(a), the Immigration Judge observed that while Ga. Code Ann. § 16-11-37(a) punishes threats to commit a "crime of violence," it does not define this term. He thus found that Ga. Code Ann. § 16-11-37(a) does not necessarily require violent force, as required to find a crime of violence pursuant to *Johnson v. United States*, 559 U.S. 133 (2010) (I.J. at 5). With regard to 18 U.S.C. § 16(b), the Immigration Judge found that Ga. Code Ann. § 16-11-37(a) does not implicate a substantial risk of the use of physical force (I.J. at 5-6). In this regard, he emphasized that Ga. Code Ann. § 16-11-37(a) punishes the *threat* of committing a crime of violence, as opposed to actual commission of violence (I.J. at 5).

The Board has stated that *Leocal* instructs that crimes with a mes rea of recklessness may qualify as crimes of violence under 18 U.S.C. § 16(b) if they raise a substantial risk that the perpetrator will resort to intentional physical force in the course of committing the crime. *Matter of U. Singh*, 25 I&N Dec. 670, 676 (BIA 2012) (*quoting Aguilar v. Att'y Gen. of U.S.*, 663 F.3d 692, 697 (3d Cir. 2011)). In addition, as noted by the respondent in his response brief, the United States Supreme Court recently explicated the proper application of the modified categorical approach. *See Descamps v. United States*, 133 S. Ct. 2276 (2013); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The Court stated that application of the modified categorical approach is appropriate to "divisible" statutes of conviction, which list one or more potential elements in the alternative, "render[ing] opaque which element played a part in the defendant's conviction." *Descamps*, *supra*, at 2283. We will remand the record for the entry of a new decision applying these precedents to the respondent's conviction under Ga. Code Ann. § 16-11-37(a). On remand, the Immigration Judge should speak to the arguments raised by the parties in their appellate briefs. The parties also should be allowed to submit additional evidence and argument.

Accordingly, the following order is entered.

ORDER: The record is remanded for further proceedings consistent with this decision.

FOR THE BOARD