U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] **A** [redacted]

Date of this notice: 9/9/2019

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:
Kelly, Edward F.

MalikAr
Userteam: Docket

File: A[redacted] – New York, NY Date: SEP - 9 2019

In re: [redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jennifer R. Vail, Esquire

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Haiti, appeals from the Immigration Judge's decision finding him removable, as charged, and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).[1] 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 a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent contends that he is not removable and the Immigration Judge erred in finding that NYPL § 265.01 is divisible and employing the realistic probability test because the state statute is facially overbroad (Respondent's Br. at 5-10). As to relief from removal, the respondent contends that the Immigration Judge improperly placed "heavy" reliance on the length of his criminal history to deny him cancellation of removal in the exercise of discretion (Respondent's Br. at 10-12).

The respondent entered the United States on December 27, 2003, as a lawful permanent resident. The Department of Homeland Security (DHS) issued a Notice to Appear (NTA) against the respondent based on the respondent's April 8, 2011, conviction under New York Penal Law (NYPL) § 265.01(1), Criminal Possession of a Weapon in the Fourth Degree (IJ Jan. 11, 2019, Dec. at 1; Exhs. 1, 3). The respondent was charged with removability under section 237(a)(2)(C) of the Act, 8 U.S.C. § 1227(a)(2)(C), for having been convicted of certain offenses involving firearms, as that term is defined in 18 U.S.C. § 921 (a).

After the NTA issued, the respondent moved to terminate proceedings, arguing that a conviction under NYPL § 265.01 does not qualify as a removable offense under section

[1] The Immigration Judge issued two decisions in this matter. The Immigration Judge's January 11, 2019, decision addresses the respondent's Motion to Terminate and the issue of removability. The April 16, 2019, decision addresses the respondent's application for cancellation of removal.

237(a)(2)(C) of the Act. The Immigration Judge denied the motion. In addition, the Immigration Judge denied the application for cancellation of removal in the exercise of discretion.

First, we adopt and affirm the Immigration Judge's determination that the respondent is removable, as charged. The Immigration Judge correctly found that because the New York state statute sets forth a list of elements of the offense in the alternative with at least one of those alternatives being a match to the generic definition of a firearm, the statute is divisible (IJ Jan. 11, 2019, Dec. at 3-4). As a divisible statute, the Immigration Judge properly applied the modified categorical approach. Based upon the third count of the indictment describing the respondent's knowing possession of a pistol, the Immigration Judge correctly concluded that the respondent's conviction was a categorical match to the generic definition under 18 U.S.C. § 921(a)(3) (IJ Jan. 11, 2019, Dec. at 3; Exh. 2, Tab B at 4).

We reject the respondent's argument that the Immigration Judge erred in applying the realistic probability test. The United States Supreme Court has explained that whenever a state firearms statute lacks an exception for antique firearms that is identical to the antique firearm exception under federal law, an alien convicted under that state law remains removable for having committed a firearms offense unless the alien can demonstrate that "the State actually prosecutes the relevant offense in cases involving antique firearms." *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1693 (2013) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *see also Matter of Navarro Guadarrama,* 27 I&N Dec. 560 (BIA 2019); *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014). *Moncrieffe* clarified the proper application of the realistic probability test and this is the appropriate legal test under the circumstances. Here, since New York's definition of firearms is broader than the federal definition which excludes an antique firearm from its definition of "firearm" (whether loaded or unloaded), the respondent bears the burden of proving there is a realistic probability that the state would prosecute someone who possesses a loaded antique firearm under NYPL§ 265.01(1). The respondent did not meet that burden of proof (IJ Jan. 11, 2019, Dec. at 3-4). We affirm that the respondent is removable, as charged, and the motion to terminate was properly denied.

Second, we agree with the Immigration Judge, for the reasons provided, that the respondent did not establish that he merits cancellation of removal in the exercise of discretion. In weighing the use of discretion, an Immigration Judge must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf to determine whether the granting of relief appears to be in the best interests of this country. *Matter of C-V-T-,* 22 I&N Dec. 7 (BIA 1998).

We acknowledge that the respondent has equities in the United States that include his nearly 16-year residence here; the presence of family, including a United States citizen daughter; and community ties to this country. However, these equities are outweighed by the adverse factor of "an extensive history of violating the law" that began in 2008 and has continued up to December 2018 (IJ April 16, 2019, Dec. at 6-9). The fact that some of the respondent's criminal conduct did not result in a conviction does not preclude a consideration of that conduct for purposes of weighing the use of discretion. *See, e.g., Matter of Thomas*, 21 I&N Dec. 20, 23-24 (BIA 1995) (explaining that an alien's misconduct may constitute an adverse discretionary consideration even if it did not result in a formal conviction). In addition to his criminal record, the Immigration Judge found that the respondent did not pay taxes on all of his income and an order of protection

was issued against the respondent after an incident with his child's mother (IJ April 16, 2019, Dec. at 9). On appeal, the respondent emphasizes the hardship he has endured in his life and the hardship which will arise, if removed, because of conditions in Haiti and having to begin his life over again in a new country without any family support (Respondent's Br. at 4). However, it is the respondent's repeated illicit conduct that has brought him to this point, and as the Immigration Judge observed, there is little in the record to show that the respondent has ever made genuine efforts toward rehabilitation (IJ at 11). On balance, we are not persuaded that the hardships the respondent has identified are sufficient to tip the discretionary scale in his favor.

Having carefully weighed the respondent's equities against the unfavorable factors, we agree with the Immigration Judge that the respondent has not met his burden of establishing that a grant of cancellation of removal under section 240A(a) of the Act is warranted in the exercise of discretion.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

FOR THE BOARD