

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLZ, 12TH FL RM1237
NEW YORK, NY 10278

The Bronx Defenders
Borsody, Sarah Elizabeth
360 E 161st St.
Bronx, NY 10451

In the matter of _____ File _____ DATE: Oct 15, 2018

✓ JUDGE'S ORDER.

- Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041
- Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
26 FEDERAL PLZ, 12TH FL RM1237
NEW YORK, NY 10278
- Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.
- Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.
- Other: _____


COURT CLERK
IMMIGRATION COURT

cc: DISTRICT COUNSEL, NYC DISTRICT
26 FEDERAL PLAZA, ROOM #1130
NEW YORK, NY, 10278

FF

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
NEW YORK, NEW YORK**

File No.: [REDACTED]

In the Matter of: _____ :
[REDACTED] : **IN REMOVAL PROCEEDINGS**
Respondent. _____ :

CHARGE: INA § 237(a)(2)(C) Firearms Offense
APPLICATION: Motion to Terminate

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[REDACTED] (“Respondent”) is a native and citizen of J [REDACTED]. She entered the United States (“U.S.”) as a Lawful Permanent Resident on [REDACTED] 2000. On [REDACTED] 2009 she was convicted of the offense of Criminal Possession of a Weapon in the Fourth Degree pursuant to New York Penal Law (“NYPL”) § 265.01(01).

On September 29, 216, the Department of Homeland Security (“DHS” or “the Department”) served Respondent with a Notice to Appear (“NTA”), charging her with removability pursuant to section 237(a)(2)(C) of the Immigration and Nationality Act (“INA”), as an alien who has been convicted of a firearms offense. At a master calendar hearing, Respondent, through counsel, admitted factual allegations one through three of the NTA, but denied the fourth allegation and the charge of removability. On July 27, 2018, Respondent submitted a motion to terminate proceedings (“Mot.”). For the reasons that follow, Respondent’s motion to terminate will be granted.

II. LEGAL STANDARDS & ANALYSIS

The Department bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the United States is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). “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 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 18 U.S.C. 921(a)] in violation of any law is deportable.” INA § 237(a)(2)(C). Firearm is defined in 18 U.S.C. § 921(a)(3) as:

“(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. **Such term does not include an antique firearm.**” (*emphasis added*)

On March 1, 2000, Respondent was convicted of Criminal Possession of a Weapon in the Fourth Degree pursuant to NYPL § 265.01 (01). At the time of Respondent’s conviction, a person was guilty of criminal possession of a weapon in the fourth degree pursuant to NYPL § 265.01(01) when, “he or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or ‘Kung Fu star.’” NYPL § 265.01 (01). At the time, firearm was further defined as:

(a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle . . .
Firearm does not include an antique firearm.

NYPL § 265.00(3). Antique firearm is further defined as, “[a]ny **unloaded** muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.” NYPL § 265.00(14). (*emphasis added*)

To determine whether Respondent’s conviction renders her removable, the Court employs the categorical approach. Under the categorical approach, the “singular circumstances of a [respondent’s] crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under [the respondent’s statute of conviction] is relevant.” *Flores v. Holder*, 779 F.3d 159, 165 (2d Cir. 2015). “[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense “necessarily” involved . . . facts equating to [the] generic [federal offense].” *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

However, in limited circumstances, the Court may apply a modified categorical approach to determine the subsection of law under which a Respondent was convicted, if a criminal statute is divisible. A criminal statute is divisible “only if (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of “elements,” more than one combination of which could support a conviction; and (2) **at least one**, but not all, of those listed offenses or combinations of disjunctive elements **is a categorical match to the relevant generic standard.**” *Descamps v. United States*, 133 S. Ct. at 2281, 2283 (*emphasis added*). An indivisible statute, however, “creates only a single crime” with different “‘means,’ ‘of committing some component of the offense.’” *Harbin v. Sessions*, 860 F.3d 58, 64 (2d Cir. 2017) (quoting *Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016)). For an indivisible statute, “[t]he jury need not agree on the particular means by which the defendant committed the crime to convict a defendant under such a statute.” *Id.*

Respondent argues that his statute of conviction is overbroad when compared to the generic definition of firearm for INA § 237(a)(2)(C) because someone may be convicted under the NY statute where they possess an unloaded antique firearm, whereas, the generic definition of a firearm excludes both loaded and unloaded antique firearms. The Respondent further argues that the NY statute is not divisible the type of firearm related weapon needed to secure such a state conviction is not an element of the state offense. Mot. at 8. The Court agrees.

Although in order to secure a conviction under NYPL § 265.01 (01) the State must prove that the Respondent possessed one of the type of weapons listed in the statute none of the listed weapons, are a categorical match to the generic definition of a firearm. As an initial matter it is clear that none of the non-firearm related weapons (e.g. gravity knife, metal knuckles etc.) listed in the NY statute is a categorical match to the generic firearm definition. Therefore, the only question in controversy is whether a “firearm,” as defined by NY state law, is a categorical match to the generic definition of a firearm. The Court finds that it is not. Here, the current jury instructions for possession of a firearm indicate that the type of firearm does not need to be specified in the relevant section of the jury instruction. *See New York Criminal Jury Instructions, Penal Law Art. 265.03(3), available at [http://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-01\(1\).firearm.pdf](http://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-01(1).firearm.pdf); see also *Harbin*, 860 F.3d at 67-68 (referring to “[t]he relevant part of the instructions”).* Therefore, the type of firearm is a means of committing the crime and not an element which requires juror unanimity, and so the statute is overbroad. *See Harbin*, 860 F.3d at 64.

The Court also finds that the Respondent’s conviction also does not require the Court to make an assessment as to whether the convictions meets the realistic probability test. The U.S. Court of Appeals for the Second Circuit has recently clarified that courts do not need to apply the realistic probability test, “when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition.” *Hylton v. Sessions*, No. 17-1567-ag, --- F.3d ---, 2018 WL 3483561 (2d Cir. July 20, 2018) (citing *Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)). Here, the state defines an antique firearm as “[a]ny *unloaded* muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.” NYPL § 265.00(14). Because the legislators included the word “unloaded” in defining antique firearms, the Court does not need use its legal imagination to find a way that the statute may be applied to conduct that falls outside the generic federal definition. The Court, therefore, does not need to engage in a realistic probability inquiry in this case. The Court, thus, finds that the statute is overbroad and grants Respondent’s motion to terminate proceedings.¹

¹ To the extent that the Court is terminating proceedings on other grounds, the Court will not issue a decision on the respondent’s alternate grounds for termination regarding her potential eligibility for naturalization before USCIS

ORDER

IT IS HEREBY ORDERED that Respondent's motion to terminate is **GRANTED**.

10/15/18
Date



Maria Lurye
U.S. Immigration Judge