

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File No.: A (_____)

In the Matter of: _____)

(, **Jahmal**)

The Respondent _____)

IN REMOVAL PROCEEDINGS

CHARGE: INA § 237(a)(2)(C) Firearms Offense

MOTION: 8 C.F.R. § 1239.2(c) Motion to Terminate

ON BEHALF OF THE RESPONDENT:

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ON BEHALF OF DHS:

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Nelson is a native and citizen of Jamaica (Exhibit 1). He was admitted as a Lawful Permanent Resident ("LPR") on February 1, 1990. *Id.* On June 4, 2010, he was convicted of Criminal Possession of a Weapon in the Second Degree, in violation of New York Penal Law ("NYPL") § 265.03(3) (Exhibit 4, Tab B).

On July 18, 2017, the Department of Homeland Security ("DHS") served the Respondent with a Notice to Appear ("NTA"), charging him with removability pursuant to INA § 237(a)(2)(C), as someone who has committed a firearms offense.

On August 29, 2017, the Respondent, through prior counsel, admitted factual allegations one through three, denied factual allegation four, and denied the charge of removability. The Court sustained allegation four based on DHS's evidence (Exhibits 1, 4). The Court also sustained the charge of removability.

On December 1, 2017, the Respondent, through new counsel, filed a motion to terminate proceedings, arguing that DHS has failed to meet its burden of establishing by clear and convincing evidence that the Respondent's NYPL § 265.03(3) conviction is categorically a firearms offense as defined in INA § 237(a)(2)(C). DHS filed an opposition motion on December 6, 2017 (Exhibit 13).

For the reasons that follow, the Court finds that DHS has failed to sustain its burden and will terminate proceedings.

II. LEGAL STANDARDS & ANALYSIS

A. Firearms Offense as Defined INA § 237(a)(2)(C)

DHS has charged the Respondent as being removable under INA § 237(a)(2)(C) because of his conviction for Criminal Possession of a Weapon in the Second Degree under NYPL § 265.03(3). DHS bears the burden of establishing by clear and convincing evidence that a person who has been admitted to the U.S. is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

INA § 237(a)(2)(C) provides that:

[Any person] 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 18 U.S.C. 921(a)] in violation of any law is deportable.

INA § 237(a)(2)(C).

A firearm as described in INA § 237(a)(2)(C) is defined 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.

18 U.S.C. § 921(a)(3).

To determine whether the Respondent's conviction renders him removable, the Court employs categorical approach. Contrary to DHS's argument that the Court should apply the circumstance specific approach, the Court finds that it is well settled that the categorical approach is to be used to determine whether a respondent is removable based on a conviction. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683-84 (2013); *see also Lanferman v. Board of Immigration Appeals*, 576 F.3d 84 (2d Cir. 2009) (applying the categorical approach when analyzing INA § 237(a)(2)(C)). 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*, 133 S. Ct. at 1684 (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

Further, under the categorical approach, the Court will determine whether there is a "realistic probability" that the statute of conviction could reach conduct that is not a removable offense. To find a realistic probability, the Supreme Court has stated that a respondent must "demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." *Moncrieffe*, 133 S. Ct. at 1693. In *Matter of Mendoza-Osorio*, the BIA noted that proof of a conviction is required to

demonstrate that, under the state law, there is a realistic probability of a “successful prosecution” for conduct that is outside the scope of the ground of removability in question. 26 I&N Dec. 703, 707 (BIA 2016).

The Respondent’s statute of conviction provides, in relevant part, that a person is guilty when “such person possesses any loaded firearm.” NYPL § 265.00(3). Like the federal definition of “firearm” in 18 U.S.C. § 921(a)(3), the New York definition of “firearm” expressly excludes “antique firearms.” *Id.* Under New York law, however, the term “antique firearm” only applies to unloaded antique firearms. NYPL § 265.00(14).

Following this, the Respondent argues that NYPL § 265.03(3) is categorically overbroad as the least of the acts criminalized under the New York State statute would not render the Respondent removable under INA § 237(a)(2)(C)—namely, the possession of a *loaded* antique firearm. The Court agrees.

Further, the mismatch between the New York State definition of “firearm” with that provided in the relevant federal statute was also recognized recently in the Eastern District of New York. *See U.S. v. Moncrieffe*, 167 F.Supp.3d 383 (E.D.N.Y. 2016). In *Moncrieffe*, the court noted that an “antique firearm” under 18 U.S.C. § 921(a)(16)(A) is defined as including any firearm manufactured “in or before 1898,” whereas New York’s definition of “firearm” does not exclude in terms weapons manufactured in or before 1898. *See* N.Y. Penal Law §§ 265.00(3), (14). The court further stated that, “[e]ven though the handgun a defendant carried would not be considered a ‘firearm’ for purposes of the relevant federal statute, it could still fall within the New York definition of firearm.” *Moncrieffe*, 167 F.Supp.3d at 412 (citing Hr’g Tr., Feb. 25, 2016, at 30:16–20, 14:20–22 (“[T]here are things that are criminally punishable [as] guns in New York that are federal antiques and therefore don’t fall under the removal ground”)); *see* 18 U.S.C. § 921(a). While not binding, the court finds the analysis of the distinctions between the definition of a firearm in the state and federal context to be instructive in this context.

The Respondent has also demonstrated that there is a realistic probability that New York prosecutes the possession of a loaded antique firearm, which is conduct outside the scope of INA § 237(a)(2)(C). *See Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014). In support of his argument, he cites two cases: *People v. Mott*, 447 N.Y.S.2d 632, 633 (Sup. Ct. 1982), and *Tillery v. Lempke*, No. 9:10-CV-1298 GTS, 2011 WL 5975068, at *1 (N.D.N.Y. Nov. 29, 2011).

In *Mott*, the court denied the defendant’s motion to dismiss the indictment for possession of a weapon in the third degree under NYPL § 265.02 because it found that the antique firearms exception under NYPL § 265.00(3) and the antique firearm definition in § 265.00(14) only applied to “*unloaded* antique firearms.” 447 N.Y.S.2d at 633 (emphasis in original). In denying the motion to dismiss, the court stated that, “[t]he crucial distinction, therefore, between the permissible act (possession of an antique firearm) and the criminal one, is founded upon whether or not the weapon is loaded.” *Id.*

In *Tillery*, the federal District Court for the Northern District denied a collateral challenge to a New York conviction that was based on the argument that the petitioner-defendant had been unlawfully convicted of weapons possession given that he possessed an antique firearm. The New York district court, citing *Mott*, held that “[b]ecause New York’s exemption concerning antique firearms pertains only to *unloaded* weapons, and the weapon Petitioner was accused of possessing was *loaded* as that term is defined by the Penal Law, Petitioner’s claim that his conviction must be set aside because he

was in possession of an antique firearm at the time of his arrest is plainly without substance.” 2011 WL 5975068 at *8 (emphasis in original).

In light of *Mott* and *Tillery*, the court finds that respondent has shown a “realistic probability” that New York prosecutes individuals for possession of a loaded antique firearm.

The inquiry ends here, as the Court finds that NYPL § 265.03(3) is not divisible to warrant the modified categorical approach. See *Descamps v. United States*, 133 S. Ct. 2276 (2013). NYPL § 265.03(3) does not list out multiple, alternative elements that would effectively make it a statute that punishes several different crimes. *Id.* at 2285. NYPL § 265.03(3) only punishes possession of a “firearm.” The type of firearm used for a conviction for NYPL § 265.03(3) is a means and not an element of the statute. The pattern jury instructions for NYPL § 265.03(3) further support this, as the jury does not need to specify the type of firearm used in order to find a defendant guilty.¹

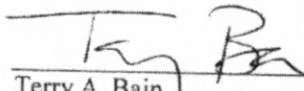
In conclusion, the Court finds that removability under INA § 237(a)(2)(C) has not been established by clear and convincing evidence. The Court will grant the Respondent’s motion to terminate proceedings.

Accordingly, after a careful review of the record, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that proceedings be terminated.

6/20/2018
Date



Terry A. Bain
Immigration Judge

¹ New York Unified Court System Criminal Jury Instructions & Model Colloquies, “Criminal Possession of a Weapon 2,” available at <http://www.nycourts.gov/judges/cji/2-PenalLaw/265/265-03%283%29.pdf>