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: 1/23/2015

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.
Pauley, Roger
Wendtland, Linda S.

schwarzA
Userteam: Docket

File: [redacted] - Seattle, WA

Date: JAN 23 2015

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jorge L. Baron, Esquire

ON BEHALF OF DHS: Jonathan M. Love
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude (not sustained)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (not sustained)

Lodged: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

APPLICATION: Termination; adjustment of status

The respondent, a native and citizen of [redacted] and a lawful permanent resident of the United States, appeals from an Immigration Judge's September [redacted], decision ordering him removed. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

In 2003, the respondent was convicted of being complicit in a drive-by shooting in violation of sections 9A.36.045 and 9A.08.020 of the Revised Code of Washington, a felony for which he was sentenced to a 24-month term of imprisonment. In a decision dated [redacted] 2008, a unanimous three-member panel of this Board determined that this conviction renders the respondent removable under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C). In that same decision, we also concluded that the respondent was not removable as an alien convicted of an aggravated felony and that he did not merit cancellation of removal in discretion; however, we deemed it necessary to remand the record for further consideration of the respondent's eligibility for asylum.[1]

[1] The respondent was also charged with removability under section 237(a)(2)(A)(i) of the Act, but the Immigration Judge dismissed that charge in 2007. The DHS has never challenged that aspect of the Immigration Judge's decision.

On remand, the Immigration Judge deemed himself bound by this Board's determination that the respondent is removable under section 237(a)(2)(C) of the Act, and thus he declined to reconsider that question despite the respondent's request that he do so. The respondent elected not to apply for asylum on remand, moreover; instead, he applied for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255. In his decision of September [redacted], the Immigration Judge found that the respondent did not merit adjustment of status in discretion, and thus he ordered him removed to [redacted] This timely appeal followed.

The respondent's primary argument on appeal is that intervening legal developments require reconsideration of our 2008 decision sustaining the section 237(a)(2)(C) charge against him. We agree with the respondent. *Cf. Gonzales v. U.S. Dept. of Homeland Sec.*, 712 F.3d 1271, 1277 (9th Cir. 2013) (holding that the prudential law-of-the-case doctrine is inapplicable where "intervening controlling authority makes reconsideration appropriate.").

As noted previously, the respondent was convicted in 2003 of being complicit in a drive-by shooting. The Washington statute defining the respondent's substantive offense of conviction provided as follows, in relevant part:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Rev. Code Wash. § 9A.36.045(1). In our prior decision, we concluded that the respondent's conviction for complicity in this offense made him deportable under section 237(a)(2)(C) of the Act, which provides as follows:

> 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 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 is deportable.

In his initial appeal, the respondent argued that section 9A.36.045(1) is overbroad vis-à-vis section 237(a)(2)(C). Specifically, he argued that Washington's definition of a "firearm," *see* Rev. Code Wash. § 9.41.010(1) (1998 & 2003 Supp.), covers some weapons that are excluded from the federal definition of "firearm" by virtue of their "antique" status. *See* 18 U.S.C. § 921(a)(3) (defining "firearm" to exclude any "antique firearm," a term defined by 18 U.S.C. § 921(a)(16)). We rejected that argument, holding that the "antique" status of a firearm was an "affirmative defense" which the respondent had failed to prove in Immigration Court. *Accord Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255-56 (BIA 2010).

As the respondent argues in his current appeal, however, the contours of the "antique firearm" defense have changed dramatically since our prior decision was rendered. First, in

Matter of Chairez, 26 I&N Dec. 349, 356 (BIA 2014), this Board determined that a state firearms statute that contains no exception for "antique firearms" is categorically overbroad relative to section 237(a)(2)(C) of the Act if the alien shows that the statute has, in fact, been successfully applied to prosecute offenses involving antique firearms. Further, in accordance with the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), we held that an alien could carry his burden in that regard by proving that "the statute was so applied in his own case [or] by a showing that the statute has been so applied to others." *Matter of Chairez, supra*, at 356-57. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter arises, has come to much the same conclusion. *See United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014); *United States v. Hernandez*, 769 F.3d 1059 (9th Cir. 2014).

As *Chairez* makes clear, it is the Board's position (absent binding contrary authority) that an alien who invokes the "antique firearm" defense has the burden of establishing a "realistic probability" that the *particular statute* under which he was convicted has been used by the prosecuting jurisdiction to successfully convict defendants for conduct involving antique firearms. *Matter of Chairez, supra*, at 357, 358. Were we to apply that standard here, the respondent would remain deportable under section 237(a)(2)(C) because he has not established that he or any other person has ever been successfully prosecuted under section 9A.36.045(1) for committing a drive-by shooting with an "antique firearm."

In a very recent precedent, however, the Ninth Circuit adopted an approach very different from the one we espoused in *Chairez*. In *Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014), the Ninth Circuit held that an alien with a state firearm conviction has carried his burden of proving the requisite "realistic probability" if he establishes that a conviction involving an antique firearm has ever been successfully prosecuted under *any* criminal statute which incorporates the convicting state's generic "firearm" definition, *regardless* of whether the alien's own particular offense of conviction has ever been prosecuted on the basis of conduct involving a federal "antique." *Id.* at 1116-17 (alien convicted under Cal. Penal Code § 12022(c) for being armed with a firearm during commission of a drug sale held not deportable under section 237(a)(2)(C), despite the absence of case law reflecting the existence of any conviction under § 12022(c) involving antique firearms, where individuals had been convicted under other California firearm statutes—i.e., §§ 12021(c)(1) and 12025(a)—for offenses involving antiques).

Under this more expansive Ninth Circuit standard, the respondent has carried his burden because he has successfully identified cases in which defendants have been prosecuted and convicted under Washington's gun laws for offenses involving weapons that are *both* "firearms" under Rev. Code Wash. § 9.40.010 *and* "antique firearms" under 18 U.S.C. § 921(a)(16). *See, e.g., State v. Spiers*, 79 P.3d 30 (Wash. Ct. App. 2003) (affirming defendant's conviction for unlawful possession of a firearm where the jury found that he possessed two antique revolvers). In light of this intervening change in law, we will reconsider our decision of [redacted], 2008, and dismiss the section 237(a)(2)(C) charge.[2] No other charges of removal are currently pending against the respondent, moreover, and therefore the removal proceedings will be terminated.

[2] There is no suggestion under Washington law that section 9A.36.045(1) is "divisible" within the meaning of *Descamps v. United States*, 133 S. Ct. 2276 (2013), into discrete offenses (continued...)

The following order will be issued.

ORDER: The appeal is sustained and the removal proceedings are terminated.

FOR THE BOARD

(...continued)
involving drive-by shootings committed with "antique" firearms and drive-by shootings committed with "non-antique" firearms. As the respondent's offense is indivisible vis-à-vis section 237(a)(2)(C) of the Act, the modified categorical approach is inapplicable. *Accord Medina-Lara v. Holder, supra*, at 1117.