Immigration Consequences

Matter of Alday-Dominguez, 27 I&N Dec. 48 (BIA 2017)

Receiving stolen property under section 496(a) of the California Penal Code was *categorically* an aggravated felony theft offense under section 101(a)(43)(G) of the INA,

On June 1, 2017, the Board of Immigration Appeals (BIA) issued a precedent decision in the *Matter of Alday-Dominguez,* 27 I&N Dec. 48 (BIA 2017) [PDF version]. The Board held that the aggravated felony receipt of stolen

property codified in section 101(a)(43)(G) of the Immigration and Nationality Act (INA) does not require that the unlawfully received property have been obtained by means of common law theft or larceny.

Facts and Procedural History:

27 I&N Dec. at 48-49

The respondent, a native and citizen of Mexico, was a lawful permanent resident (LPR) of the United States. On March 11, 2011, the respondent was convicted of receiving stolen property in violation of section 496(a) of the California Penal Code. As a result of the conviction, the respondent was sentenced to serve 16 months in prison.

In footnote 1, the BIA quoted the pertinent part of section 496(a) of the California Penal Code at all relevant times in the case:

> **“ Every person who buys or receives any property that has been stolen or that has been obtained in any manner construing theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment…**

Based on the conviction, the Department of Homeland Security (DHS) issued a notice to appear to the respondent, charging him as removable based on having been convicted of an aggravated felony theft offense under section

101(a)(43)(G) of the INA.

In proceedings, the Immigration Judge concluded that the DHS failed to demonstrate that the respondent was removable as charged and thus terminated removal proceedings. The Immigration Judge reasoned that a conviction under section 496(a) of the California Penal Code is not categorically a conviction for an aggravated felony theft offense. To this effect, the Immigration Judge cited to controlling precedent from the United States Court of Appeals for the Ninth Circuit in *Lopez-Valencia v. Lynch,* **798 F.3d 863 (9th Cir. 2015) [PDF version].**

Board's Analysis and Decision

27 I&N Dec. at 49-51

The Board would review *de novo* **whether receiving stolen property under section 496(a) of the California Penal Code was categorically an aggravated felony theft offense under section 101(a)(43)(G) of the INA, that is, review the case from the beginning. In employing the "categorical approach," the question involved not the respondent's specific conduct, but rather whether the minimum conduct that would violate section 496(a) would be an aggravated felony under section 101(a)(43)(G) of the INA.**

For reasons that we will examine, the BIA would conclude that a conviction under section 496(a) of the California Penal Code was categorically an aggravated felony theft offense as defined in section 101(a)(43)(G) of the INA.

The Board explained that section 101(a)(43)(G) of the INA defines aggravated felony theft as "a theft offense (including receipt of stolen

property) or burglary offense for which the term of imprisonment is [at] least one year." The Board explained in footnote 2 that the Supreme Court of the United States, the Ninth Circuit, and the Board itself have each defined "theft" as "the taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than permanent."

In the *Matter of Cardiel,* **25 I&N Dec. 12, 17 (BIA 2009) [PDF version], the Board held that a conviction for receipt of stolen property under the statute of conviction in the instant case — section 496(a) of the California Penal Code — was categorically a conviction for aggravated felony theft under section 101(a)(43)(G) of the INA, provided that such conviction was accompanied by a prison sentence of at least one year. The Board noted that the Ninth Circuit had reached the same conclusion that same year in** *Verdugo-Gonzalez v. Holder,* **581 F.3d 1059, 1061-62 (9th Cir. 2009) [PDF version].**

The Board explained that in *Matter of Cardiel,* **25 I&N Dec. at 14, it held that the term "receipt of stolen property" is not a subset of "theft," as the term is used in section 101(a)(43)(G) of the INA, "because each can be considered a distinct and separate offense."**

In the instant case, the respondent argued that "receipt of stolen property" in section 101(a)(43)(G) only encompasses offenses where the stolen property is obtained through theft. However, the Board found this argument unpersuasive. The Board noted that "[t]he parenthetical does not say that it only includes 'receipt of stolen property obtained by theft' or some comparable formulation."

Furthermore, the Board cited to the Supreme Court decision in *United States v. Turley,* **352 U.S. 407, 415-17 (1957) [PDF version]. The Board described the Supreme Court decision in** *Turley* **as having held that the term "stolen does**

not have a fixed meaning that only refers to common law offenses such as theft and larceny. Rather, the Board noted that the Supreme Court held that the term "stolen should, instead, be interpreted broadly as including offenses of embezzlement, false pretenses, and any other felonious takings." The Board noted that the issue arose in a "different, albeit relevant, context…"

Relying on *Turley,* **the Board held that it was not necessary for it to decide whether the respondent's violation of section 496(a) of the California Penal Code is a generic "theft" offense as the Board has defined the term. This is because, as the Board reiterated, "the receipt of stolen property parenthetical [in section 101(a)(43)(G)] is not limited to receipt offenses in which the property was obtained by means of theft.**

In footnote 4, the Board explained why the Immigration Judge was incorrect when it found that the Ninth Circuit had implicitly overruled *Verdugo-Gonzalez* **in** *Lopez-Valencia.* **The Board noted that** *Lopez-Valencia* **addressed an entirely different statute — section 484 of the California Penal Code — than the statute at issue in** *Matter of Alday-Dominguez.* **In** *Lopez-Valencia,* **the Ninth Circuit held that section 484 was categorically overbroad relative to the generic definition of aggravated felony theft because it covered theft of labor, false credit reporting, and false pretenses. The Board in the instant case explained that this ruling has no bearing on the issue in the instant case. Furthermore, the Ninth Circuit did not once mention** *Verdugo-Gonzalez* **in the** *Lopez-Valencia* **decision. In any event„ in 2016, the Ninth Circuit explicitly reaffirmed** *Verdugo-Gonzalez* **in a non-precedent decision titled** *Prieto-Hernandez v. Lynch,* **653 F.App'x 547, 549 (9th Cir. 2016) [PDF version].**

Ninth Circuit Decision

For the foregoing reasons, the Ninth Circuit concluded that the respondent's conviction in violation of section 496(a) of the California Penal Code for receipt of stolen property was categorically an aggravated felony theft offense under section 101(a)(43)(G) of the INA. The Board held that "the Immigration Judge's reliance on *Lopez-Valencia* **was misplaced." The Board sustained the DHS's appeal, reinstated removal proceedings, and remanded the record for consideration of any relief from removal for which the respondent may be eligible.**

Conclusion

In the *Matter of Alday-Dominguez,* **the Board made clear that a conviction for "receipt of stolen property" need not require proof that the property have been originally obtained through "theft" in order for the conviction to fall under section 101(a)(43)(G) of the INA for aggravated felony theft. Considering the fact that the Board had previously found that the very same California statute categorically fell under section 101(a)(43)(G) in the** *Matter of Cardiel***, this decision is unlikely to cause any significant changes in how immigration courts read the provision.**

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