[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-12082
Non-Argument Calendar

Agency No. A055-745-117

DIEUDLET JEAN-LOUIS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(July 9, 2021)

Before MARTIN, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Dieudlet Jean-Louis, a native and citizen of Haiti, seeks review of the Board of Immigration Appeals' ("BIA") order, affirming the Immigration Judge's ("IJ") final order of removal. He argues that the BIA erred in determining that his conviction for access device fraud conspiracy, in violation of 18 U.S.C. § 1029(b)(2), qualified as an "aggravated felony," pursuant to Immigration and Nationality Act ("INA") § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). He argues that the BIA failed to apply a circumstance-specific approach, as required by *Nijhawan v. Holder*, 557 U.S. 29 (2009), to determine that his offense resulted in a loss in excess of $10,000, as required to constitute an "aggravated felony" under the INA. Specifically, he argues that the BIA erred by relying on the loss amount that was stated in his restitution order and his plea agreement, but which was not necessarily tied to his specific count of conviction.

We review whether we have subject matter jurisdiction over a petition for review *de novo*. *Guzman-Munoz v. U.S. Att'y Gen.*, 733 F.3d 1311, 1313 (11th Cir. 2013). We also review *de novo* the BIA's legal determinations, *Castillo-Arias v. U.S. Att'y. Gen.*, 446 F.3d 1190, 1195 (11th Cir. 2006), and whether a prior conviction qualifies as an aggravated felony, *Accardo v. U.S. Att'y Gen.*, 634 F.3d 1333, 1335 (11th Cir. 2011). We review administrative factual findings under the substantial-evidence test, viewing the evidence in the light most favorable to, and drawing all reasonable inferences in favor of, the agency's decision. *Kazemzadeh*

v. U.S. Att'y Gen., 577 F.3d 1341, 1350-51 (11th Cir. 2009). Under this highly deferential standard, we must affirm the BIA's decision if it is supported by substantial evidence on the record considered as a whole. *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 818 (11th Cir. 2004).

Our jurisdiction to review orders of removal is limited by the INA, which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [8 U.S.C. § 1227(a)(2)(A)(iii)]." 8 U.S.C. § 1252(a)(2)(C). We retain jurisdiction, however, over "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). The question of whether a petitioner's conviction constitutes an "aggravated felony" within the meaning of the INA is a question of law that falls within our jurisdiction. *See Balogun v. U.S. Att'y Gen.,* 425 F.3d 1356, 1360 (11th Cir. 2005). We also retain jurisdiction to determine underlying facts that establish our jurisdiction or lack thereof. *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1343 (11th Cir. 2010). We review the BIA's decision as the final judgment, except to the extent that the BIA expressly adopted the opinion of the IJ. *Kazemzadeh*, 577 F.3d at 1350.

"Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an

aggravated felony, as is an attempt or conspiracy to commit such an offense. 8 U.S.C. § 1101(a)(43)(M)(i), (U). To prove that such a noncitizen is removable for having been convicted of an aggravated felony under § 1101(a)(43)(M)(i) or (U), the government must present clear and convincing evidence that the loss to the victim exceeds $10,000. 8 U.S.C. § 1229a(c)(3)(A); *see Nijhawan*, 557 U.S. at 42. As to conspiracies to commit fraud offenses under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), the BIA has decided that it is sufficient for the government to prove that the potential loss to victims was more than $10,000, rather than the actual loss. *Matter of S-I-K*, 24 I. & N. Dec. 324, 327 (BIA 2007).

In *Nijhawan*, the Supreme Court held that the loss amount for purposes of determining removability was a factual circumstance surrounding the fraud and not an element of the fraud itself, thus requiring a circumstance-specific inquiry, rather than the categorical approach. *Nijhawan*, 557 U.S. at 36-40. However, it stated that "the loss must be tied to the specific counts covered by the conviction" involving fraud and deceit and that, "since the Government must show the amount of loss by clear and convincing evidence, uncertainties caused by the passage of time are likely to count in the alien's favor." *Id.* at 42. Ultimately, the Supreme Court concluded that the IJ properly "relied upon earlier sentencing-related material," including a factual stipulation at sentencing and a restitution order, which both showed that the loss was greater than $10,000, in finding that the loss

amount was clear and convincing, especially given the lack of conflicting evidence from the petitioner. *Id.* at 42-43.

We have held that an IJ is not entitled to rely solely on a restitution order to establish the loss amount for an aggravated felony if the restitution order includes additional conduct not included in the plea, when so demonstrated by the petitioner. *Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785, 789-91 (11th Cir. 2007), *abrogated by Nijhawan*, 557 U.S. at 29. In *Obasohan*, we held that a "restitution order was insufficient as a matter of law" at the immigration hearing, both because it referenced conduct not charged, proven, or admitted prior to sentencing and because the standard at sentencing was a lower "preponderance of the evidence" standard. *Id.* at 791. The government, however, admitted to the fact that the restitution order was based on other acts than the offense of conviction. *Id.* at 789-90.

Although we retain jurisdiction to determine whether Jean-Louis's offense qualifies as an aggravated felony, we ultimately do not have jurisdiction to consider his petition for review because the BIA correctly concluded that his offense qualifies as an aggravated felony. The record shows that Jean-Louis was convicted of an access device fraud conspiracy—an offense involving fraud or deceit—and the restitution order and stipulation contained in his plea agreement together confirm that his offense conduct resulted in victim loss exceeding

$10,000. Furthermore, the amount of restitution was tied to his specific offense of conviction. Thus, because Jean-Louis was convicted of an aggravated felony within the meaning of the INA, we lack jurisdiction over his final order of removal.

PETITION DENIED.

MARTIN, Circuit Judge, concurring:

I write separately to note why I prefer not to use the term "alien," which the panel opinion quotes three times. Justice Kavanaugh has equated the term "noncitizen" with the statutory term "alien." Nasrallah v. Barr, 590 U.S. __, 140 S. Ct. 1683, 1689 n.2 (2020); see also United States v. Estrada, 969 F.3d 1245, 1253 n.3 (11th Cir. 2020). "Alien" is increasingly recognized as an "archaic and dehumanizing" term. Maria Sacchetti, ICE, CBP to Stop Using 'Illegal Alien' and 'Assimilation' Under New Biden Administration Order, Wash. Post (Apr. 19, 2021), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html.

To the extent the term "noncitizen" does not, in every instance, serve as a perfect replacement for the term "alien," that concern is not present in this case. I see no need to use a term that "has become pejorative" where a non-pejorative term works perfectly well. Library of Congress, Library of Congress to Cancel the Subject Heading "Illegal Aliens" at 1 (2016), https://www.loc.gov/catdir/cpso/illegal-aliens-decision.pdf.

BRANCH, Circuit Judge, concurring:

In her separate concurrence, Judge Martin takes issue with the fact that the majority uses the statutory term "alien," rather than her preferred term "noncitizen."[1] However, the term "alien" is the term chosen by Congress in the text of the Immigration and Nationality Act ("INA"), and as it is not our role to "fix" the text of the INA, we should not stray into legislative draftsmanship. *See Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000) (en banc) ("[T]he role of the judicial branch is to apply statutory language, not to rewrite it."); *see Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978) ("[A] statute is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." (quotation omitted)). Further, as Justice Alito cautioned in his dissent in *Moncrieffe v. Holder*, "'[a]lien' is the term used in the relevant provisions of the [INA], and this term does not encompass all noncitizens." 569 U.S. 184, 210 n.1 (2013) (Alito, J., dissenting). For these reasons, I write separately.

[1] I recognize that, on occasion, the Supreme Court has used the term "noncitizen" rather than "alien" in its general discussion of our country's immigration laws. However, more recently, Supreme Court precedent has confirmed that the term "alien" remains appropriate. *See Garland v. Dai*, 141 S. Ct. 1669, 1680 (2021).