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BURNING DOWN THE HOUSE: THE SECOND AND THIRD CIRCUITS SPLIT ON WHETHER ARSON NOT RELATING TO INTERSTATE COMMERCE IS AN AGGRAVATED FELONY

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The lyrics of the Talking Heads song "Burning Down the House" do not mention whether the house in question was involved in commerce. According to *Jones v. United States*, 529 U.S. 848 (2000), however, arson of "an owner-occupied residence not used for any commercial purpose" does not qualify as a violation of 18 U.S.C. §844(i), which makes it a crime to "maliciously damage[] or destroy[] . . . by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce." Under INA §101(a)(43)(E)(i), 8 U.S.C. §1101(a)(43)(E)(i), a conviction for an offense "described in" 18 U.S.C. §844(i) is an aggravated felony for immigration purposes. The Courts of Appeals for the Second and Third Circuits have recently come to differing conclusions regarding whether an arson conviction under a state law that does not require such involvement in commerce, and thus would cover burning down a house, qualifies as such an aggravated felony.

In *Bautista v. Attorney General*, 744 F.3d 54 (3d Cir. 2014), the Third Circuit, whose jurisdiction includes New Jersey, Pennsylvania, and Delaware, ruled that conviction for attempted arson under New York State law lacking such a commerce requirement "cannot qualify as an aggravated felony because it lacks the jurisdictional element of § 844(i), which the Supreme Court has found to be a critical and substantive element of that arson offense." *Bautista,* slip op. at 1-2. Robert Bautista, a lawful permanent resident of the United States since 1984, had been convicted of attempted arson in the third degree under N.Y. Penal Law §110 and 150.10, and sentenced to five years of probation (and had

also been convicted of uttering a forged instrument under New Jersey law, for which he was sentenced to one year of probation). After being placed in removal proceedings upon his return from a trip abroad, he applied for cancellation of removal for permanent residents under INA 240A(a), 8 U.S.C. §1229b(a), but his application was pretermitted by the Immigration Judge on the ground that the attempted arson conviction was an aggravated felony. The BIA agreed with this finding in a precedential decision, *Matter of Bautista,* 25 I&N Dec. 616 (BIA 2011), but the Third Circuit disagreed and vacated that decision.

As the Third Circuit explained, it was clear that the New York arson statute and the federal statute at §844(i) differed with respect to the interstate-or-foreign-commerce requirement but had very similar elements in other respects.

Bautista does not dispute that the New York statute and the federal statute contain three identical, substantive elements: 1) damaging a building or vehicle, 2) intentionally, 3) by using fire or explosives. The Government does not dispute that the jurisdictional element of § 844(i), requiring that the object of arson be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," is not contained in the New York statute.

Bautista, 744 F.3d at 60, slip op. at 12.

The Government argued that the jurisdictional element of §844(i) should not count for purposes of the aggravated felony analysis because it was not "substantive". The Third Circuit, however, held (in a 2-1 split panel decision) that this element, like the other elements of §844(i), must be present in order for a conviction to qualify under the categorical approach as "described in" §844(i) for purposes of the aggravated felony designation of §101(a)(43)(E)(i). If Congress had wanted to include all generic arson as an aggravated felony, the Third Circuit reasoned, Congress could simply have referenced arson as a generic offense in the statute. Referencing the federal statute instead evinced a deliberate choice to require the jurisdictional element. As the majority wrote:

We cannot undermine the categorical approach and Congress's deliberate choice to include § 844(i), rather than generic arson, in § 101(a)(43)(E)(i). Further, were we to ignore the jurisdictional element in our categorical approach to § 844(i), as the BIA has here, we would be characterizing a state conviction for arson of the intrastate house in *Jones* as an aggravated felony "described in" § 844(i), when the Supreme Court clearly excised the arson of such intrastate objects from the scope of that federal statute. We are loath to suggest that

Congress would use a federal statute, like § 844(i), to "describe" offenses outside the parameter of that very federal statute without an unequivocal indication that it was doing something so counterintuitive.

Bautista, 744 F.3d at 66, slip op at 24. "The bottom line," the Third Circuit concluded, "is that § 844(i) does not describe generic arson or common law arson, but arson that involves interstate commerce." Therefore, the Third Circuit held that Bautista's conviction for attempted arson in the third degree under New York law did not constitute an aggravated felony.

Last week, however, the Court of Appeals for the Second Circuit, which includes New York, Connecticut, and Vermont, came to a different conclusion. In its opinion in *Luna Torres v. Holder*, No. 13-2498 (August 20, 2014), the Second Circuit deferred to what it found to be the BIA's reasonable interpretation of the INA. The Second Circuit did not find the BIA's conclusion regarding the meaning of INA §101(a)(43)(E)(i) to "follow[] inexorably from the INA's text and structure." *Luna Torres*, slip op. at 13. However, "onsidering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as a whole," the Second Circuit "conclude that the statute is ambiguous as to whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony." Id. at 11. The Second Circuit therefore determined that the BIA's interpretation of the statute, in which the BIA had found that such a jurisdictional element need not be included in order for a statute to qualify as an aggravated felony, was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Finding the BIA's interpretation at least a reasonable one, the Second Circuit deferred to it and denied the petition for review.

One issue that was not addressed in *Luna Torres* (and may not have been raised) is whether, at the time the Second Circuit made its decision, there was any precedential BIA opinion to defer to. The BIA's decision in *Matter of Bautista*, after all, had already been vacated by the Third Circuit prior to the Second Circuit's decision. It seems in some sense disrespectful of that action by the Third Circuit to say, as the Second Circuit did in a section of its opinion addressing and rejecting a retroactivity argument, that "*Matter of Bautista* . . . governs Luna's case." Arguably, there was no extant decision and judgment of the BIA in *Matter of Bautista* which could so govern, since it had already been vacated by a court. The decision in *Matter of Bautista,* in an important sense, no longer existed by the time of the Second Circuit's decision.

Moreover, while the BIA had reached the same result in its unpublished decision in Luna Torres's case as in *Matter of Bautista,* the Second Circuit had previously held, in *Rotimi v. Gonzales*, 473 F.3d 55, 56 (2d Cir. 2007), that "a nonprecedential decision by a single member of the BIA should not be accorded Chevron deference." Thus the nonprecedential decision in Luna Torres's case, by itself, cannot be what the Second Circuit was deferring to in its opinion. Deference was evidently given to *Matter of Bautista* itself, and yet one might reasonably ask why the Second Circuit should have felt itself bound to defer to a precedential decision that had been vacated by a Court of Appeals and no longer existed. It might have made more sense for the Second Circuit to vacate the nonprecedential decision in Luna Torres's case and remand to the BIA as it had vacated the nonprecedential BIA decision in *Rotimi* and remanded, saying to the BIA, in effect, that it should, in light of the Third Circuit's decision in *Bautista,* issue a new precedential decision, *Matter of Luna Torres*. The BIA could then have determined not only whether it continued to stand by its reasoning from *Matter of Bautista* in light of the Third Circuit's contrary decision, but whether it was troubled by the prospect of its ruling being valid only in some judicial circuits but not others, and would find it appropriate to acquiesce in the Third Circuit's ruling in the interest of national uniformity. It does not appear that this possibility was considered by the Second Circuit.

Of course, since the Second Circuit found INA §101(a)(43)(E)(i) to be ambiguous and deferred to the BIA's decision only as a matter of *Chevron* deference, the BIA could still reconsider *Matter of Bautista* in the next appropriate case to come before it, and change course to follow the Third Circuit's *Bautista* decision. For the moment, however, if a noncitizen is convicted of burning down a house, whether an arson conviction for that burning is found to be an aggravated felony may depend on whether the noncitizen is placed into removal proceedings in New York or Connecticut, on the one hand, or in New Jersey or Pennsylvania, on the other.