

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2013

4 (Argued: May 5, 2014 Decided: August 20, 2014)

5 Docket No. 13-2498

6
7 JORGE LUNA TORRES,
8 Petitioner,

9 v.

10 ERIC H. HOLDER, JR., Attorney General of the United States,
11 Respondent.*

12
13 Before: SACK, RAGGI, and CHIN, *Circuit Judges*.

14 The petitioner, a lawful permanent resident of the United States, was
15 convicted of attempted arson in the third degree in violation of New York Penal
16 Law §§ 110 and 150.10. A United States Immigration Judge determined that this
17 conviction was an "offense described in" 18 U.S.C. § 844(i) and therefore
18 constituted an "aggravated felony" rendering the petitioner ineligible for
19 cancellation of removal under the Immigration and Nationality Act. *See* 8 U.S.C.
20 § 1101(a)(43)(E)(i). The Board of Immigration Appeals affirmed, rejecting the
21 petitioner's argument that the state provision under which he was convicted is

* The Clerk of the Court is respectfully directed to amend the caption as set forth above.

1 not an "offense described in" 18 U.S.C. § 844(i) because it lacks a federal
2 jurisdictional element. We conclude that under *Chevron, U.S.A., Inc. v. Natural*
3 *Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we must defer to the
4 reasonable determination of the Board of Immigration Appeals that a state law
5 offense need not contain a federal jurisdictional element in order to qualify as an
6 "offense described in" 18 U.S.C. § 844(i), and thereby constitute an aggravated
7 felony. The petition is therefore

8 DENIED.

9 MATTHEW L. GUADAGNO, New York,
10 NY, *for Petitioner*.

11 REBECCA HOFFBERG PHILLIPS, Trial
12 Attorney (Stuart F. Delery, Assistant
13 Attorney General; William C. Peachey,
14 Assistant Director; Brianne Whelan Cohen,
15 Acting Senior Litigation Counsel, *on the*
16 *brief*), Civil Division, U.S. Department of
17 Justice, Washington, DC, *for Respondent*.

18 SACK, *Circuit Judge*:

19 We consider on this appeal whether a conviction under New York Penal
20 Law §§ 110 and 150.10 for attempted arson in the third degree constitutes an
21 "aggravated felony" under the Immigration and Nationality Act ("INA"). *See* 8
22 U.S.C. § 1101(a)(43)(E)(i). Answering this question requires us to decide whether
23 this state crime, which lacks a federal jurisdictional element, is an "offense

described in" 18 U.S.C. § 844(i), the federal statute governing explosive materials offenses, which does contain such an element. Because we defer to the BIA's reasonable determination that a state "offense described in" 18 U.S.C. § 844(i) need not contain a federal jurisdictional element, we deny the petition.

BACKGROUND

Jorge Luna Torres, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, was convicted in 1999 of attempted arson in the third degree in violation of New York Penal Law §§ 110 and 150.10. Luna¹ was sentenced to one day of imprisonment and five years of probation.

In 2006, Luna sought admission to the United States as a lawful permanent resident after a trip abroad. On March 13, 2007, the Immigration and Naturalization Service issued a Notice to Appear charging Luna with inadmissibility as an alien convicted of a crime involving moral turpitude.

Luna applied for cancellation of removal. After a merits hearing, a United States Immigration Judge ("IJ") found Luna removable as charged, a conclusion which Luna does not challenge before this Court. Relying on *Matter of Bautista*,

¹ Although the removal proceedings employ the petitioner's full name, Jorge Luna Torres, he refers to himself as Jorge Luna. We follow his preference here.

1 25 I. & N. Dec. 616 (BIA 2011), *overruled by Bautista v. Attorney Gen.*, 744 F.3d 54
2 (3d Cir. 2014), the IJ also found Luna ineligible for cancellation of removal as a
3 permanent resident convicted of an aggravated felony, *see* 8 U.S.C. § 1229b(a)(3).
4 In *Matter of Bautista*, the Board of Immigration Appeals ("BIA") had concluded
5 that a conviction under the same provision of the New York Penal Law
6 constitutes an aggravated felony under section 101(a)(43)(E)(i) of the INA as an
7 "offense described in" 18 U.S.C. § 844(i). *Matter of Bautista*, 25 I. & N. Dec. at 618–
8 20; *see* 8 U.S.C. § 1101(a)(43)(E)(i) (codifying INA § 101(a)(43)(E)(i)).

9 Luna appealed the denial of cancellation to the BIA. He argued that the
10 agency should reconsider *Matter of Bautista* and that, if it did not, the decision
11 should not be applied retroactively to his case. The BIA dismissed Luna's
12 appeal, declining to reconsider *Matter of Bautista* and concluding that its effect
13 was not impermissibly retroactive. Luna timely petitioned this Court for review,
14 repeating both of these arguments.

15 After briefing but before oral argument in Luna's appeal, the Third Circuit
16 vacated the BIA's ruling in *Matter of Bautista*, concluding that the New York
17 arson statute did not qualify as an aggravated felony because it lacked the
18 federal jurisdictional element. *Bautista v. Attorney Gen.*, 744 F.3d 54, 56 (3d Cir.

2014). The Third Circuit's decision conflicts with interpretations by the Fifth, Seventh, Eighth, and Ninth Circuits of 8 U.S.C. § 1101(a)(43)'s "offense described in" language. *See Spacek v. Holder*, 688 F.3d 536 (8th Cir. 2012) (interpreting 8 U.S.C. § 1101(a)(43)(J), relating to racketeering offenses); *Nieto Hernandez v. Holder*, 592 F.3d 681 (5th Cir. 2009) (interpreting 8 U.S.C. § 1101(a)(43)(E)(ii), relating to firearms offenses); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (same); *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (same). We therefore requested supplemental briefing, which the parties submitted prior to oral argument.

DISCUSSION

I. Jurisdiction and Standard of Review

This Court lacks jurisdiction to review the BIA's denial of discretionary relief from removal. *See* 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1229b(a). But Luna's claim that his conviction is not an aggravated felony rendering him statutorily ineligible for cancellation of removal raises a question of law which we retain jurisdiction to review, *id.* § 1252(a)(2)(D), and which we evaluate under the principles of deference set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

1 **II. Whether a Violation of New York Penal Law § 150.10 Constitutes an**
2 **Aggravated Felony Under the INA**

3 On appeal, Luna argues that *Matter of Bautista* was incorrectly decided
4 because Congress intended to define as "aggravated felonies" only those state
5 law crimes encompassing all elements of the federal statute, including so-called
6 "jurisdictional" elements. Because we defer to the BIA's reasonable conclusion to
7 the contrary, we reject this argument.

8 ***The Statutory Framework***

9 Under the INA, an alien is ineligible for cancellation of removal if he has
10 been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3). The statute
11 defines the term "aggravated felony" by enumerating an extensive catalogue of
12 crimes identified with varying degrees of specificity. *See id.* § 1101(a)(43). The
13 definition's penultimate sentence also provides that "[t]he term applies to an
14 offense described in this paragraph whether in violation of Federal or State law
15 and applies to such an offense in violation of the law of a foreign country for
16 which the term of imprisonment was completed within the previous 15 years."

17 *Id.*

1 Among the offenses included under INA § 101(a)(43)'s definition is "an
2 offense described in" 18 U.S.C. § 844(i). *See* 8 U.S.C. § 1101(a)(43)(E)(i). That
3 section in turn provides:

4 Whoever maliciously damages or destroys, or attempts to damage
5 or destroy, by means of fire or an explosive, any building, vehicle, or
6 other real or personal property used in interstate or foreign
7 commerce or in any activity affecting interstate or foreign commerce
8 shall be imprisoned for not less than 5 years and not more than 20
9 years, fined under this title, or both

10
11 18 U.S.C. § 844(i). New York Penal Law § 150.10, under which Luna was
12 convicted, provides that "[a] person is guilty of arson in the third degree when he
13 intentionally damages a building or motor vehicle by starting a fire or causing an
14 explosion." N.Y. Penal Law § 150.10(1). The two statutes are substantially
15 similar except that 18 U.S.C. § 844(i) contains one element—that the property
16 destroyed be "used in interstate or foreign commerce or in any activity affecting
17 interstate or foreign commerce"—which New York Penal Law § 150.10 lacks.
18 The question this appeal poses is whether the New York provision must include
19 this jurisdictional element in order to qualify as an "offense described in" the
20 federal statute.

1 ***The BIA's Decision in Matter of Bautista***

2 The BIA confronted precisely this question in *Matter of Bautista*. After
3 determining that New York Penal Law § 150.10 and 18 U.S.C. § 844(i) are
4 substantially similar except for the jurisdictional element, the BIA concluded that
5 its analysis in *Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (en banc),
6 controlled. *Matter of Bautista*, 25 I. & N. Dec. at 618-20.

7 In *Matter of Vasquez-Muniz*, the BIA decided that a conviction under the
8 California Penal Code for possession of a firearm by a felon constituted an
9 aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii) as an "offense described in"
10 18 U.S.C. § 922(g)(1). *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 213. The BIA,
11 sitting *en banc*, reasoned that a state crime "described in" a federal crime need not
12 reproduce the federal jurisdictional element. *Id.* The BIA concluded that the
13 penultimate sentence of section 1101(a)(43), which clarifies that the term
14 "aggravated felony" applies to "an offense described in this paragraph whether in
15 violation of Federal or State law" or "the law of a foreign country," expressed a
16 congressional "concern over *substantive* offenses rather than any concern about
17 the jurisdiction in which they are prosecuted." *Id.* at 210 (emphasis added). The
18 BIA also reasoned that, since states rarely include federal jurisdictional language

1 in their criminal statutes, requiring state crimes to reproduce federal
2 jurisdictional elements in order to constitute aggravated felonies would virtually
3 excise state criminal convictions from the ambit of section 1101(a)(43)(E), despite
4 clear language to the contrary. *Id.* at 211 (citing 8 U.S.C. § 1231(a)(4)(B)(ii), which
5 refers to aliens "in the custody of a State" pursuant to a final conviction for an
6 offense described in 8 U.S.C. § 1101(a)(43)(E)). The same would be true, the BIA
7 concluded, of foreign offenses. *Id.* at 211-12.

8 Applying this reasoning in *Matter of Bautista*, the BIA found no distinction
9 between the federal jurisdictional element of 18 U.S.C. §§ 844(i) and that of
10 922(g)(1). *Matter of Bautista*, 25 I. & N. Dec. at 620. The BIA also distinguished
11 the holding of *Jones v. United States*, 529 U.S. 848 (2000), which emphasized the
12 importance of section 844(i)'s federal jurisdictional element, as "related to the
13 scope of the Federal criminal statute, not the collateral consequences in an
14 immigration case." *Matter of Bautista*, 25 I. & N. Dec. at 621. The BIA therefore
15 concluded that a conviction under New York Penal Law §§ 110 and 150.10
16 constituted an aggravated felony rendering an alien ineligible for cancellation of
17 removal. *Id.* at 622.

1 ***Our Analysis Under Chevron***

2 *Chevron* requires us to defer to an agency's reasonable interpretation of the
3 statute it administers. *Chevron*, 467 U.S. at 842-44; *Kar Onn Lee v. Holder*, 701 F.3d
4 931, 936 (2d Cir. 2012). We must first ask "whether Congress has directly spoken
5 to the precise question at issue[,] . . . for the court, as well as the agency, must
6 give effect to the unambiguously expressed intent of Congress." *Chevron*, 467
7 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific
8 issue, the question for the court is whether the agency's answer is based on a
9 permissible construction of the statute." *Id.* at 843. We must defer to the BIA's
10 interpretation of the INA unless it is "arbitrary, capricious, or manifestly contrary
11 to the statute." *Id.* at 844.

12 "The plainness or ambiguity of statutory language is determined by
13 reference to the language itself, the specific context in which that language is
14 used, and the broader context of the statute as a whole." *Kar Onn Lee*, 701 F.3d at
15 936 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (internal quotation
16 marks omitted). "In interpreting the statute at issue, we consider not only the
17 bare meaning of the critical word or phrase but also its placement and purpose in
18 the statutory scheme." *Id.* (quoting *Holloway v. United States*, 526 U.S. 1, 6 (1999))

(internal quotation marks omitted). Considering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as whole, we 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.

Section 1101(a)'s paragraph 43 identifies crimes that constitute aggravated felonies in three ways. Some are indicated in terms of generic offenses or offenses "relating to" generic offenses. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); *id.* § 1101(a)(43)(S) ("an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness"). Others are referred to as offenses "defined in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(B) ("illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)"). And still others are denominated offenses "described in" a particular federal statute. *See, e.g., id.* § 1101(a)(43)(E). The provision at issue here belongs in this last category.

Luna contends that, for a state offense to be one that is "described in" a federal statute, the elements of the state and federal crimes, including any jurisdictional elements, must be identical. *See* Pet'r's Br. at 13-17. The Third

1 Circuit took a similar approach in rejecting the BIA's decision in *Matter of*
2 *Bautista*, concluding that state offenses "described in" a federal statute must
3 reproduce the federal jurisdictional element to constitute aggravated felonies,
4 while offenses "defined in" a federal statute need not.² *Bautista*, 744 F.3d at 59.

5 We are inclined to disagree. It seems to us, as it did to the Fifth, Seventh,
6 Eighth, and Ninth Circuits, that "described in" is the broader standard, and that
7 an offense identified in this way need not reproduce the federal jurisdictional
8 element to have immigration consequences. *See Castillo-Rivera*, 244 F.3d at 1023
9 (stating that Congress "'had to use some looser standard such as 'described in'
10 rather than the more precise standard of 'defined in,' if it wanted more than a
11 negligible number of state offenses to count as aggravated felonies'"); *Negrete-*
12 *Rodriguez*, 518 F.3d at 502, 503 (discussing *Castillo-Rivera*'s distinction between
13 "described in" and "defined in" and rejecting petitioner's argument that "'defined
14 in' and 'described in' are synonymous"); *Nieto Hernandez*, 592 F.3d at 685-86

² The Third Circuit also reasoned that if Congress had intended all state arson crimes to constitute aggravated felonies, it could have written section 1101(a)(43)(E)(i) to refer to the generic offense of arson rather than the federal statute governing explosives offenses. *Bautista*, 744 F.3d at 64. While this argument is not without force, we find at least equally persuasive the counterargument that Congress may have chosen to indicate the covered crimes by referring to 18 U.S.C. § 844 because the explosives offenses detailed therein are broader than generic or common-law arson. *Cf. Negrete-Rodriguez*, 518 F.3d at 503 ("[M]any firearms offenses are not susceptible to being easily described in general terms . . .").

1 (citing *Negrete-Rodriguez* and *Castillo-Rivera*); *Spacek*, 688 F.3d at 538 ("Section
2 1101(a)(43)(J) requires only 'an offense *described in* section 1962 of title 18,' while
3 Congress used the more restrictive construction 'as *defined in*' elsewhere in the
4 statute." (emphases in original)); *see also* *Bautista*, 744 F.3d at 71 (Ambro, J.,
5 dissenting) ("To me, the phrase 'described in' refers broadly to the *type* of
6 offense." (emphasis in original)).

7 On the other hand, we do not think that this conclusion follows inexorably
8 from the INA's text and structure. We are not fully convinced, for example, that
9 paragraph 43's penultimate sentence unequivocally expresses Congress's intent
10 to discount federal jurisdictional elements when determining whether a state
11 offense is "described in" a federal statute. The BIA has reasoned and the
12 government has argued that the penultimate sentence—which states that the
13 term "aggravated felony" "applies to an offense described in this paragraph
14 whether in violation of" federal, state, or foreign law—requires this
15 interpretation, because otherwise section 1101(a)(43)(E) would capture few, if
16 any, state crimes. *See Matter of Bautista*, 25 I. & N. Dec. at 619-20; Resp't's Br. at
17 21-24. We think, though, that the penultimate sentence could also be read to
18 make clear that an offense will not be exempted from the definition of an

1 "aggravated felony" merely because it was a violation of state or foreign, rather
2 than federal, law. This reading would not require the result that the government
3 and the BIA appear to have reached. We therefore are not persuaded that the
4 penultimate sentence evinces an unambiguously expressed congressional intent.

5 The BIA also determined in *Matter of Bautista*, and the government argues
6 on appeal, that reading 8 U.S.C. § 1101(a)(43) to require state offenses to include a
7 federal jurisdictional element renders meaningless another provision of the
8 Immigration and Naturalization Act. *See Matter of Bautista*, 25 I. & N. Dec. at 620
9 (citing *Matter of Vasquez-Muniz*, 23 I. & N. Dec. at 212); Resp't's Br. at 25. That
10 provision refers to the removal of aliens who are held "in the custody of a
11 State . . . pursuant to a final conviction for . . . an offense described in" 8 U.S.C.
12 § 1101(a)(43)(E), among other provisions. 8 U.S.C. § 1231(a)(4)(B)(ii). We agree
13 with the BIA and the government that this provision suggests that at least some
14 state offenses must constitute aggravated felonies under subparagraph (E), or
15 there could be no individuals held in state custody pursuant to crimes
16 "described" there. But this fact alone does not compel the conclusion that
17 Congress has spoken unequivocally regarding whether a state offense "described
18 in" 18 U.S.C. § 844(i) must reproduce that statute's jurisdictional element.

1 Because we conclude that the statute is ambiguous, we owe deference to
2 the BIA's interpretation unless it is unreasonable. *See Chevron*, 467 U.S. at 842–43;
3 *Rotimi v. Holder*, 577 F.3d 133, 139 (2d Cir. 2009). As already indicated, we find
4 persuasive the BIA's reading of the relevant statutory provisions as set forth in
5 *Matter of Bautista* and might well adopt it ourselves,³ were we not constrained to
6 do so in any event by *Chevron*. It is noteworthy, too, that the BIA's interpretation
7 is consonant with the conclusions of the Fifth, Seventh, Eighth, and Ninth
8 Circuits concerning related provisions of paragraph 43. We therefore defer to the
9 BIA's "permissible construction" of section 1101(a)(43)(E)(i).⁴ *See Kar Onn Lee*, 701
10 F.3d at 937.

11 **III. Whether Applying *Matter of Bautista* Is Impermissibly Retroactive**

12 In the alternative, Luna argues that *Matter of Bautista* cannot be applied
13 retroactively to him because the decision represented "such a departure from
14 past practices by the [BIA]" that he lacked notice that the state arson crime to

³ Even if we were to decide that the BIA's reading of the statute is clearly preferable to the Petitioner's, it would not follow that the provision is unambiguous and that *Chevron* deference is therefore not required. Equipoise is not a precondition to a finding of ambiguity.

⁴ For this reason, we reject Luna's argument that the rule of lenity should be applied to his case. *See Adams v. Holder*, 692 F.3d 91, 107 (2d Cir. 2012) (stating that lenity enters only "when none of the other canons of statutory interpretation is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute" (internal quotation marks omitted)).

1 which he pled guilty would be deemed an aggravated felony. Pet'r's Br. 30. We
2 see no obstacle to *Matter of Bautista*'s application in Luna's case.

3 Luna's 1999 conviction postdated the 1996 enactment of 8 U.S.C.
4 § 1101(a)(43). See *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 126-27 (2d Cir. 2005).
5 In relying on *Matter of Bautista*, the BIA therefore "did not retroactively apply a
6 new law but instead applied [its] determination of what the law 'had *always*
7 meant.'" *De Quan Yu v. U.S. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009)
8 (per curiam) (emphasis in original) (quoting *Rivers v. Roadway Express, Inc.*, 511
9 U.S. 298, 313, n. 12 (1994)). Once *Matter of Bautista* issued, "that decision became
10 the controlling interpretation of the law and was entitled to full retroactive effect
11 in all cases still open on direct review, regardless of whether the events predated
12 the . . . decision." *Id.* at 1334; see also *Rivers*, 511 U.S. at 312 ("The essence of
13 judicial decisionmaking—applying general rules to particular situations—
14 necessarily involves some peril to individual expectations because it is often
15 difficult to predict the precise application of a general rule until it has been
16 distilled in the crucible of litigation."). *Matter of Bautista* therefore governs Luna's
17 case.

CONCLUSION

For the foregoing reasons, we defer to the BIA's determination, which we conclude is reasonable, that a conviction under New York Penal Law §§ 110 and 150.10 constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(i), rendering an alien ineligible for cancellation of removal. Luna's petition is therefore DENIED.