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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
July - August 2013

- **JULY 2013**

Board of Immigration Appeals

Matter of Zeleniak, 26 I. & N. Dec. 158 (BIA 2013)

Following the decision in *United States v. Windsor*, 570 U.S. __ , 2013 U.S. LEXIS 4921 (June 26, 2013), striking down section 3 of the Defense of Marriage Act (DOMA), the Board of Immigration Appeals (BIA) held that a legally valid same-sex marriage may now form the basis of a family-based immigration petition. Therefore a noncitizen married to a U.S. citizen of the same gender may apply, if otherwise eligible, to become a lawful permanent resident based on that marriage. The validity of the marriage will be determined by looking to the law of the place of the marriage ceremony, rather than the location where the couple resides.

Practice Tip

Noncitizen clients in same-sex marriages may now have a path to lawful permanent resident (LPR – "green card" holder) status, depending on their circumstances. It's important for defense attorneys to be aware of this, because criminal convictions that make a noncitizen inadmissible can bar him from becoming an LPR, even if he is married to a U.S. citizen.

- **AUGUST 2013**

Massachusetts Appeals Court (unpublished)

Commonwealth v. Paulo Marques, 2013 Mass. App. LEXIS 137 (Aug. 28, 2013)

The Appeals Court reversed the denial of a motion to withdraw a plea for failure to provide the warnings required by G.L. c. 278, § 29D. The defendant, who was found inadmissible (i.e. denied admission to the U.S.) based on a continuance without a finding (CWOF), sought to withdraw his plea arguing that he was not advised regarding the consequences of a CWOF. While the docket sheet reflected that an "alien warning" was given and the green sheet included a certification from the judge regarding the alien warning, the green sheet certification did not include a warning regarding an "admission to sufficient

facts" resulting in a continuance without a finding, as required by statute. The Appeals Court, observing that the burden was on the Commonwealth to show compliance with c. 278, § 29D, found that the Commonwealth had failed to meet its burden. The court stated: "[A]bsent a record to support it, we cannot accept the Commonwealth's argument that the certification did not reflect the judge's actual warning, but was simply a by-product of the fact that the District Court was working through a backlog of obsolete green sheets."

Practice Tip

The case provides a good reminder of the burden the Commonwealth carries on any G.L. c. 278, § 29D motion and the importance of carefully reviewing the docket sheet and complete court record to determine the viability of a motion to vacate a plea.

Board of Immigration Appeals

Matter of Tavarez Peralta, 26 I. & N. Dec. 171 (BIA 2013)

This case presented the BIA with a novel question regarding the meaning of a ground of deportability that is seldom charged. In a provision separate from the more common criminal grounds of deportability, the Immigration and Nationality Act makes a noncitizen deportable if she "has engaged, is engaged, or at any time after admission engages in . . . any criminal activity which endangers public safety or national security." 8 U.S.C. § 1227(a)(4)(A)(ii).

Tavarez Peralta was convicted of willfully interfering with an individual engaged in the authorized operation of an aircraft with a reckless disregard for the safety of human life under 18 U.S.C. § 32(a)(5). He directed a laser into the eyes of a police officer piloting a helicopter, causing the officer to temporarily lose vision and forcing another officer to take over control of the helicopter. Peralta continued to use the laser and temporarily blinded the officer a second time. He was sentenced to eighteen months in prison.

The Department of Homeland Security (DHS) placed Peralta in removal proceedings, charging him with being deportable for (1) having engaged in criminal activity which endangers public safety under § 1227(a)(4)(A) and (2) having been convicted of an aggravated felony under § 1227(a)(2)(A)(iii), specifically a crime of violence for which a sentence of one year or more was imposed under § 1101(a)(42)(F). The Immigration Judge terminated proceedings finding he was not deportable under either ground. The DHS appealed to the BIA.

The BIA determined that Peralta was deportable based on his conduct, because he endangered public safety under § 1227(a)(4)(A). The Board determined that no conviction is required under § 1227(a)(4)(A) and therefore it was free to look beyond the record of conviction to determine whether the "totality of the circumstances" supported a finding of deportability under this provision. The provision was not limited to threats to national security, but it was not so broad as to "cover typical single-victim crimes." Instead, "[t]he type of criminal activity that endangers 'public safety' should be limited to actions that place a large segment of the general population at risk." The BIA found that Peralta's conduct fell within this ground of deportability because of the risk of harm following a helicopter crash in a large city, particularly where he "targeted a police helicopter that was on a public safety mission and did so repeatedly."

The BIA concluded, however, that Peralta had not been convicted of an aggravated felony because his offense was not a crime of violence. The definition of "crime of violence" is found at 18 U.S.C. § 16 and covers an offense that (a) "has an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "any offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the court of committed the offense." The BIA noted there was no dispute the offense in question did not satisfy subsection (a), and focused its analysis on subsection (b). The Board concluded that the offense did not satisfy subsection (b) either, because there was not a substantial risk that "violent force" would be used, as required by *Leocal v. Ashcroft*, 543 U.S. 1 (2004).[1]The BIA noted that the risk at issue for a "crime of violence" is the risk that force will be used, not that someone would be injured.

Practice Tip

While the "endanger public safety" provision is rarely applied, the potential breadth is worrisome. Defense counsel representing a noncitizen client charged with conduct that might have threatened a significant number of people (perhaps arson or explosive offenses in an urban setting), should be concerned about this provision. As always, defense counsel should consult with the IIU concerning the specific immigration consequences facing an individual noncitizen client.

Matter of Pinzon, 26 I. & N. Dec. 189 (BIA 2013)

In this case the BIA determined that a noncitizen who entered the United States with a false U.S. passport had not been "inspected and admitted," and therefore could be placed in removal proceedings for grounds of inadmissibility, not grounds of deportability (a person who was lawfully admitted to the U.S. is usually subject only to the grounds of deportability). In so holding, the BIA observed that a U.S. citizen is not subject to the same scrutiny as a noncitizen at the U.S. border and that an immigration officer is not empowered to inspect a U.S. citizen in the same manner as a noncitizen. Therefore, Pinzon's entry using a false U.S. passport was not a true inspection or admission and she could be removed based on grounds of inadmissibility.

The BIA further affirmed the Immigration Judge's conclusion that Pinzon's conviction under 18 U.S.C. § 1001(a)(2) for knowingly and willfully making any materially false, fictitious or fraudulent statement or representation to the U.S. government was a crime involving moral turpitude (CIMT). The Board concluded that the offense had a sufficient evil intent, because it necessarily involved the intent to defraud and further the conduct was sufficiently reprehensible because it necessarily involved a material misrepresentation. The BIA observed that it had previously found that offenses involving fraud and offenses that impair or obstruct a function of the government by deceit, graft, trickery or dishonest means are CIMTs.

Practice Tip

There are multiple Massachusetts crimes that involve making a false statement. Defense counsel should assume that all such offenses are likely to be considered CIMTs. Immigration counsel, however, should

[1] Significantly, the BIA appeared to acknowledge that the recent U.S. Supreme Court decision in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) would apply when determining if an offense is a crime of violence under immigration law. *See* Immigration Case Notes for Massachusetts Criminal Defense Attorneys (April - June 2013).

look both at the statute and case law to see if intent to defraud and materiality are required for a conviction. *Matter of Pinzon* leaves open the argument that if neither is required by statute, it is not a CIMT.