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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys January 2012

From the U.S. Court of Appeals for the First Circuit:

U.S. v. Curet, 2012 U.S. App. LEXIS 504 (1st Cir., Jan. 11, 2012)

This case deals with the question of whether a Guilty-Filed disposition is considered a conviction under the U.S. Sentencing Guidelines for purpose of the career offender provisions. The court holds that it is considered a conviction for purposes of the USSG.

Practice Note: Immigration practitioners were concerned about this case because it cited to *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001), a case that held that a Guilty-Filed disposition was not a conviction under the immigration laws in circumstances where there was no restraint on the defendant's liberty imposed as a *quid pro quo* for pleading guilty. The *Curet* decision originally contained a disconcerting and ultimately incorrect parenthetical about *Griffiths*, suggesting that a Guilty-Filed disposition was a conviction under the immigration laws. However, the parenthetical was later revised to confirm the holding in *Griffiths*.

The USSG definition of conviction is very different from the immigration law's definition, and a Guilty-Filed disposition is not considered a conviction for immigration purposes if there are no conditions imposed (fines, probation, programs, victim witness fee, etc). However, it is still preferable for a noncitizen to receive pre-trial probation on a deportable or inadmissible offense, as the law is clearer that pre-trial probation is not considered a conviction under the immigration laws.

From the Board of Immigration Appeals:

Matter of R-A-M-, 25 I&N Dec. 657 (BIA, Jan. 3, 2012).

The California offense of possession of child pornography is an aggravated felony under 8 U.S.C. §1101(a)(43)(I). Also, the BIA found that the offense was a "particularly serious crime," thus barring the immigrant from withholding of removal (which is a deportation defense similar to asylum and based on a fear of persecution). It stated that although child pornography was not "per se" a particularly serious crime, it was so in this case because the immigrant had downloaded numerous pornographic images to his computer. The BIA also held that factors such as a relatively short sentence, lack of violence, the fact that this was possession and not production, and rehabilitation did not mitigate the immigrant's behavior.

Practice Note: In determining whether an offense is a particularly serious crime, the BIA is required to analyze the facts of the case and make an individualized determination as to whether the behavior resulting in the conviction constitutes a particularly serious crime. It is allowed to use any document in making this analysis (which is quite different from most other immigration determinations relating to criminal behavior, which are restricted to the record of conviction). Although the BIA claimed that it was not making a "per se" rule about child pornography, its holding basically amounted to that, as its reasoning was devoid of any specific facts and was based simply on the nature of child pornography itself.

Matter of U. Singh, 25 I&N Dec. 670 (BIA, Jan. 19, 2012)

This case analyzes whether a particular crime constitutes a crime of violence, as defined under 18 U.S.C. §16(b), which requires that an offense be a felony and that it involve a substantial risk that physical force will be used against person or property in the course of committing the offense. In this case, the BIA holds that the California felony offense of stalking, in which the defendant is convicted of following and harassing a victim, is a crime of violence under 18 U.S.C. §16(b). The BIA stated that stalking in particular includes a substantial risk that physical force will be used as part of the course of conduct, because the perpetrator is often trying to elicit a physical response from the victim. Additionally, an offense does not need to involve particular mens rea for an offense to be a crime of violence; rather, the inquiry is whether, in the ordinary case, the inherent nature of the crime involves a substantial risk that the perpetrator will intentionally use physical force to complete the crime.

Since the offense is a crime of violence, it then becomes an aggravated felony if the defendant is sentenced to a term of imprisonment of at least one year. 8 U.S.C. §1101(a)(43)(F). The decision upholds a prior decision, *Matter of Malta*, which had the same holding.

Practice Note: The Massachusetts offense of stalking under G.L. c. 265, §43 is also likely to be considered a crime of violence, based on the analysis of this case, as well as *Matter of Malta*. Thus, with a term of imprisonment of at least one year, it would become an aggravated felony. Stalking also is likely a crime involving moral turpitude, and also falls into the stalking ground of deportability, under 8 U.S.C. §1227(a)(2)(E)(i).

Cases of note from other circuits of the U.S. Court of Appeals:

Contreras-Bocanegra v. Holder, 2012 U.S. App. LEXIS 1964 (10th Cir., Jan. 30, 2012).

Mr. Contreras came to the U.S. as a permanent resident, but was later convicted of drug possession. He was deported and subsequently moved to reopen his removal proceedings based on a claim of ineffective assistance of counsel. The BIA found that it lacked jurisdiction over the motion pursuant to 8 C.F.R. 1003.2(d), also known as the "post-departure bar" regulation, because he was no longer in the U.S.

The Tenth Circuit, after rehearing the case *en banc*, overturned the BIA and the post-departure bar regulation. The court found that the regulation "impermissibly interferes with Congress' clear intent to afford each noncitizen a statutory right to pursue a motion to reopen." Thus, the BIA may accept and hear Mr. Contrera's motion to reopen.

Practice Note: Under this decision, immigrants ordered deported within the jurisdiction of the Tenth Circuit may now submit motions to reopen their removal proceedings after deportation. This is quite significant for defendants who were deported due to crimes, and who were later able to vacate those convictions.

The Tenth Circuit joins six other circuits in overturning this regulation (2nd, 3rd, 4th, 6th, 7th and 9th). However, the First Circuit has upheld the post-departure bar; thus, noncitizens outside the U.S. who were ordered deported in Massachusetts are not able to reopen their removal proceedings, even if they are able to vacate their convictions.

Prudencio v. Holder, 2012 U.S. LEXIS 1693 (4th Cir., Jan. 30, 2012).

In this case, the Fourth Circuit joins three other circuits in rejecting the BIA's decision in *Matter of Silva-Trevino*. That case set out a new framework for determining whether a particular offense was a crime involving moral turpitude, allowing adjudicators to look behind the record of conviction in some circumstances. In *Prudencio*, the court holds that the modified categorical approach, as articulated by the Supreme Court in the *Taylor* and *Shepard* cases, applies to determinations relating to crimes involving moral turpitude.

Practice Note: The First Circuit has not rejected *Matter of Silva-Trevino*; thus, it is still good law in our circuit. Under *Silva-Trevino*, if the statute and record of conviction are ambiguous as to the nature of the offense, an adjudicator may look at any other documentation to determine whether the offense involves moral turpitude.