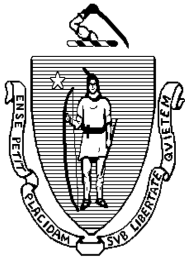

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys February and March 2016

Board of Immigration Appeals

Matter of Guzman-Polanco**,** 26 I & N Dec. 713 (BIA 2016)

This case examines whether a Puerto Rico aggravated battery statute that punishes a person who "through any means or form inflicts injury to the bodily integrity of another" is a crime of violence under 18 U.S.C. §16(a). Coming shortly after *Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015), the Board of Immigration Appeals (BIA) followed the reasoning in *Whyte* and concluded that because the Puerto Rico offense did not require, as an element, the use or attempted use of violent physical force, the offense could not be a crime of violence under § 16(a).

A state offense is considered a "crime of violence" if it categorically matches all the elements of the federal definition of a "crime of violence" found at 18 U.S.C. §16. The federal statute contains two separate definitions:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other 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 course of committing the offense.

In this case, the Immigration Judge had only analyzed the case under 16(a), so the Board was reviewing only that decision. Under 16(a), an offense must have as an element, the use, attempted use, or threatened use of physical force. Physical force has been defined as "violent force." *Johnson v. United States*, 559 U.S. 133, 140 (2010). However, for many years, the Board has held that any statute which requires the intentional infliction of physical injury is sufficient to infer that physical force is required under the statute. See *Matter of Martin*, 23 I & N Dec. 491 (BIA 2002).

In *Whyte*, the First Circuit held that a statute must have as an element, the use, attempted use or threatened use of violent force and that such an element cannot be inferred. Based on the reasoning in *Whyte*, the Board withdrew from *Matter of Martin* and held that because the Puerto

Rico statute in question had only the requirement of injury, but not a requirement that violent physical force be used, it was not a crime of violence under 16(a). The case was remanded to the Immigration Judge for review under 16(b).

For further discussion of *Whyte v. Lynch*, see IIU cases notes from December 2015.

Matter of Adeniye**,** 26 I & N Dec. 726 (BIA 2016)

The Respondent, Mr. Adeniye, was convicted in 1995 of possession of a stolen mailbox key in violation of 18 U.S.C. §1704. The maximum possible term of imprisonment for this offense was ten years. Mr. Adeniye was sentenced to a term of 24 months imprisonment, however he absconded before being taken into Federal custody. He was later caught and convicted of escape (18 U.S.C. §751(a)) and failing to surrender for service of sentence (18 U.S.C. §§3146(a)(2) and (b)(1)(A)(ii)).

In 2014, Mr. Adeniye was placed in removal proceedings where the immigration judge determined that the "failure to appear" conviction was an aggravated felony under 8 U.S.C. §1101(a)(43)(Q). As such, Mr. Adeniye was removable and ineligible for all forms of requested relief from removal.

Section 1101(a)(43)(Q) of the aggravated felony statute says:

> "The term 'aggravated felony' means...an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is *punishable* by imprisonment for a term of 5 years or more." (emphasis added)

Mr. Adeniye argued that his conviction was not an aggravated felony because the term of imprisonment by which he was "punishable" was only the 24 month sentence he was ordered to serve. The government's position was that "punishable" should mean the statutory maximum penalty available – in this case, ten years.

After undertaking extensive statutory analysis, the Board of Immigration Appeals decided that there was no basis to deviate from the ordinary meaning of the term "punishable by" which they interpreted to mean "any punishment capable of being imposed." Under this definition, since the maximum possible penalty for the underlying conviction carried a potential sentence of ten years imprisonment, Mr. Adeniye's failure to appear conviction was considered an aggravated felony.

Forthcoming Practice Advisories

In March the Supreme Judicial Court issued two critical immigration related decisions:

In *Recinos v. Escobar*, 473 Mass. 734 (2016), the SJC addressed in detail the state court role in adjudicating predicate orders for Special Immigrant Juvenile status applications.

In *Commonwealth v. Sylvain (II)*, 473 Mass. 832 (2016), the Court addressed the outstanding question of whether a trial judge abuses his discretion by granting a new trial motion based on affidavits.

The IIU is preparing detailed practice advisories for both of these cases and will distribute them in the near future. They will also be available on our website www.publiccounsel.net/iiu