



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**Steinfeld, Jeffrey B., Esq.
Jeffrey B. Steinfeld, P.C.
27 Warren Street, Suite 302
Hackensack, NJ 07601**

**DHS/ICE Office of Chief Counsel - NEW
P.O. Box 1898
Newark, NJ 07101**

Name: ORTEGA, EDGAR

A 045-624-720

Date of this notice: 9/23/2013

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Lulsege
User team: Docket

For more unpublished BIA decisions, visit www.irac.net/unpublished

18



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**ORTEGA, EDGAR
A045-624-720
ICE/ESSEX COUNTY JAIL
354 DOREMUS AVENUE
NEWARK, NJ 07105**

**DHS/ICE Office of Chief Counsel - NEW
P.O. Box 1898
Newark, NJ 07101**

Name: ORTEGA, EDGAR

A 045-624-720

Date of this notice: 9/23/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Lulsegas
Userteam: **Docket**

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A045 624 720 – Newark, NJ

Date: SEP 23 2013

In re: EDGAR ORTEGA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Jeffrey B. Steinfeld, Esquire

APPLICATION: Continuance; remand

On June 4, 2013, an Immigration Judge ordered the respondent removed to Peru as an alien convicted of an aggravated felony. *See* section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). The respondent filed a timely appeal of the Immigration Judge's decision. On August 1, 2013, the respondent filed a motion to remand based on a state court ruling reducing his sentence for the criminal conviction underlying the charge of removability. The Department of Homeland Security (DHS) has not filed a response to the respondent's appeal or motion. The motion will be granted and the record will be remanded.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, *de novo*. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The DHS charges the respondent as removable pursuant to section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Section 101(a)(43)(F), in turn, defines an aggravated felony as a crime of violence for which the term of imprisonment is at least one year. The respondent was convicted on July 14, 2006, of two counts of aggravated assault in the third degree, in violation of N.J. Stat. § 2C:12-1b(7); he was initially sentenced to five years of imprisonment for each count, to run concurrently.

Attached to his motion to remand, the respondent presents evidence that on June 25, 2013, he was resentenced to 3 days of jail confinement for each assault offense. *See* Resp. Motion, Tab C. The respondent therefore argues that because his sentence was reduced to under 1 year, he is no longer removable as an alien convicted of an aggravated felony. In *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), we held that a trial court's decision to modify an alien's criminal sentence *nunc pro tunc* was entitled to full faith and credit by Immigration Judges and this Board, and that the modified sentence would be valid for immigration purposes regardless of the reasons behind the sentence reduction. *See also Matter of Song*, 23 I&N Dec. 173 (BIA 2001); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982).

Based on the evidence of the respondent's sentence reduction, we find that a remand for further consideration as to the respondent's removability and eligibility for relief from removal is

appropriate. See *Matter of Cota-Vargas, supra*; *Matter of Song, supra*. As the respondent's removability is now an open question, it would be premature to address the other arguments advanced in his appeal at this time. Accordingly, the following order shall be issued.

ORDER: The respondent's motion to remand is granted and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File No.: **A045 624 720**

In the Matter of

Edgar ORTEGA,

Respondent.

DETAINED

In Removal Proceedings

CHARGES: INA § 237(a)(2)(A)(iii)- Aggravated Felony - Crime of Violence

APPLICATIONS: Termination
Continuance

ON BEHALF OF RESPONDENT

Jeffrey B. Steinfield, Esq.
27 Warren Street, Ste. 302
Hackensack, NJ 07601

ON BEHALF OF DHS

Manuel Ramirez, Esq.
Office of Chief Counsel/ICE/DHS
970 Broad Street, Room 1104B
Newark, New Jersey 07102

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Mr. Ortega is a native and citizen of Peru who was admitted to the United States ("U.S.") at Newark, New Jersey, on or about July 25, 1996, as a lawful permanent resident. Exhibit 1.

On or about July 14, 2006, Mr. Ortega was convicted in the New Jersey Superior Court at Passaic County of two counts of aggravated assault in the third degree, in violation of N.J. Stat § 2C:12-1b(7). He was sentenced to 5 years of imprisonment on each count with the sentences to run concurrently. Exhibit 3.

On August 15, 2012, the Department of Homeland Security ("DHS") issued Mr. Ortega a Notice to Appear ("NTA") charging him with deportability under INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(F) (crime of violence). Exhibit 1. On March 5, 2013, DHS issued a Form I-261, Additional Charges of Inadmissibility/Deportability, charging Mr. Ortega with deportability under INA § 237(a)(2)(A)(iii) as an alien convicted of an aggravated felony as defined in INA § 101(a)(43)(U) (attempt or conspiracy to commit an aggravated felony). Exhibit 1A.

Through counsel, Mr. Ortega admitted all the factual allegations contained in the NTA but denied the charges contained on the NTA as amended by the Form I-261. Counsel for Mr. Ortega briefed the issue of whether Mr. Ortega's conviction for aggravated assault is an aggravated felony as defined in INA §§ 101(a)(43)(F) or 101(a)(43)(U). In hearings before the Court, both parties presented arguments on that issue. At a hearing on April 24, 2013 the Court sustained both charges. The Court reset the matter to allow Mr. Ortega to submit applications for

relief from removal.

At a continued hearing on May 8, 2013, counsel for Mr. Ortega advised the Court that Mr. Ortega would not be filing any applications for relief from removal but wished to appeal the Court's decision regarding the charge on the NTA. He also requested a continuance to pursue a recently filed motion for post-conviction relief (PCR) which was pending with the New Jersey Superior Court. Counsel for DHS opposed the request for continuance, arguing that the PCR motion was collateral to these proceedings and the outcome was speculative. The Court denied the motion for a continuance to pursue the motion for PCR and reserved decision.

Legal Standard

The Immigration and Nationality Act provides for the removal of an alien who is convicted of an aggravated felony at any time after admission. INA § 237(a)(2)(A)(iii). The Third Circuit Court of Appeals has held that in determining whether an offense is an aggravated felony under the Act, courts must presumptively apply the formal categorical approach, focusing on the statutory definition of the offense and not the particular facts underlying the conviction. *Stubbs v. Att'y Gen.*, 452 F.3d 251, 254 (3d Cir. 2006); *Singh v. Ashcroft*, 383 F.3d 144, 163 (3d Cir. 2004) (applying the approach employed in *Taylor v. U.S.*, 495 U.S. 575, 599-600 (1990)); *Francis v. Reno*, 269 F.3d 162, 171 (3d Cir. 2001). In applying the categorical approach, courts must ascertain the least culpable conduct necessary to sustain a conviction under the statute. *Denis v. Att'y Gen.*, 633 F.3d 201, 206 (3d Cir. 2011).

Courts may depart from the formal categorical approach where the statute of conviction is "phrased in the disjunctive or structured in outline form." *Singh, supra*, at 163-64; *see Stubbs, supra*, at 254. The statute need not be formally divided in order to be considered disjunctive—"rather, the key is whether the provision is disjunctive in a relevant sense." *Garcia v. Att'y Gen.*, 462 F.3d 287, 293 n. 9 (3d Cir. 2006) (citing *Singh, supra*, at 163).

Under the "modified" categorical approach, courts may "inquir[e] into the facts of the underlying conviction" for the limited purpose of determining under which part of the divisible statute the respondent has been convicted. *Knapik v. Ashcroft*, 384 F.3d 84, 92 n.8 (3d Cir. 2004); *Matter of Vargas-Sarmiento*, 23 I&N Dec. 651, 654 (BIA 2004). In doing so, the court is permitted to examine the record of conviction, which includes the charging document and the plea colloquy. *See Stubbs, supra*, at 254; *Singh, supra*, at 163; *see also Jean Louis v. Att'y Gen.*, 582 F.3d 46, 472 (3d Cir. 2009) ("the formal record of conviction...could include the charging document, the terms of the plea agreement or transcript of the colloquy between judge and defendant in which the factual basis for the plea is confirmed by the defendant, or some comparable judicial record of this information") (citing *Shepard v. U.S.*, 544 U.S. 13, 26 (2006)). Having determined which portion of the statute the respondent was convicted of, what remains is whether the respondent's conviction necessarily constitutes an aggravated felony under the Act. *Restrepo v. Att'y Gen.*, 617 F.3d 787, 791 (3d Cir. 2010); *Stubbs, supra*, at 25-56; *see Denis, supra*, at 206.

Analysis

The Court finds that good cause has not been established to continue the case for adjudication of the pending PCR motion. Such a motion is collateral to these proceedings and its

outcome is speculative. For these reasons, the Court denied the motion to continue for adjudication of the PCR motion.

The primary issue in this case is whether Mr. Ortega's conviction for aggravated assault in violation of N.J. Stat. § 2C:12-1b(7) is an aggravated felony as defined in INA § 101(a)(43)(F) as a crime of violence for which the term of imprisonment is at least one year and/or whether his conviction is an aggravated felony as defined in INA § 101(a)(43)(U), making him removable under INA § 237(a)(2)(A)(iii). For the reasons below, the Court will sustain the charge under INA § 237(a)(2)(A)(iii) based upon INA § 101(a)(43)(F) and will not reach the charge based upon INA § 101(a)(43)(U).

An alien is deportable under INA § 237(a)(2)(A)(iii) if he has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F), which states that "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year" is an aggravated felony. INA § 101(a)(43)(F).

Under 18 U.S.C. § 16, a crime of violence is defined as:

(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, on July 14, 2006, Mr. Ortega was convicted in the New Jersey Superior Court, Passaic County, of two counts of aggravated assault in the third degree in violation of N.J. Stat § 2C:12-1b(7), and was sentenced to five years of imprisonment for each count to be run concurrently. (*See* Exhibit 3, Judgment of Conviction.) N.J. Stat. §2C:12-1b(7) states that,

A person is guilty of aggravated assault if he:

(7) Attempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury.

N.J. Stat. §2C:12-1b(7)(2009). The judgment of conviction indicates that Respondent was originally charged with 6 separate offenses, but ultimately pled guilty to only the first and fourth counts, which were amended to aggravated assault in the third degree in violation of N.J. Stat. § 2C:12-1b(7).¹ Thus, as "the use, attempted use, or threatened use of physical force" (18 U.S.C. § 16(a)) is not an element of N.J. Stat § 2C:12-1b(7), 18 U.S.C. § 16(b) is the relevant definition of "crime of violence" which must be considered here. The Court concludes that his conviction on each count categorically constitutes a conviction for an aggravated felony.

The least culpable conduct criminalized by Mr. Ortega's statute of conviction is recklessly causing significant bodily injury "under circumstances manifesting extreme indifference to the value of human life." DHS relies on the Third Circuit Court of Appeals' decision in *Aguilar v. Att'y Gen.*, 663 F.3d 692 (3d Cir. 2011) in arguing that Mr. Ortega's aggravated assault conviction constitutes a crime of violence under 18 U.S.C. § 16(b). In

Aguilar, the Third Circuit, after reviewing and cataloguing the relevant precedents, held that crimes with a *mens rea*, or mental state, of recklessness do not necessarily fall outside of § 16(b); rather, the key issue is whether the *actus reus* of the offense, by itself, creates a substantial risk that physical force may be intentionally used in the commission of that offense. *Aguilar*, 663 F.3d at 698.

The Court finds that the portion of the statute most relevant to the § 16(b) analysis is not that the defendant “recklessly causes such injury,” but that the defendant commits an assault “under circumstances manifesting extreme indifference to the value of human life.” Regardless of whether an injury ultimately resulted and the *mens rea* accompanying such injury, the Court finds that a person who commits an assault “under circumstances manifesting extreme indifference to the value of human life” necessarily creates a substantial risk that physical force may be intentionally used in the commission of the crime. *Aguilar*, 663 F.3d at 698-99. *See also Briolo v. Attorney General of the United States*, 2013 WL 1010634 (3d Cir. Mar. 15, 2013)(Unpublished).

This situation is notably different than the acts at issue in cases of “pure recklessness” found not to constitute crimes of violence under § 16(b), such as the DUI offense in *Leocal v. Aschroft*, in which the Supreme Court reasoned that a person driving under the influence cannot be said to “risk having to ‘use’ physical force against another person,” 543 U.S. 1, 11 (2004), and reckless burning in *Tran v. Gonzalez*, in which the Third Circuit reasoned that the risk involved in reckless burning is not the use of *intentional* force but rather the risk that the fire will spread and harm property. 414 F.3d 464, 465 (3d Cir. 2005). In *Aguilar*, the Third Circuit characterized “pure recklessness” crimes as those in which “the *mens rea* of a crime “lack[s] an intent or willingness to use force or cause harm at all.” 663 F.3d at 697-698 (quoting *U.S. v. Parson*, 955 F.2d 858, 966 (3d Cir. 1992)). In far contrast from such “pure recklessness” crimes, which “do not fall under § 16(b) for the very reason that the perpetrator runs “no risk of intentionally using force in committing the crime,” *Aguilar*, 663 F.3d at 698 (quoting *Tran*, 414 F.3d at 465), a conviction of aggravated assault under this subsection of 2C:12-1b(1) requires “extreme indifference to the value of human life,” and indeed, requires such a willingness to use force or cause harm that inherent in the conduct there is a “probability as opposed to a mere possibility of serious bodily injury.” *See* New Jersey Pattern Jury Instructions, Aggravated Assault, Serious Bodily Injury, N.J.S.A. § 2C:12-1b(1) at 2.

In this way, aggravated assault under this subsection of 2C:12-1b(7) – because it entails complete indifference to human life and thus a willingness of the perpetrator to risk the application of force in the commission of the crime – is akin to the classic § 16(b) example of burglary discussed in *Aguilar* and *Leocal*¹ and to reckless sexual assault, which *Aguilar* held to be a crime of violence under § 16(b).²

¹ As the Third Circuit stated in *Aguilar*,

[A] burglary would be covered under 16(b) *not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.*

Aguilar, 663 F.3d at 698 (quoting *Leocal*, 543 U.S. at 10) (emphasis in original).

² The Court has considered the crime of driving under the influence in *Leocal*, which the Supreme Court held is not a crime of violence under § 16b, and the possibility that some form of driving under the influence, coupled with the infliction of significant bodily injury, could fall under aggravated assault in violation of 2C:12-1b(7). However, the

For the foregoing reasons, the Court finds that each of Mr. Ortega's convictions for aggravated assault under N.J. Stat § 2C:12-1b(7) are convictions for a crime of violence under 18 U.S.C. § 16(b) in that the convictions are for a felony 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." 18 U.S.C. § 16(b). Accordingly, the Court finds that Mr. Ortega has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F) and will sustain the charge of removability under INA § 237(a)(2)(A)(iii).

The Court will not reach the issue with regard to the charge of aggravated felony as defined in INA § 101(a)(43)(U) as the Court has concluded that Mr. Ortega's conviction on each count meets the definition of an aggravated felony contained INA § 101(a)(43)(F).

As discussed above, Mr. Ortega did not request any relief from removal. The Court does not doubt that Mr. Ortega has accrued many equities during his time in the United States. Unfortunately, because he has been convicted of an aggravated felony, the Court is not able to consider those equities.

ORDER

IT IS HEREBY ORDERED that the Respondent be removed from the United States to Peru on the charge of deportability under INA § 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(F)) as contained on the Notice to Appear.

Date

MARGARET R. REICHENBERG
Immigration Judge

ⁱ The judgment of conviction indicates that Respondent was originally charged with 6 separate offenses, but ultimately pled guilty to only the first and fourth counts, which were amended to aggravated assault in violation of N.J. Stat. § 2C:12-1b(7). The plea transcript reveals that the state moved to amend the first count during the plea hearing, with the agreement of Mr. Ortega's counsel, to read:

...Edgar Ortega, on or about the 13th day of March 2005, in the City of Paterson, in the county of Passaic, and within the jurisdiction of this Court, did purposely or knowingly cause significant bodily injury to Eduardo Godinez, or did recklessly

additional element of proving depraved indifference to the value of human life distinguishes the conduct criminalized here from that criminalized in *Leocal* and brings the instant statute into the ambit of a crime of violence.

For the foregoing reasons, the Court finds that each of Mr. Ortega's convictions for aggravated assault under N.J. Stat § 2C:12-1b(7) are convictions for a crime of violence under 18 U.S.C. § 16(b) in that the convictions are for a felony 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." 18 U.S.C. § 16(b). Accordingly, the Court finds that Mr. Ortega has been convicted of an aggravated felony as defined in INA § 101(a)(43)(F) and will sustain the charge of removability under INA § 237(a)(2)(A)(iii).

The Court will not reach the issue with regard to the charge of aggravated felony as defined in INA § 101(a)(43)(U) as the Court has concluded that Mr. Ortega's conviction on each count meets the definition of an aggravated felony contained INA § 101(a)(43)(F).

As discussed above, Mr. Ortega did not request any relief from removal. The Court does not doubt that Mr. Ortega has accrued many equities during his time in the United States. Unfortunately, because he has been convicted of an aggravated felony, the Court is not able to consider those equities.

ORDER

IT IS HEREBY ORDERED that the Respondent be removed from the United States to Peru on the charge of deportability under INA § 237(a)(2)(A)(iii) (as defined in INA § 101(a)(43)(F)) as contained on the Notice to Appear.

6-4-2013
Date

Margaret R. Reichenberg
MARGARET R. REICHENBERG
Immigration Judge

ⁱ The judgment of conviction indicates that Respondent was originally charged with 6 separate offenses, but ultimately pled guilty to only the first and fourth counts, which were amended to aggravated assault in violation of N.J. Stat. § 2C:12-1b(7). The plea transcript reveals that the state moved to amend the first count during the plea hearing, with the agreement of Mr. Ortega's counsel, to read:

...Edgar Ortega, on or about the 13th day of March 2005, in the City of Paterson, in the county of Passaic, and within the jurisdiction of this Court, did purposely or knowingly cause significant bodily injury to Eduardo Godinez, or did recklessly

additional element of proving depraved indifference to the value of human life distinguishes the conduct criminalized here from that criminalized in *Leocal* and brings the instant statute into the ambit of a crime of violence.