



U.S. Department of Justice

Executive Office for Immigration Review

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Name: BARROS FERNANDES, AGUINA... A 036-784-467

Date of this notice: 6/29/2018

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:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

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Falls Church, Virginia 22041

File: A036 784 467 – Boston, MA

Date: **JUN 29 2018**

In re: Aguinaldo Lopes Barros FERNANDES

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Susan Church, Esquire

APPLICATION: Reopening; termination

The respondent has filed an untimely motion to reopen, requesting termination on the ground that he is no longer removable as charged. The Department of Homeland Security has not filed a response. For the following reasons, the motion to reopen is granted and proceedings are terminated.

The respondent is a native and citizen of Cape Verde who was admitted to the United States in 1981 as an immigrant. On September 17, 1998, he was convicted of the offense of assault and battery of a police officer in violation of chapter 265, § 13D of the General Laws of Massachusetts, and sentenced to a term of imprisonment of 18 months with 12 months suspended. In 1998, section 13D of Chapter 265 provided that a person “commits an assault and battery upon any public employee when such person is engaged in the performance of his duties at the time of such assault and battery.”

Based on his conviction, the respondent conceded removability as an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Exh. 2). Specifically, he was charged with a crime of violence as defined in 18 U.S.C. § 16 for which the term of imprisonment was at least one year under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18 of the United States Code, which includes the elements clause¹ and the residual clause, provides:

(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.”

The Immigration Judge ordered the respondent removed and denied relief. On October 29, 2010, the Board dismissed the respondent’s appeal. On May 5, 2017, the respondent filed an

¹ Section 16(a) clause is also referred to as the force clause or the use clause.

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untimely motion to reopen and terminate proceedings. *See* sections 240(c)(7)(A), (C)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent seeks sua sponte reopening on the basis that he is no longer removable as charged due to, inter alia, *Descamps v. United States*, 570 U.S. 254 (2013), and *Johnson v. United States*, -- U.S. --, 135 S. Ct. 2551 (2015). The Department of Homeland Security has not filed a response. The motion to reopen is granted and the proceeding is terminated.

The record of proceeding does not identify whether the respondent conceded removability under section 16(a) or (b), or both. It is now settled that section 16(b), the residual clause, is impermissibly vague in violation of due process. *Sessions v. Dimaya*, -- U.S. --, 138 S. Ct. 1204 (2018). Therefore, our focus is on whether the respondent's conviction under section 13D of Chapter 265 was a crime of violence within the meaning of 18 U.S.C. § 16(a).

We conclude that the respondent's conviction is not an aggravated felony within the meaning of the Act and terminate proceedings. Recently, the United States Court of Appeals for the First Circuit considered whether assault and battery of a police officer was a crime of violence within the meaning of 18 U.S.C. § 16. *United States v. Faust*, 853 F.3d 39, 55-60 (1st Cir. 2017), *reh'g denied* 869 F.3d 11 (1st Cir. 2017). Since section 13D has not changed from 1990, the year of the respondent's conviction, to 2009, the year of conviction in *Faust*, the *Faust* analysis applies here. *United States v. Faust*, 853 F.3d at 57. *Cf. United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016) (applying informed prophecy approach in the sentencing guideline context). In accordance with *Faust*, section 13D is overbroad because it includes offenses not requiring violent force. *United States v. Faust*, 853 F.3d at 55.

Moreover, as the *Faust* court explained, section 13D is divisible. *United States v. Faust*, 853 F.3d at 55-58. Under common law, there are two theories of assault and battery: intentional battery, which includes both harmful battery and offensive battery, and reckless battery. *United States v. Faust*, 853 F.3d at 55, *citing Commonwealth v. Eberhart*, 461 Mass. 809, 965 N.E.2d 791, 798 (2012) (citations omitted). *See also Commonwealth v. Beal*, 474 Mass. 341, 52 N.E.3d 998 (2016).

As the First Circuit held, section 13D is divisible between intentional assault and battery, on the one hand, and reckless assault and battery on the other. *United States v. Faust*, 853 F.3d at 58. However, the First Circuit held that an intentional battery is not further divisible between harmful and offensive because an intentional battery conviction may be based on an offensive battery, which does not require violent force. *United States v. Faust*, 853 F.3d at 58. Since an intentional battery under section 13D is overbroad and not divisible, the respondent is not removable for a crime of violence aggravated felony based on an intentional battery.

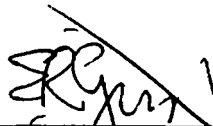
The First Circuit in *Faust* left open the question whether reckless conduct qualifies as a use of force within the meaning of section 16(a). *United States v. Faust*, 853 F.3d at 60. The respondent's conviction document does not indicate whether the respondent was convicted of intentional or reckless battery. Nor was there any reason for the record to include any *Shepard* documents because the respondent conceded removability. *See Shepard v. United States*, 544 U.S. 13 (2005).

Other case law also supports our decision here. See *United States v. Kennedy*, 881 F.3d 14 (1st Cir. 2018) (conviction for reckless assault and battery with a deadly weapon not a violent felony under the force clause); see also *United States v. Dancy*, 248 F.Supp.3d 292, 296-98 (D. Mass 2017), distinguishing *Voisine v. United States*, --U.S. --, 136 S. Ct. 2272 (2016), holds that a reckless mens rea does not satisfy the force clause of 18 U.S.C. § 16(a) for purposes of assault and battery of a police officer.² Given these holdings that a reckless mens rea does not satisfy 18 U.S.C. § 16(a), we agree with the respondent that he was not convicted of a crime of violence within the meaning of the Act. As such, he is not removable as charged. Accordingly, we will grant the motion and terminate proceedings.

Accordingly, the following orders will be issued.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The proceedings are terminated.



FOR THE BOARD

² The *Dancy* court did not have the benefit of *Faust*'s analysis regarding the divisibility of intentional assault and battery as *United States v. Faust* was published two days after issuance of *United States v. Dancy*.