U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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BAILEY, TERRANCE DANIEL
A# 089-010-106 (INMATE# 10 A 0818)
4250 FEDERAL DRIVE
BATAVIA, NY 14020

DHS/ICE Office of Chief Counsel - BUF
130 Delaware Avenue, Room 203
Buffalo, NY 14202

Name: BAILEY, TERRANCE DANIEL **A089-010-106**

Date of this notice: 9/14/2011

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

File: A089 010 106 - Batavia, NY Date: SEP 14 2011

In re: TERRANCE DANIEL BAILEY a.k.a. Terrence Daniel

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United States in violation of law

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The respondent appeals from an Immigration Judge's July 18, 2011, decision, finding him removable, as charged, on account of his 2010 New York conviction for the offense of assault in the second degree, which the Immigration Judge found to be a conviction for a "crime of violence" aggravated felony, as defined under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). See Exh. 2. The appeal will be dismissed. The respondent's request to proceed on appeal *in forma pauperis* is granted under 8 C.F.R. § 1003.8(a)(3). *See Matter of Chicas*, 19 I&N Dec. 114 (BIA 1984).

The respondent is a native and citizen of Trinidad and Tobago, who was admitted as a nonimmigrant visitor on August 4, 2001, and remained in the United States beyond the period of his authorized stay without permission from the Department of Homeland Security ("DHS"). On February 16, 2010, the respondent was convicted in the County Court of the State of New York, County of Greene, State of New York, for the offense of assault in the second degree, a Class "D" felony, in violation of NY PENAL LAW § 120.05(8), for which he was sentenced to a term of imprisonment of 2½ years, followed by 3 years of post-release supervision (Exh. 2). On the basis of that conviction, the Immigration Judge found the respondent removable as an alien convicted of an aggravated felony, to wit, a "crime of violence" under 18 U.S.C. § 16 for which the term of imprisonment is at least 1 year. *See* section 101(a)(43)(F) of the Act.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, and judgment and all other issues in an appeal of an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The only issue raised on appeal concerns the Immigration Judge's finding of removability. On *de novo* review, however, we are not persuaded to disturb the Immigration Judge's conclusion that the respondent's 2010 New York conviction for the offense of assault in the second degree is a conviction for a "crime of violence" aggravated felony offense as defined under section 101(a)(43)(F) of the Act.[1]

At the outset, we note that this case arises under the jurisdiction of the United States Court of Appeals for the Second Circuit, which applies a categorical analysis of the statute of conviction in order to determine if the elements of the crime meet the definition of an aggravated felony, and will not look any further if the language of the statute is clear on its face and is not divisible or overbroad. *See Alsol v. Mukasey,* 548 F.3d 207 (2d Cir. 2008); *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001). The Second Circuit also has concluded that in cases where the statute of conviction is divisible and reaches both conduct that would constitute an aggravated felony and conduct that would not, the court may conduct an examination of the record of conviction to determine if there is sufficient evidence to conclude that an alien was convicted of the elements of the defined crime. *Gertsenshteyn v. U.S. Dept. of Justice*, 544 F.3d 137, 143 (2d Cir. 2008); *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003).

Under the plain language of 18 U.S.C. § 16(a), one of the elements of a crime of violence must be "the use, attempted use, or threatened use of physical force against the person or property of another." *See Chrzanoski v. Ashcroft*, 327 F.3d 188, 191 & n. 6 (2d Cir. 2003). However, as the Supreme Court noted in *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004), "section 16(b) sweeps more broadly than § 16(a)." Under 18 U.S.C. § 16(b), a "crime of violence" is 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 course of committing the offense. *See Costa v. Holder*, 611 F.3d 110, 113 (2d Cir. 2010) (citing *Dos Santos v. Gonzales*, 440 F.3d 81, 83 (2d Cir. 2006). "A 'crime of violence' under 18 U.S.C. § 16(b) thus has two elements: it is a felony, and it involves a substantial risk that physical force may be used during its commission." *Id.* (citing *Chery v. Ashcroft*, 347 F.3d 404, 407 (2d Cir. 2003)). Additionally, 18 U.S.C. § 16(b) "refers only to those offenses in which there is a substantial likelihood that the perpetrator will intentionally employ physical force." *Id.* at 83-84 (quoting *Dalton v. Ashcroft*, 257 F.3d 200, 208 (2d Cir. 2001)).

Applying a categorical approach, we agree with the Immigration Judge that the respondent is removable under section 237(a)(2)(A)(iii) of the Act, as his 2010 New York conviction for the offense of assault in the second degree in violation of NEW YORK PENAL LAW § 120.05(8), a Class "D" violent felony, for which he was sentenced to a term of imprisonment of 2½ years, is

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[1] A "crime of violence," is defined in 18 U.S.C. § 16 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.

for a "crime of violence" under 18 U.S.C. § 16(b), and an aggravated felony as defined under section 101(a)(43)(F) of the Act. The certificate of conviction (Exh. 2) reflects that the respondent was convicted under subsection 8 of NY PENAL LAW § 120.05, which states that a person is guilty of assault in the second degree when, "[b]eing eighteen years old or more and with the intent to cause physical injury to a person less than eleven years old, the defendant causes serious physical injury to such person."

Although the offense of assault in the second degree may be committed without physical force actually being used against the person of another, it is evident from the terms of the statute that, in the ordinary case, an individual who commits such an offense necessarily disregards the substantial risk that, in the course of committing it, he might be required to intentionally use violent physical force against his victims. *See James v. United States*, 127 S. Ct. 1586 (2007); *see also Jobson v. Ashcroft,* 326 F.3d 367, 374 (2d Cir. 2003) (noting that "an offense need not require an actual use of force to come within section 16(b)'s reach"). Therefore the offense, which is a felony under New York law, qualifies as a crime of violence under 18 U.S.C. § 16(b). *See Leocal v. Ashcroft*, *supra* (holding that 18 U.S.C. § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16(b) relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime"); *see also Canada v. Gonzales*, 448 F.3d 560, 568-569 (2d Cir. 2006) (stating that an offense is a crime of violence under 18 U.S.C. § 16(b) if it requires intentional conduct and there is an inherent risk that force will be used to commit the crime, even if force will not always be required to commit the crime).

Furthermore, as the court noted in *Vargas-Sarmiento v. U.S. Dept. of Justice,* 448 F.3d 159 (2d Cir. 2006), with regard to a conviction in New York for First-degree manslaughter, the offense here "cannot be committed through mere reckless passivity or omission, circumstances identified in *Jobson* as presenting no risk of the intentional use of force," but rather when the statute requires the intent of the perpetrator "to inflict serious physical injury-action likely to meet vigorous resistance from a victim-we can confidently conclude that inherent in the nature of the crime is a substantial risk that the perpetrator may intentionally use physical force to achieve his criminal objective." *Id.* at 172-73.

Therefore, we are not persuaded to disturb the Immigration Judge's conclusion that the respondent is removable under section 237(a)(2)(A)(iii) of the Act as an alien convicted of an aggravated felony as that term is defined under section 101(a)(43)(F) of the Act. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Moreover, the respondent has not established his eligibility for any relief or protection from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BATAVIA, NEW YORK

IN THE MATTER OF: **In Removal Proceedings**

BAILEY, TERRANCE DANIEL FILE NUMBER: A089-010-106

CHARGES: INA §237(a)(1)(B) in that after admission as a non-immigrant under Section 101(a)(15) of the Act, you have remained in the United States for a longer time than permitted, in violation of this Act or any other law of the United States.

INA §237(a)(2)(A)(iii) in that at any time after admission, you have been convicted of an aggravated felony as defined in §101(a)(43)(F) of the Act, a crime of violence (as defined in Section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year.

APPLICATION: NONE

ON BEHALF OF THE RESPONDENT
Pro Se

ON BEHALF OF THE DHS
Robert P. Levy, Esq.
Assistant Chief Counsel
4250 Federal Drive
Batavia, NY 14020

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. STATEMENT OF FACTS

The respondent in this cause is a 26 year old male, native and citizen of Trinidad and Tobago. The Department of Homeland Security (DHS) commenced removal proceedings against the respondent by way of a Notice to Appear dated November 10, 2010 (See Exhibit #1 of Record). The respondent was charged with removability pursuant to INA §237(a)(1)(B) as an alien who had overstayed the period of his authorized admission as a nonimmigrant visitor, and under INA §237(a)(2)(A)(iii) as an alien convicted of an aggravated felony crime of violence as defined in INA §101(a)(43)(F) for which a term of imprisonment ordered is at least one year.

At a master calendar hearing conducted on January 31, 2011, the Respondent appeared before this Court without counsel. The contents of the Notice to Appear were explained to the respondent, and he was advised of his rights in these removal proceedings. At the request of the respondent, the matter was reset so that respondent could seek counsel. On February 14, 2011, the respondent again appeared before the Court and indicated he was still trying to obtain counsel. The matter was reset to another master calendar hearing. On February 28, 2011, a master calendar hearing was conducted. The Respondent still did not have counsel, and he proceeded without counsel.

The respondent entered a pleading to the Notice to Appear. He admitted all of the factual allegations contained therein. Specifically, the respondent admitted:

1. That he was not a citizen or national of the United States;
2. That he was a native and citizen of Trinidad and Tobago;
3. That he was admitted to the United States at New York, New York on or about August 4, 2001 as a nonimmigrant visitor for pleasure with authorization to remain in the United States for a temporary period not to exceed February 3, 2002;
4. That he remained in the United States beyond February 3, 2002 without authorization from the Immigration and Naturalization Service or its successor the Department of Homeland Security;
5. That he was convicted of the crime of Assault in the Second Degree, in violation of §120.05(8) of the New York State Penal Law, pursuant to a judgment entered on or about February 16, 2010 by the County Court of the State of New York, County of Greene, under indictment number 08-185;
6. That for the aforementioned offense, he was sentenced to a term of imprisonment of over one year.

When queried by the Court, the respondent indicated that he had never filed an appeal of the conviction alleged in factual allegation number 5. He stated that he had been sentenced to serve a term of imprisonment of two and one half years for that offense, of which he served 25 months. Regarding, the two charges of removability alleged, the respondent conceded his removability under INA §237(a)(1)(B) as an overstay visitor. The respondent denied his removability as charged under INA §237(a)(2)(A)(iii) as an alien convicted of an aggravated felony crime of violence as defined in INA §101(43)(F).

Based on the respondent's admissions to Factual Allegations #1 through #6 of the Notice to Appear, his concession of removability under §237(a)(1)(B), as well as the Court's review of the DHS documentary evidence found at Exhibit #2, Tabs A and D of record, the Court finds that respondent's removability under INA §237(a)(1)(B) has been established by evidence that is clear and convincing.

Regarding the contested charge of removability under INA §237(a)(2)(A)(iii) as an aggravated felony crime of violence, the following legal analysis and findings apply.

II. Legal Analysis and Findings

The respondent admitted that he was convicted of the crime of Assault in the Second Degree in violation of §120.05(8) of the New York State Penal Law. The offense is a Class D felony. He was sentenced to two and one half years imprisonment. The respondent indicated that he never appealed that conviction. Respondent's record of conviction is found as Exhibit #2, Tab B of record.

New York State Penal Law §120.05(8), which is a Class D Felony states:

> "A person is guilty of assault in the second degree when: Being eighteen years old or more and with the intent to cause physical injury to a person less than eleven years old , the defendant recklessly causes serious physical injury to such person."

To qualify as a crime of violence, the offense must meet the definition of a crime of violence as found at Title 18 United States Code §16 which reads as follows:

> (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 respondent's removal proceedings are venued within the jurisdiction of the United States Court of Appeals for the Second Circuit. Under general Second Circuit principles, the determination whether a state crime is a crime of violence must be made by reference to the statutory definition of the crime. See Dalton v. Ashcroft, 257 F. 3d 200 (2d Cir. 2001). The Second Circuit takes a categorical approach to determining whether an offense is a crime of violence within the meaning of §16(b) and looks to the intrinsic nature of the statutory offense, and not the factual circumstances surrounding any particular violation. See Dalton v. Ashcroft, cited *supra.*, at 204. See also Jobson v. Ashcroft, 326 F. 3d 367 (2d Cir 2003). Under this approach, the question is whether the minimum criminal conduct necessary to violate the criminal statute is by its nature a crime of violence under Title U.S.C. §16(b). The crime must be a felony and must involve a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Court finds that respondent's felony conviction under NYSPL §120.05(8) is categorically a crime of violence. Respondent's conviction under NYSPL §120.05(8) by its nature, involves a substantial risk that physical force against the person may be used. See 18 U.S.C. §16(b). Respondent's conviction offense requires that the actor have intent to cause

physical injury to a person and that the victim suffers serious physical injury through the actor's reckless conduct.

The Court makes this finding based on the fact of the conviction, and not the particular underlying factual circumstances of the offense. See also James v. United States, 550 U.S. 192 (2007) (in assessing the issues of substantial risk, only the ordinary case needs to be considered). Therefore, the Court finds removability has been established under INA §237(a)(2)(A)(iii) by clear and convincing evidence.

In the alternative, should the argument be made that the criminal statute is divisible, that would trigger application of a modified categorical approach. If that were to be the case, review of the conviction record would be appropriate, which would reflect that forceful physical contact was employed, resulting in serious physical injury. Should a modified categorical approach have to be employed, removability would still be established under INA §237(a)(2)(A)(iii) (See Exhibit #2, Tab B of record).

Regarding relief from removal, the respondent indicated he did not fear being persecuted or harmed if returned to Trinidad and Tobago. His only fear of return there was premised on his claim he know no one in that country. Respondent also declined to seek voluntary departure and requested a removal order. This Court notes that respondent's aggravated felony conviction precludes the respondent from voluntary departure statutorily and the nature of the offense with a two and one half year sentence would not warrant any favorable exercise of discretion were respondent eligible to seek voluntary departure.

Therefore, the following order shall enter:

ORDERED, the respondent is hereby ordered removed to Trinidad and Tobago on the charges contained in the Notice to Appear.

Steven J. Connelly
Immigration Judge
July 14, 2011