U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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3400 Concord Road
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Name: [redacted] [redacted]

Date of this notice: 01/12/2001

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

Very Truly Yours,

Paul W. Schmidt

Paul W. Schmidt
Chairman

Enclosure

Panel Members:
ESPENOZA, CECELIA M.
GUENDELSBERGER, JOHN
MILLER, NEIL P.

RECEIVED
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1/16/2001

File: [redacted] - York

Date: JAN 12 2001

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas Hutchins, Esquire

ON BEHALF OF SERVICE: Jeffrey T. Bubier
Assistant District Counsel

CHARGE:

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

Sec. 237(a)(2)(E)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(E)(ii)] - Violation of a protection order (withdrawn)

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of a crime of domestic violence, stalking, or child abuse, neglect or abandonment

APPLICATION: Termination of proceedings

In an oral decision rendered on February 8, 2000, an Immigration Judge found that the Immigration and Naturalization Service had not established that the respondent was removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1227(a)(2)(E)(i) (Supp. IV 1998), and consequentially terminated removal proceedings. The Service timely appealed the Immigration Judge's finding that the respondent is not removable under section 237(a)(2)(A)(iii) of the Act for conviction of an aggravated felony. The respondent's request for oral argument is denied. The Service's appeal will be dismissed.

The respondent does not contest that on March 2, 1998, he was convicted in a Delaware court of the offense of driving under the influence of alcohol, a felony under Delaware law based on two previous convictions, and was sentenced to a term of imprisonment of 18 months. *See* 21 Del. C. § 4177(d)(3). The issue to be resolved in this appeal is whether his offense constitutes a crime of violence under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F) (Supp. IV 1998), as defined in section 18 U.S.C. § 16.

The statute under which the respondent was convicted states, in pertinent part: "No person shall drive a vehicle . . . [w]hen the person is under the influence of alcohol." 21 Del.C. § 4177(a)(1). The term "drive" is further defined to "include driving, operating, or having actual physical custody of a vehicle." 21 Del.C. § 4177(c)(3). Moreover, the phrase "[w]hile under the influence" is further defined to mean, in pertinent part, "that the person is, because of alcohol . . . less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of the vehicle." 21 Del.C § 4177(c)(5).

The term "crime of violence" within the meaning of the term "aggravated felony" is defined at 18 U.S.C. § 16 as

> (a) an offense that has as an element the use, attempted use, or threatened use of 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.

It is undisputed that the respondent's offense does not have as one of its element the use of force. Therefore, we look to 18 U.S.C. § 16(b). We then apply the "generic" or "categorical" approach to determine whether "the nature of the crime as elucidated by the generic elements of the offense be such that its commission would ordinarily present a risk that physical force would be used against the person or property of another, irrespective of whether the risk develops or the harm actually occurs." *Matter of Puente*, Interim Decision 3412 at 7 (BIA 1999). We have held that "the potential for harm is determinative in finding a criminal offense a crime of violence under 18 U.S.C. § 16(b)." *Matter of Magallanes*, Interim Decision 3341 at 9 (BIA 1998).

The Immigration Judge correctly determined that the Delaware statute covers not only driving and operating a motor vehicle, conduct discussed in *Matter of Puente*, *supra*, and *Matter of Magallanes*, *supra*, but also "having actual physical control of a vehicle." *See* 21 Del.C. § 4177(c)(3). He also correctly identified that the definition of "actual physical control" pronounced in *State v. Purcell*, 336 A.2d 223 (Del. Supr. Ct. 1975), is the definition employed by Delaware courts. *See Bodner v. State*, 752 A.2d 1169, 1172 (Del. Sup. Ct. 2000). "Actual physical control" means "exclusive physical power and present ability to operate, move, park or direct whatever use or non-use was to be made of the motor vehicle at the moment." *Id.*

The Delaware Supreme Court recently adopted the language of the Minnesota Supreme Court in further explaining the term:

> Insofar as "physical control" refers to something other than "driving" or "operating," . . . physical control is meant to cover situations where an inebriated person is found in a parked vehicle

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> under circumstances where the car, without too much difficulty, might again be started and become a source of danger to the operator, to others, or to property.

Id. at 1173 (quoting from *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. Sup. Ct. 1992)). The Delaware Supreme Court added:

> The broadest conduct that has been criminalized by the General Assembly is having actual physical control of a vehicle that is capable of being driven or operated on Delaware's highways by a person who is under the influence of alcohol.

Id.

The Service argues in its brief that the respondent's conviction is plainly an aggravated felony under the Board's analysis in *Matter of Magallanes*, *supra*, and *Matter of Puente*, *supra*. Service's brief at 3-4. We agree with the Service that the respondent's conviction constitutes a felony under Delaware law due to the prior convictions just like the alien's conviction in *Matter of Magallanes* constituted a felony under Arizona law for the same reason. The Service next asserts that the Board already rejected in *Matter of Puente* the respondent's argument that his conviction is not an aggravated felony because the statute under which he was convicted requires only the operation, but not necessarily the driving, of a motor vehicle.

However, the definition of operating a motor vehicle under Texas law differs from that under Delaware law. We found in *Matter of Puente* that "Texas case law defines the action of operating a motor vehicle while intoxicated as the exertion of personal effort to cause the vehicle to function, i.e., the defendant must take action to affect functioning of a vehicle in a manner that enables the vehicle's use." *Id.* at 8 (citations omitted). We then commented: "This general definition . . . appears to conform to the analysis set forth in *Matter of Alcantar*, [20 I&N Dec. 801 (BIA 1994], wherein we cited case law that interprets the term 'substantial risk.'" *Id.* In contrast, the Delaware courts have adopted a more expansive definition as revealed by the quoted excerpts from the Delaware Supreme Court. *See e.g.*, *State v. Purcell*, *supra*, at 224 (defendant was lying across the front seat of a vehicle parked on the shoulder of the highway); *Bryfogle v. Shahan*, 1993 WL 19642 (Del. Super. 1993) (appellant was sitting in the driver's seat of a truck parked in an open shed 30 feet from the road with the key in the ignition). Therefore, we disagree with the Service's assertion that "the facts [in this case] are virtually identical to the facts in *Matter of Magallanes* and *Matter of Puente*." Service's brief at 4.

The broader definition of operating a motor vehicle employed by the Delaware courts may include offenses which do not fit within the section 16(b) definition of a crime of violence. The Immigration Judge correctly determined that the conviction record in this case does not identify the type of driving under the influence offense of which the respondent was convicted. *See Matter of Sweetser*, Interim Decision 3390 at 7 (BIA 1999) (the categorical approach allows a court to go beyond the mere fact of conviction). As such, we agree with the Immigration Judge that the

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Service has failed to prove by clear and convincing evidence that the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act. Therefore, we affirm the Immigration Judge's finding that the Service has failed to sustain the charge under section 237(a)(2)(A)(iii) of the Act.

In light of our disposition of the Service's appeal, we need not address the Immigration Judge's finding that he is bound by *United States v. Parson*, 955 F.2d 858 (3rd Cir. 1992), and the Service's argument related thereto. We also need not address the Immigration Judge's comments regarding the language of and the legislative history behind section 101(h) of the Act. I.J. at 8-12. We have reviewed the brief and the supplemental brief of respondent's counsel, but we decline to revisit the Board's analysis used in *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994); *Matter of Magallanes*, *supra*; and *Matter of Puente*, *supra*.

ORDER: The Immigration and Naturalization Service's appeal is dismissed.

Cecelia M. Espenoza
FOR THE BOARD