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Crimes & Immigration Newsletter

March, 2016

This Newsletter contains selected recent developments in criminal immigration law occurring during March, 2016. The full version , which includes *all* monthly updates, is available here.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2007), with monthly updates online at NortonTooby.com.

Andrew J. Phillips, Esq.
Editor

INSIDE

RECENT DEVELOPMENTS

Practice Advisories

DETENTION – REMOVAL – REPATRIATION AGREEMENTS

DHS signs several repatriation agreements covering locations along the U.S. Mexico border, covering procedures, and protections for certain vulnerable groups, like unaccompanied minors.

https://www.dhs.gov/news/2016/02/23/united-states-and-mexico-sign-updated-repatriation-arrangements

CD4:6.6.37;AF:2.11;CMT3:3.11

BIA

AGGRAVATED FELONY – FAILURE TO APPEAR TO RECEIVE SENTENCE

Matter of Adeniye, 26 I&N Dec. 726 (BIA Mar. 17, 2016) (federal conviction of failing to surrender to serve a sentence, in violation of 18 U.S.C. § 3146(b)(1)(A)(ii), constituted an aggravated felony under INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q), since the underlying offense was punishable

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Consultations

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"Brilliant legal strategies."
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For Mr. Tooby's biography click here.

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by a term of five years or more, regardless of the actual sentence imposed).

CD4:19.67;AF:5.49, A.20, B.25

OVERVIEW – REMOVAL PROCEEDINGS – EVIDENCE

Matter of Ruzku, 26 I&N Dec. 731 (BIA 2016) (DNA test result showing 99.5% certainty of sibling relationship should be considered probative evidence of sibling relationship).

CD4:15.26

First Circuit

CANCELLATION OF REMOVAL – STOP TIME RULE – ORDERS TO SHOW CAUSE

Santos-Quiroa v. Lynch, __ F.3d __ (1st Cir. Mar. 5, 2016) (stop-time rule, at INA § 240A(d), applies to all Orders to Show Cause, regardless of the date of issue or whether proceedings were pending on April 1, 1997, the effective date of IIRAIRA).

AILA Doc. No. 16030701

CD4:24.6;AF:2.6;CMT3:3.6

Second Circuit

JUDICIAL REVIEW – BAR TO REVIEW – BIA DECISION NOT TO CERTIFY UNTIMELY APPEAL

Vela-Estrada v. Lynch, __ F.3d __ (2d Cir. Mar. 21, 2016) (BIA decision not to certify noncitizen's untimely appeal of removal order is discretionary, and so not subject to judicial review).

CD4:15.37;AF:2.19;CMT3:3.18

Third Circuit

OVERVIEW – REMOVAL PROCEEDINGS – NOTICE TO APPEAR

Orozco-Velasquez v. Att'y Gen., 817 F.3d 78 (3d Cir. Mar. 11, 2016) (service of a Notice to Appear that lacks specificity as to the time and date of noncitizen's removal proceedings does not stop the clock for purposes of cancellation of removal, under INA § 240A(d)).

NOTE: The court found that INA § 240A(d)(1) was unambiguous on this point, and thus not due *Chevron* deference.

CD4:15.24

Ninth Circuit

CAL CRIM DEF – PRACTICE ADVISORY – NEW SHOPLIFTING MISDEMEANOR, UNDER PENAL CODE § 459.5

In Proposition 47, the California voters enacted new Penal Code § 459.5, which added a "shoplifting" offense, defined as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property taken or intended to be taken does

not exceed" $950. (Effective date Nov. 4, 2014.)

Since this is a misdemeanor offense, unless the defendant has one or more prior convictions qualifying under Penal Code § 667(e)(2)(C) or requiring registration as a sex offender under Penal Code § 290(c), the maximum penalty under Penal Code § 18.5 for a misdemeanor is 364 days, so a misdemeanor conviction of shoplifting under Penal Code §459.5 can never qualify as any aggravated felony, including attempted theft, that requires a sentence imposed of one year or more.

A felony version of this offense, with a one-year or greater sentence imposed, however, might be charged in immigration proceedings as an attempted theft aggravated felony under INA §§ 101(a)(43)(G)(theft), (U)(attempt), 8 U.S.C. § 1101(a)(43)(G) (theft), (U) (attempt). This should not be allowed, because the Ninth Circuit has held, in the burglary context under Penal Code § 459, that the mere act of entering a building with the intent to commit theft, is insufficient to constitute an attempt. *Hernandez-Cruz v. Holder*, 651 F.3d 1094 (9th Cir. Aug. 31, 2011).

In that decision, the Ninth Circuit held:

Unlike generic attempted theft, California commercial burglary does not have as an element *both* an intent to commit theft *and* an overt act that is a substantial step toward doing so; only an *intent* to commit theft or a felony when entering is required. Even if one assumes, as we are doing, that Hernandez-Cruz intended to commit theft when entering, his guilty plea to commercial burglary did not "necessarily admit," *Shepard*, 544 U.S. at 26, the requisite substantial step, as mere entry cannot be such a step.

(*Id*. at 1105.)

Nor is § 459 categorically a CIMT on the ground that it punishes conduct that is "per se morally reprehensible," *Matter of L—V—C—*, 22 I. & N. Dec. 594, 603 (BIA 1999); or that is "base, vile, or depraved." *Navarro-Lopez*, 503 F.3d at 1074 (Reinhardt, J., concurring for the majority). To hold otherwise would mean that someone who did what Hernandez-Cruz admitted doing—walking into a commercial building with the intent to commit larceny—but then changed his mind and walked out without ever committing any crime, would be guilty of a CIMT. As previously discussed, society is not harmed, but benefitted by encouraging moral reasoning about whether to commit a crime. To harbor an inchoate intent to commit a crime, never acted upon, simply does not "shock society's conscience." *Id.* If it did, the phrase "moral turpitude" would be devoid of all meaning.

(*Id*. at 1108-1109.)

Moreover, the new offense of shoplifting under Penal Code 459.5 cannot qualify as a crime of moral turpitude either.

As to the other possible bases for holding that the § 459 offenses were CIMTs, the BIA did not hold, nor does the government here argue, that § 459 criminalizes "fraudulent"

conduct. *See Tijani,* 628 F.3d at 1075–76; *Navarro-Lopez*, 503 F.3d at 1076 (Reinhardt, J., concurring for the majority). Even if we could consider the argument, however, it would fail. "When we analyze a statute to determine whether the conduct it criminalizes is fraudulent, and thus whether the offense qualifies as a crime of moral turpitude, we consider whether the statute meets either of two conditions." *Navarro-Lopez,* 503 F.3d at 1076 (Reinhardt, J., concurring for the majority). The first condition is that "intentional fraud is an element of the offense," *id.,* which plainly is not the case here. *See id.; see also Blanco v. Ukase,* 518 F.3d 714, 719–20 (9th Cir.2008); *Latu v. Mukasey*, 547 F.3d 1070, 1074–75 (9th Cir.2008).

The second condition that could qualify an offense as a fraud-based CIMT is if the crime is "inherently fraudulent," meaning that the statute of conviction requires "knowingly false representations made in order to gain something of value." *Navarro-Lopez,* 503 F.3d at 1076 (Reinhardt, J., concurring for the majority). That condition is also not met here, as the statute of conviction required only that Hernandez–Cruz walk into a commercial building with the intent to commit larceny. It did not require him to make any representations at all, much less false representations on which he intended others to rely to his pecuniary benefit. *See Blanco,* 518 F.3d at 719 ("Fraud ... does not equate with mere dishonesty, because fraud requires an attempt to induce another to act to his or her detriment. One can act dishonestly without seeking to induce reliance. Our cases have therefore recognized fraudulent intent only when the individual employs false statements to obtain something tangible." (citations omitted)).

Nor is § 459 categorically a CIMT on the ground that it punishes conduct that is "per se morally reprehensible," *Matter of L-V-C-*, 22 I. & N. Dec. 594, 603 (BIA 1999); or that is "base, vile, or depraved." *Navarro-Lopez,* 503 F.3d at 1074 (Reinhardt, J., concurring for the majority). To *1109 hold otherwise would mean that someone who did what Hernandez–Cruz admitted doing—walking into a commercial building with the intent to commit larceny—but then changed his mind and walked out without ever committing any crime, would be guilty of a CIMT. As previously discussed, society is not harmed, but benefitted by encouraging moral reasoning about whether to commit a crime. To harbor an inchoate intent to commit a crime, never acted upon, simply does not "shock society's conscience." *Id.* If it did, the phrase "moral turpitude" would be devoid of all meaning.

In sum, admitting only the elements that Hernandez–Cruz admitted cannot be a CIMT, as they do not match the elements of any generic crime involving moral turpitude, *see Uppal,* 605 F.3d at 714; qualify as fraudulent conduct, *see Blanco,* 518 F.3d at 719–20; or otherwise constitute acts that are per se morally reprehensible, *see Matter of L-V-C-*, 22 I. & N. Dec. at 603. Consequently, Hernandez–Cruz's crimes of conviction are not CIMTs, and he is not removable under 8 U.S.C. § 1227(a)(2)(A)(ii) by reason of their commission. The BIA's holding to the contrary, premised either on the mistaken

belief that Hernandez–Cruz was convicted of generic burglary or the mistaken belief that this court has held the California commercial burglary offense to be a CIMT, was in error.

(*Id*. at 1108-1109.)

CCDOI 13.5, 13.8

AGGRAVATED FELONY – OBSTRUCTION OF JUSTICE – ACCESSORY TO A FELONY

Gallardo v. Lynch, 818 F.3d 808 (9th Cir. Mar. 31, 2016) (California conviction under Penal Code § 32, accessory after the fact, did not constitute an obstruction of justice aggravated felony, under INA § 101(a)(43)(S), 8 U.S.C. § 1101(a)(43)(S); the court rejected the BIA's new interpretation of "obstruction of justice," announced in *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838, 840, 842 (BIA 2012), which removed the nexus to an ongoing investigation, based on a concern that the new definition would be unconstitutionally vague); see *United States v. Aguilar,* 515 U.S. 593, 598–99, 115 S.Ct. 2357, 132 L.Ed.2d 520 (1995) (holding that "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings" and narrowly construed 18 U.S.C. § 1503's "catchall phrase" (footnote omitted) to require action taken with an intent to influence judicial or grand jury proceedings).

Note: This decision may also apply to a California conviction of dissuasion of a witness, in violation of Penal Code § 136.1(b), with a sentence imposed of one year or more.

CD4:19.80;AF:5.63, A.31, B.62;SH:7.89, 8.65

Tenth Circuit

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – UNLAWFUL SEXUAL ACTIVITY WITH A MINOR

Rangel-Perez v. Lynch, 816 F.3d 591 (10th Cir. Mar. 1, 2016) (Utah misdemeanor conviction of unlawful sexual activity with a minor, under U.C.A. § 76–5–401, is not a categorical sexual abuse of a minor aggravated felony, under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), since the statute does not require a mens rea other than 'knowing', and does not require a four year age difference).

CD4:19.87;AF:5.70, A.38, B.73;SH:7.96, 8.77

Eleventh Circuit

DETENTION – IMMIGRATION DETAINER – NO DAMAGES

*Alvarez v. U.S. Immigration and Customs Enforcement,*___ F.3d ___, 2016 WL 1161445 (11th Cir. Mar. 24, 2016) (no *Bivens* remedy of damages was available for noncitizen against ICE lodging a detainer against alien, who had been ordered removed, and holding him in custody for nearly a year after he was released from prison).

CD4:6.6.37;AF:2.11;CMT3:3.11