05-2586-ag

To Be Argued By:
VICTORIA S. SHIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2586-ag

DURANT BLAKE, a/k/a Terrel Carner,
a/k/a Durant Stanley,

Petitioner,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review an order of the Board of Immigration Appeals removing an alien who commits an "aggravated felony," *see* § 242(a)(2)(C) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1252(a)(2)(C), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). Nevertheless, the INA, as amended by the REAL ID Act, permits this Court to review "questions of law raised upon a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(2)(D). Since the Petitioner raises a question of law – whether his criminal offense is a "crime of violence" qualifying as an aggravated felony – this Court has jurisdiction to review it. *See Canada v. Gonzales*, _F.3d_, 2006 WL 1367367, at *2 (2d Cir. May 18, 2006).

ISSUES PRESENTED FOR REVIEW

1. Whether the Immigration Judge correctly held that Mr. Blake's conviction in the Commonwealth of Massachusetts District Court for assault and battery on a police officer constituted an "aggravated felony" for immigration purposes?

2. Whether the Immigration Judge acted within his discretion in denying Mr. Blake a continuance to permit adjudication of an I-130 Petition filed by Mr. Blake's son on his behalf, or to otherwise allow him to seek discretionary relief?[1]

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[1] Mr. Blake partitions this second issue into two issues, numbers II and III. *See* Petitioner's Brief ("Pet. Br.") at 1. For purposes of this response, the Government combines Mr. Blake's Issues II and III in the interest of clarity and efficiency. Nonetheless, Respondent will address all points raised by Mr. Blake under Issues II and III of his brief.

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ON PETITION FOR REVIEW FROM
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BRIEF FOR ALBERTO R. GONZALES
ATTORNEY GENERAL OF THE UNITED STATES

Preliminary Statement

Mr. Durant Blake ("Mr. Blake"), a native and citizen of Jamaica, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") affirming the removal order issued by an Immigration Judge ("IJ") based

on Mr. Blake's conviction for assault and battery on a police officer as well his continued presence in the United States after the Immigration and Naturalization Services[2] ("INS") terminated his temporary resident status on the grounds that Mr. Blake had been convicted of possession of a Class B controlled substance.

Mr. Blake now seeks judicial review of that removal order, contending, *inter alia*, that his conviction for assault and battery on a police officer is not an aggravated felony because use of force is not an element of the offense. In the alternative, he contends that the IJ abused his discretion by denying Mr. Blake's request for continuance of the removal hearing pending adjudication of an I-130 petition filed on his behalf by his son, or to otherwise allow Mr. Blake to seek various forms of discretionary relief.

Contrary to Mr. Blake's contentions, an element of assault and battery on a police officer is the intentional application of force. Additionally, the offense by its nature involves a substantial risk that physical force will be used in the course of committing the offense, and is therefore a "crime of violence" that qualifies as an

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[2] Effective March 1, 2003, the INS was dissolved and merged with the Department of Homeland Security pursuant to the Homeland Security Act of 2002. *See* Pub. L. No. 107-296, 451, 471, 116 Stat. 2135, 2196, 2205 (codified as amended in scattered sections of the U.S. Code). The Bureau of Citizenship and Immigration Services now administers the functions relevant to this case. *See* 6 U.S.C. § 271 (2006).

aggravated felony. However, assuming *arguendo* that the Court disagrees, Mr. Blake is nonetheless removable based on his continued presence in the United States after termination of his temporary resident status.

Finally, Mr. Blake's claim that the IJ abused his discretion by denying Mr. Blake's request for a continuance to seek various forms of discretionary relief is without merit. Not only did the IJ render his decision pursuant to his broad discretion, he anchored his denial in his determination that Mr. Blake was ineligible for any form of discretionary relief due to his criminal convictions and his lack of permanent resident status.

Statement of the Case

Mr. Blake entered the United States in 1985. JA 242. He was granted temporary resident status under the Special Agricultural Workers ("SAW") Program[3] on May 31, 1988, to terminate on November 30, 1988.[4] JA 242.

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[3] The SAW program was established pursuant to the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359. *See Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1108 (9th Cir. 1994). An amnesty program for undocumented aliens, SAW allows undocumented alien farmworkers to apply for temporary and then permanent resident status. *See* INA § 210, 8 U.S.C. § 1160 (2006).

[4] Other than Mr. Blake's representations, JA 214, there is no evidence in the record that his SAW status was renewed or extended, though there are indications to the contrary, *see* JA (continued...)

On or about February 12, 1991, the INS terminated Mr. Blake's temporary resident status following a previously issued Notice of Intent to Terminate, based on convictions against Mr. Blake for possession of a Class B controlled substance (cocaine), and for assault and battery on a police officer. JA 239-41.

On October 31, 2002, the INS commenced removal proceedings against Mr. Blake by filing with the immigration court a Notice to Appear ("NTA"). JA 270-72.

Following a continuance, JA 220, Mr. Blake appeared with his counsel before IJ Matthew J. D'Angelo in Hartford, Connecticut, on September 15, 2004, for a removal hearing. JA 94-123. At the hearing, the Government submitted a Form I-261 amending the NTA. JA 98-102, 268. The IJ allowed the amendments, JA 110, resulting in Allegations 1, 2, and 5 in the NTA, and Charges 3, 4, and 6 in the I-261. JA 137. The

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[4] (...continued)
193 (item #23 of Mr. Blake's Application for Cancellation for Removal and Adjustment of Status). In addition, Mr. Blake's claim that he acquired SAW status on October 12, 1985, *see* JA 214, is dubious, since the SAW program did not exist until the IRCA was enacted on November 6, 1986. *See* Pub. L. No. 99-603, 100 Stat. 3359; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 481(1991). Moreover, under the IRCA, aliens were permitted to file applications for SAW status during an 18-month period commencing on June 1, 1987. *Id.* at 485 (citing 8 U.S.C. § 1160(b)(1)(A)).

Government's amended charges under the I-261 for purposes of the removal hearing were:

> Charge 3: On September 12, 1990, you were admitted as a temporary resident upon application for adjustment of status under [the SAW program], approved on September 12, 1990, and you were authorized to remain in the United States for the duration of temporary residence.
>
> Charge 4: On February 12, 1991, your lawful temporary (SAW) status was terminated, based upon your controlled substance conviction on September 20, 1990, and you have remained in the United States since that time without the authorization of the [INS].
>
> Charge 6: On September 20, 1990, you were convicted of assault and battery upon a police officer in violation of Massachusetts General Laws chapter 265 sec. 13D, for which a sentence of two years suspended was imposed.

JA 268.

The IJ continued the hearing until September 23, 2004, to permit Mr. Blake to submit revised pleadings in response to the Government's amendments. JA 119. However, because Mr. Blake's revised pleadings were incomplete as of the hearing on September 23, 2004, the IJ again continued the hearing until October 1, 2004, at

which time Mr. Blake was to submit a complete revised pleading. JA 129-30.

On October 1, 2004, a removal hearing was held, at which Mr. Blake submitted his revised pleadings, admitting Allegations 1 and 2, but denying Allegation 5 in the NTA, as well as denying all three charges in the I-261. JA 137. At the conclusion of the hearing the IJ declared Mr. Blake removable on two independent grounds. JA 82-83. First, Mr. Blake was removable based on his conviction for assault and battery on a police officer, an offense the IJ determined was a crime of violence and, therefore, an aggravated felony. JA 84-86. Second, the IJ concluded that Mr. Blake was removable because, while Mr. Blake was initially admitted to the United States as a lawful temporary resident under the SAW program, his status was subsequently terminated on account of his criminal convictions and yet he remained in the country without authorization from the INS. JA 83-84, 86.

In addition, the IJ denied Mr. Blake's request for a continuance for purposes of seeking various avenues of discretionary relief from removal. JA 86-90. Due to Mr. Blake's conviction for possession of a Class B controlled substance, the IJ found that Mr. Blake was ineligible for adjustment of status or for § 212(h) waiver. JA 87. The IJ also determined that Mr. Blake's aggravated felony conviction – for assault and battery on a police officer – rendered him ineligible for cancellation of removal. JA 87-88. Finally, the IJ concluded that Mr. Blake was precluded from seeking § 212(c) relief because he was not a lawful permanent resident, as is required of § 212(c)

applicants, and because, at any rate, he was recently convicted – in 2002 – of submitting false information on a passport application and of deceitful use of a social security number. JA 89.

On March 21, 2005, Mr. Blake filed a timely appeal of the IJ's decision to the BIA. JA 61.

On April 28, 2005, the BIA affirmed the IJ's decision. JA 2-5. Mr. Blake filed a timely petition for review with this Court on May 27, 2005.

STATEMENT OF FACTS

A. Petitioner's Entry into the United States and Aggravated Felony Conviction

Mr. Blake is a native and citizen of Jamaica, JA 98, who in 1985 entered the United States. JA 242. On approximately May 31, 1988, Mr. Blake was granted temporary resident status under the SAW program, to expire on November 30, 1988. JA 242.

On September 20, 1990, in the Commonwealth of Massachusetts District Court, Springfield Division, Mr. Blake pleaded guilty to two charges: (1) possession of a Class B substance in violation of Mass. Gen. Laws ch. 94c, § 32A(a), which resulted in a one-year sentence of imprisonment, and (2) assault and battery on a police officer in violation of Mass. Gen. Laws ch. 265, § 13D, which resulted in a two-year suspended sentence. JA 234.

On February 12, 1991, the INS terminated Mr. Blake's temporary resident status pursuant to 8 C.F.R. § 210.4(d)(2) based on his convictions for possession of a controlled substance and for assault and battery on a police officer.[5] JA 239-41.

On October 15, 2002, Mr. Blake pleaded guilty to violating 18 U.S.C. § 1542 (False Statements in Application for Passport), and 42 U.S.C. § 408(a)(7)(B) (Deceitful Use of Social Security Number). JA 221. The court entered a judgment against Mr. Blake for those charges on December 16, 2002. JA 221. He was sentenced to 71 days of imprisonment for each offense, to run concurrently. JA 223.

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[5] The INS informed Mr. Blake that his controlled substances conviction rendered him excludable under § 212(a)(23) and that, according to 8 C.F.R. § 210.3(e), the grounds for his exclusion may not be waived. JA 239-40. Also, as a result of Mr. Blake's felony conviction, he was ineligible under 8 C.F.R. § 210.3(d)(3). The term "felony" is defined in 8 C.F.R. § 245a.1(p) as "a crime committed in the United States, punishable by imprisonment for a term for more than one year, regardless of the term such alien actually served, if any, except: When the offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less regardless of the term such alien actually served. . . ." JA 241. Mr. Blake was informed of his right to appeal the INS' termination of his temporary resident status, JA 241, but there is no evidence that he filed an appeal.

B. Petitioner's Removal Proceedings

The INS initiated removal proceedings against Mr. Blake on October 31, 2002, by filing with the immigration court an NTA. JA 270-71. Mr. Blake appeared at a hearing before an IJ on October 1, 2004, represented by counsel. JA 134.

1. Documents Entered Into Evidence

At the removal hearings, the following documentary exhibits were submitted:

Exhibit 1: Notice to Appear. JA 270.

Exhibit 1-A: Additional Charges of Inadmissibility/Deportability (I-261). JA 268.

Exhibit 2: INS letter to Mr. Blake notifying him of termination of his lawful temporary status. JA 239-41.

Exhibit 3: Original pleadings submitted by Mr. Blake on February 7, 2003. JA 237-38.

Exhibit 3A: Amended pleadings submitted by Mr. Blake on September 23, 2004. JA 235-36.

Exhibit 4: Certified copy of Record of Conviction from Springfield District Court in Springfield, Massachusetts, docket number 89-23-CR-8895. JA 234.

Exhibit 5: Indictment against Mr. Blake for making false statements on application for passport and for deceitful use of Social Security number. JA 231-32.

Exhibit 6: Judgment of United States District Court for District of Massachusetts against Mr. Blake for violations of 18 U.S.C. § 1542, making false statements in application for passport, and of 42 U.S.C. § 408(a)(7)(B), for deceitful use of a Social Security number. JA 221-30.

Exhibit 7: Motion to Continue filed by Attorney De Grave on January 22, 2003. JA 220.

Exhibit 8: Motion to Continue filed by Attorney De Grave on September 2, 2004. JA 217.

Exhibit 9: Application for waiver of excludability. JA 214.

Exhibit 10: Amended pleadings, submitted October 1, 2004. JA 212-13.

Exhibit 11: Form I-130 Petition for Alien Relative filed by Mr. Blake's son, Leon Blake. JA 208-11.

Exhibit 12: Order to Show Cause, issued October 23, 1999. JA 206-07.

Exhibit 13: Memorandum of Oral Decision by IJ entered on July 9, 1991, in New York, New York,

terminating prior proceedings because of *Matter of Midrano*. JA 205.

Exhibit 14: Application for cancellation of removal. JA 192-99.

Exhibit 15: Affidavit of counsel and a letter from Attorney Schonfeld, dated September 30, 2004. JA 190-91.

Exhibit 16: Request for change of venue. JA 187-89.

D. The IJ's Decision

At the conclusion of the removal hearing, the IJ issued an oral decision, JA 75-93, finding Mr. Blake removable on two separate grounds: conviction for an aggravated felony and for presence in the United States without authorization after Mr. Blake's lawful temporary status as a SAW worker was terminated on account of his conviction for possession of a controlled substance. JA 83-86. Although Mr. Blake sought discretionary relief in the way of adjustment of status, cancellation of removal, waiver of deportation under § 212(h), discretionary waiver under § 212(c), and suspension of deportation, the IJ concluded that Mr. Blake's criminal convictions and his lack of lawful permanent resident status rendered him ineligible for any of the foregoing forms of relief. JA 86-90.

The IJ began by identifying the evidence in the record which established by clear and convincing evidence that, on September 20, 1990, Mr. Blake was convicted in the District Court in Springfield, Massachusetts, for possession of a Class B controlled substance in violation of Mass. Gen. Laws ch. 94C, § 32A(a). JA 83. Accordingly, the IJ sustained Allegation 5 in the NTA. JA 83.

Proceeding to Allegations 3 and 4 in the I-261, the IJ found that the record evidence established that, on September 12, 1990, Mr. Blake was admitted to the United States as a temporary resident based on an application for adjustment of status under the SAW program, approved on

September 12, 1990, and that Mr. Blake was thereunder authorized to remain in the United States for the duration of the temporary status. JA 83-84. The IJ then explained that, on February 12, 1991, Mr. Blake's lawful temporary SAW status was terminated with proper notice[6] based upon his September 20, 1990, controlled substance conviction, but that he nonetheless remained in the United States without INS authorization.[7] JA 84. Accordingly, the IJ found Mr. Blake removable under INA § 237 (a)(1)(B). JA 86.

The IJ next found that the evidence sustained Charge 6 in the I-261 regarding Mr. Blake's conviction on

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[6] Mr. Blake did not recall receiving the Intent to Terminate letter referenced in the subsequent termination letter. JA 107. The Government contended at the hearing, however, that proper service by the Government should be presumed. JA 150. The IJ agreed, and found that the termination letter established that Mr. Blake's lawful temporary resident status was terminated on February 12, 1991. JA 84.

[7] Mr. Blake does not provide substantive argument regarding his date of entry, and any argument on the issue is thereby deemed abandoned. *See State Street Bank v. Inversiones Errazuriz*, 374 F.3d 158, 172 (2d Cir. 2004) ("When a party fails adequately to present argument in an appellant's brief, we consider those arguments abandoned.").

In any event, there is no evidence that his status was ever adjusted to that of a lawful permanent resident. Indeed, the I-130 application filed by Mr. Blake's son on his father's behalf gives rise to an inference that Mr. Blake was aware he was without lawful permanent resident status.

September 20, 1990, for assault and battery against a police officer in violation of Mass. Gen. Laws ch. 265, § 13D, for which a two-year suspended sentence was imposed. JA 84. Furthermore, the IJ determined that assault and battery on a police officer was a crime of violence qualifying as an aggravated felony contemplated by §101 (a)(43)(F) of the INA. JA 84-86. The IJ reasoned that assault and battery against a police officer

> ha[s] as an element, the use, attempted use, or threatened use of physical force against the person or property of another. This Court finds in the alternative that [the] offense is 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. Therefore, this Court finds that [Mr. Blake's] convictions for assault and battery on a police officer with a sentence of two years in [a] house of correction is, in fact, an aggravated felony as set forth in the statute.

JA 85. Accordingly, the IJ declared Mr. Blake removable under INA § 237(a)(2)(A)(iii). JA 85-86.

The IJ denied Mr. Blake's request to continue the removal hearing pending adjudication of an I-130 petition filed on his behalf by his son,[8] or, alternatively, to afford

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[8] It appears from the record that Mr. Blake's son, Leon Andre Blake, was naturalized on September 29, 2004, two days (continued...)

Mr. Blake an opportunity to pursue several forms of discretionary relief.[9] JA 86-89. As to the I-130 visa petition, an antecedent component of an application for adjustment of status, the IJ explained that Mr. Blake's conviction of possession of a Class B substance would statutorily preclude him from ultimately obtaining adjustment of status. JA 87. The same conviction statutorily barred Mr. Blake from § 212(h) relief. JA 87. The IJ explained

> A Section 212(h) waiver provides that the Attorney General may waive, in his discretion, certain grounds, including a drug ground as long as it relates to a single offense of simple possession of 30 grams or less of marijuana. In this case, the respondent's conviction does not involve marijuana, which would be under Class D in Massachusetts, but was convicted of a separate controlled substance offense under Class B . . . .

JA 87.

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[8] (...continued)
before the October 1, 2004, removal hearing. JA 210.

[9] Mr. Blake suggested a continuance pending his request for records under the Freedom of Information Act, 5 U.S.C. § 552 (2002). JA 106. The IJ declined this proposal on the basis that there is no discovery in immigration proceedings, and that the court must deal with the facts of the case as they stand. JA 86, 105.

Mr. Blake's application for cancellation of removal under INA § 240A would be similarly abortive, according to the IJ, for "cancellation of removal require[s] that the respondent not be convicted of an aggravated felony," JA 88, and Mr. Blake had been convicted of an aggravated felony, "that is, assault and battery on a police officer for which he was sentenced to over one year of incarceration." JA 87-88.

Although Mr. Blake had not applied for suspension of deportation, the IJ explained that such an application would not be proper in the context of a removal proceeding. JA 88. Additionally, the IJ noted that Mr. Blake expressed no fear of returning to Jamaica, the country he designated in the event of removal. JA 88-89.

Lastly, the IJ found that Mr. Blake could not avail himself of § 212(c) relief were he to request it. JA 89. The IJ explained that

> [b]ecause of the respondent's recent Federal Court conviction as set forth in Exhibits 5 and 6, he would likely be barred from any Section 212(c) relief were he even able to show that is a lawful permanent resident in the United States. This Court finds that the respondent cannot show that he is a lawful permanent resident in the United States as the [INS] has, in fact, terminated his temporary resident status as of February 12, 1991. This Court

> notes that only lawful permanent residents would be eligible to apply for Section 212(c) relief.

JA 89.

E. The BIA Appeal

On March 21, 2005, Mr. Blake appealed the IJ's decision to the BIA, contesting the IJ's finding that assault and battery on a police officer is an aggravated felony.[10] JA 57-58. Mr. Blake then requested the BIA to peruse the transcript of the removal proceedings to determine for itself the putative errors committed by the IJ. JA 59. However, Mr. Blake offered some examples of what he believed were errors, largely focusing on the IJ's refusal to

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[10] In his appeal to the BIA, Mr. Blake did not challenge the IJ's finding of removability based on Mr. Blake's continued presence in the United States after termination of his temporary residence status by the INS, in violation of INA § 237(a)(1)(B).

Likewise, Mr. Blake did not present to the BIA the IJ's determination that he was ineligible for either § 212(h) discretionary waiver, *see* JA 57-60, or suspension of deportation, JA n.2. As a result, these issues have not been administratively exhausted, and Mr. Blake is barred from raising them at this juncture. *See Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005) (noting that 8 U.S.C. § 1252(d)(1) "bars the consideration of bases for relief that were not raised below"); *see also, Tanov v. INS*, 443 F.3d 195, 200-01 (2d Cir. 2006) (same); *Zhou Yi Ni v. United States Dep't of Justice*, 424 F.3d 172, 175 (2d Cir. 2005) (per curiam) ("Because petition did not raise" an argument on appeal "before the BIA, it is not properly exhausted.").

continue the hearing to allow Mr. Blake to seek "any and all" available discretionary relief on the basis of ineligibility. JA 59-60.

On April 28, 2005, the BIA issued a decision dismissing Mr. Blake's appeal. JA 2-5. The BIA noted that the IJ declared Mr. Blake removable under both INA § 237(a)(1)(B) and § 237(a)(2)(A)(iii). JA 2. In its opinion, the BIA affirmed the IJ's finding that Mr. Blake's conviction of assault and battery on a police officer under Mass. Gen. Laws ch. 265, § 13D, "involves the intentional use of physical force against another, and, therefore, qualifies as a crime of violence under 18 U.S.C. § 16(a)." JA 4. Alternatively, the BIA stated that, "[w]hile it is true that neither violence, nor the use of violence, nor the use of force, is an essential element of the crime as statutorily defined, still, violence, the use of force, and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer." JA 4 (quoting *United States v. Santos*, 363 F.3d 19, 23 (1st Cir. 2004)). Since the common law definition of the offense requires some physical contact and force, "it only need involve the substantial risk that force will be used under 18 U.S.C. § 16(b)." JA 4. The BIA concluded that assault and battery on a police officer is an aggravated felony that both rendered Mr. Blake removable under INA § 237(a)(2)(A)(iii), and rendered him ineligible for cancellation of removal.

The BIA also concluded that the IJ did not abuse his discretion when he denied Mr. Blake's request for a continuance. The BIA cited the IJ's broad discretion over the matter and Mr. Blake's failure to proffer specific facts

in the evidence to establish that denial of a continuance was prejudicial to Mr. Blake or materially affected the outcome of the case. JA 5. The BIA noted that Mr. Blake's request was denied because he was ineligible for the relief he sought, and because there is no discovery provision in immigration proceedings. JA 5. Finally, the BIA found no evidence that the proceedings were unfair and or that the IJ was biased. JA 4-5.

SUMMARY OF ARGUMENT

Mr. Blake claims that his conviction for assault and battery on a police officer does not constitute an aggravated felony. He further argues that the IJ should have granted his request for a continuance to pursue various forms of discretionary relief.

1. A charge of assault and battery on a police officer under Massachusetts law qualifies as a "crime of violence" under 18 U.S.C. § 16, and therefore is an aggravated felony under § 101(a)(43)(F) of the INA, 8 U.S.C. § 1101(a)(43)(F). There are two theories of liability upon which a conviction for assault and battery on a police officer may result. The first, involving the intentional use of force, is a crime of violence under 18 U.S.C. § 16(a) because the offense has as an element the use of physical force against the person. The second theory, involving the wanton and reckless commission of assault and battery on a police officer, is a crime of violence under 18 U.S.C. § 16(b) because it involves a substantial risk that physical force against the person will be used in the course of committing the offense. The First Circuit has held that assault and battery on a police officer is a crime of

violence in the context of the career offender provision of the United States Sentencing Guidelines. *United States v. Santos*, 363 F.3d at 23. As an aggravated felon, and as a person who has remained in the United States after the INS terminated his lawful temporary resident status due to a drug conviction, Mr. Blake is removable under § 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(iii) (2005), and § 237(a)(1)(B) of the INA, 8 U.S.C. § 1227(a)(1)(B) (2005), respectively.

2. The IJ did not abuse his discretion in denying Mr. Blake's request for a continuance in order to seek a panoply of discretionary relief. The law accords the IJ broad discretion to determine whether to grant continuances. The IJ properly exercised his discretion to deny a continuance on two rational bases: because Mr. Blake was ineligible to obtain discretionary relief on account of his criminal convictions and because Mr. Blake was not a lawful permanent resident.

ARGUMENT

I. THE BIA CORRECTLY AFFIRMED THE IJ'S DECISION THAT A CONVICTION FOR ASSAULT AND BATTERY ON A POLICE OFFICER IS AN AGGRAVATED FELONY UNDER THE IMMIGRATION AND NATIONALITY ACT

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

Pursuant to § 1227(a)(2)(A)(iii) (2006) of Title 8, United States Code, any alien who has been convicted of an "aggravated felony" at any time after he has been admitted into the United States is removable. *See Vargas-Sarmiento v. United States Dept' of Justice*, _F.3d_, 2006 WL 1223105, at *4 (2d Cir. May 8, 2006). "As a rule, federal courts lack jurisdiction to review final agency orders of removal based on an alien's conviction for certain crimes, including aggravated felonies." *Id.* at *3; 8 U.S.C. § 1252(a)(2)(C) (2005). Under the REAL ID Act of 2005, however, this Court retains jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). This includes the question of whether a petitioner's offense is a "crime of violence" qualifying as an aggravated felony. *Canada*, 2006 WL 1367367, at *2. If the Court concludes

that the BIA correctly determined that the alien was removable based on his conviction for an aggravated felony, the Court lacks jurisdiction to further review the order of removal in the case. *See Vargas-Sarmiento*, 2006 WL 1223105, at *1.

The term "aggravated felony" includes all offenses described in 8 U.S.C. § 1101(a)(43) (2006), "whether in violation of Federal or State law." The Court reviews *de novo* the question of whether a state crime constitutes a "crime of violence" which qualifies as an aggravated felony. *Dos Santos v. Gonzales*, 440 F.3d 81, 83 (2d Cir. 2006) (crime of violence).

The term "aggravated felony" is defined in 8 U.S.C. § 1101(a)(43) and includes, among numerous other offenses, 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 [is] at least one year." INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (2006). Section 16, in turn, defines "crime of violence" 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.

18 U.S.C. § 16 (2006).

"Under the plain language of § 16(a), use of force must be an element of the offense for that offense to be a crime of violence under § 16(a)." *Chrzanoski v. Ashcroft*, 327 F.3d 188, 191 (2d Cir. 2003). "The critical aspect of § 16(a) is that a crime of violence is one involving the 'use . . . of physical force *against the person* . . . .'" *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (emphasis and first ellipsis in original). "The key phrase in § 16(a) – the 'use . . . of physical force against the person . . .' – most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id*. (first ellipses in original).

Under 18 U.S.C. § 16(b), by contrast, use of force is not required. Instead, that provision covers any 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) (emphasis added); *see Dos Santos*, 440 F.3d at 83-84. This provision "'sweeps more broadly' than § 16(a)," *Vargas-Sarmiento*, 2006 WL 1223105, at *7 (quoting *Leocal*, 543 U.S. at 10), and "instructs courts to focus on the nature of the felony at issue to determine if it inherently presents 'a substantial risk' that the perpetrator 'may' use physical force in the commission of the crime." *Id.* (citing *Dickson v. Ashcroft*, 346 F.3d 44, 51 (2d Cir. 2003)). In *Leocal*, the Supreme Court explained that

> [Section] 16(b) does not [] encompass all negligent misconduct . . . . It simply 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 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. . . .
>
> Thus, while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person . . . . Accordingly, we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than [] merely accidental or negligent conduct . . . .

543 U.S. at 10-11 (emphasis in original, footnote omitted).[11]

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[11] In *Leocal,* the Court reviewed the question of whether a conviction for driving under the influence of alcohol and causing bodily injury was a "crime of violence" under 18 U.S.C. § 16, and therefore an "aggravated felony" under the INA. 543 U.S. at 3. The Court answered in the negative because "DUI statutes such as Florida's do not require any mental state with respect to the use of force against another person, thus reaching individuals who were negligent or less." *Id*. at 13. However, the Court added that "[t]his case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id.* at 13 (emphasis in original); *see Vargas-Sarmiento*, 2006 WL 1223105, at *8 n.6 ("The Court [in (continued...)

This Court has defined "physical force" for purposes of § 16 as "power, violence, or pressure directed against a person or thing," *Vargas-Sarmiento*, 2006 WL 1223105, at *8 (internal quotation marks omitted), and has rejected the view that the "force referenced in § 16(b) must be '*violent* force applied directly to the person of the victim.'" *Id.* (quoting *Dickson*, 346 F.3d at 50) (emphasis in original).

In reviewing whether an offense is a "crime of violence" within the meaning of § 16(b), the Court employs a categorical approach. *See Vargas-Sarmiento*, 2006 WL 1223105, at *5; *Dos Santos*, 440 F.3d at 84. Accordingly, "only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant," *Vargas-Sarmiento*, 2006 WL 1223105, at *5 (internal quotation marks omitted), and "[t]he critical categorical inquiry is whether, inherent in any commission of the felony is 'a substantial risk' that the perpetrator 'may' use such force." *Id.* at *8 (citing *Leocal*, 543 U.S. at 10).

Assault and battery on a police officer is a felony under Mass. Gen. Laws ch. 265, § 13D, which provides:

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[11] (...continued)
Leocal] did, however, note that a measure of recklessness was implicit in § 16(b) to the extent the statute covered 'offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.'") (quoting *Leocal*, 543 U.S. at 13).

> Whoever commits an assault and battery upon a police officer, firefighter, correction officer, sheriff, deputy sheriff, court officer, parole supervisor, constable, an employee of the department of social services, an employee of the registry of motor vehicles having police powers, an employee in the department of youth services with the care and custody of a juvenile offender, a public school teacher, a public school administrator or any person in the public school system having duties similar to a teacher or administrator when such person is engaged in the performance of his duty at the time of such assault and battery, or a bus, trackless trolley, rail or rapid transit motorman, operator, gateman, guard, or collector when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.

St. 1990, ch. 498 (current version at Mass. Gen. Laws ch. 265, § 13D).[12]

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[12] The version of Mass. Gen. Laws ch. 265, § 13D, provided above was amended on December 31, 1990. The current version states:

> Whoever 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

(continued...)

Simple criminal assault and battery, codified at Mass. Gen. Laws ch. 265, § 13A,[13] is a lesser-included offense of assault and battery on a police officer. *See Commonwealth v. Rosario*, 13 Mass. App. Ct. 920 (1982); *see also Commonwealth v. Moore*, 36 Mass. App. Ct. 455, 461 (1994) ("The offense of assault and battery on a police officer requires a specific intent to strike a police officer; more particularly, it has two additional elements beyond those required for simple assault and battery (compare G.L. c. 265, § 13D, with G.L. c. 265, § 13A) – the officer must be engaged in the performance of his duties at the time and the defendant must know that the victim was an officer engaged in the performance of his duties."). An analysis of assault and battery on a police officer, therefore, begins with defining simple assault and battery.

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[12] (...continued)

> and battery, shall be punished by imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.

Mass. Gen. Laws ch. 265, § 13D (2006). The revised version is identical to the former version in all material respects. However, Mr. Blake was convicted under § 13D on September 20, 1990, JA 234, and thus under the pre-December 1990 version. The current, post-December 1990, version is therefore irrelevant to this matter.

[13] "Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 1/2 years in a house of correction or by a fine of not more than $1,000." Mass. Gen. Laws ch. 265, §13A(a) (2006).

However, neither Mass. Gen. Laws ch. 265, § 13A, nor Mass. Gen. Laws ch. 265, § 13D, outlines the elements of criminal assault and battery. For that reason, the courts in Massachusetts look to common law for a definition. *Commonwealth v. Burke*, 390 Mass. 480, 483 (1983) ("To ascertain the elements of a crime we ordinarily look to the statutory language. But G.L. c. 265, § 13A, does not define assault and battery; it merely specifies penalties. Hence we must decide the question as a matter of common law.") (citing *Commonwealth v. Slaney*, 345 Mass. 135, 138 (1962)) (internal citations omitted); *see also Commonwealth v. Macey*, 47 Mass. App. Ct. 42, 43 (1999) (noting Massachusetts courts rely on common law for definition of assault and battery, for the statutes "only set forth punishments and do not define the crimes"); *cf. Sutherland v. Reno*, 228 F.3d 171, 175-76 (2d Cir. 2000) (looking to Massachusetts case law for definition of indecent assault and battery under Mass. Gen. Laws. ch. 265, § 13H, which does not provide the elements of the petitioner's offense).

Under the common law of Massachusetts there are two categories that constitute the crime of assault and battery. First, "[a]n assault and battery is 'the intentional and unjustified use of force upon the person of another, however slight . . . .'" *Commonwealth v. Burno*, 396 Mass. 622, 625 (1986) (quoting *Commonwealth v. McCan*, 277 Mass. 199, 203 (1931)) (hereinafter, "intentional theory").

Alternatively, a conviction for assault and battery may result from "the intentional commission of a wanton or

reckless act (something more than gross negligence) causing physical or bodily injury to another." *Burno*, 396 Mass. at 625 (citing *Commonwealth v. Welansky*, 316 Mass. 383, 400-01 (1944)) (hereinafter, "wanton or reckless theory"). More specifically, with respect to the wanton or reckless prong, "'the Commonwealth must prove (1) that the defendant's "conduct involve[d] a high degree of likelihood that substantial harm will result to another," [*Welansky*, 316 Mass. at 399], or that it "constitute[d] . . . a disregard of probable harmful consequences to another," *Commonwealth v. Vanderpool*, 367 Mass. 743, 747 (1975), *and* (2) that, as a result of that conduct, the victim suffered some physical injury.'" *See Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 458 (2000) (quoting *Commonwealth v. Welch*, 16 Mass. App. Ct. 271, 274-75 (1983)) (alterations and emphasis in original); *see Macey*, 47 Mass. App. Ct. at 43.

B. Discussion

Mr. Blake submits that the BIA erred in concluding that assault and battery on a police officer is a crime of violence, and thereby an aggravated felony, because: (1) violent behavior is not an element of the offense, Pet. Br. at 6-7; and (2) there is not a substantial risk that force will be used in committing assault and battery on a police officer because the statute encompasses both violent and nonviolent conduct, Pet. Br. at 10.

1. Use of Physical Force Is an Element of Assault and Battery on a Police Officer

Mr. Blake asserts that assault and battery on a police officer is not covered by 18 U.S.C. § 16(a) since the offense does not have as an element "the use, attempted use, or threatened use of physical force" against another. Pet. Br. 6-7. Contrary to Mr. Blake's position, the intentional theory of simple assault and battery plainly requires, as an element of the offense, the use of force against a person.

"The classic definition of assault and battery is 'the intentional and unjustified use of force upon the person of another, however slight.'" *Welch*, 16 Mass. App. Ct. at 274 (quoting *McCan*, 277 Mass. at 203); *Commonwealth v. Dixon*, 34 Mass. App. Ct. 653, 654 (1993) ("An assault and battery is the intentional, unprivileged, unjustified touching of another with such violence that bodily harm is likely to result.").[14] This definition explicitly requires "use of force upon the person of another," and since "[t]he critical aspect of § 16(a)" is that the crime involves the "use . . . of physical force against the person," *Leocal*, 543 U.S. at 9, the crime of intentional assault and battery qualifies as a crime of violence under § 16(a). The BIA recognized this, writing that "it is clear that battery, at least

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[14] The physical force "'may be direct, as by striking another, or it may be indirect, as by setting in motion some force or instrumentality with the intent to cause injury.'" *Commonwealth v. Cohen*, 55 Mass. App. Ct. 358, 359 (2002) (quoting *Dixon*, 34 Mass. App. Ct. at 654).

the common law definition, does require some physical contact and force . . . .," and citing language from *Correia* that a conviction for assault and battery is based on "the intentional and unjustified use of force upon . . . another." JA 4.

Since assault and battery on a police officer incorporates simple assault and battery, it necessarily (to the extent it is based on the intentional theory) has as an element the use of physical force. Consequently, assault and battery on a police officer is a crime of violence under the intentional theory within the purview of § 16(a) as it is "an offense that has as an element the use . . . of physical force against the person."

Mr. Blake, however, denies that assault and battery on a police officer requires the intentional use of force. Rather, he insists that the offense, as statutorily defined, merely requires specific knowledge that the victim is a police officer and that the police officer is performing his duties at the time the defendant commits the assault and battery. Pet. Br. at 7. As discussed *supra*, the text of § 13D references common law assault and battery and without spelling out the elements of the offense. Mr. Blake does not address the common law of assault and battery, which clearly has as an element the intentional use of force against another.

Additionally, Mr. Blake avers that "a conviction can be had on a showing of offensive touching where there is neither violence or injury to the . . . police officer." Pet. Br. at 7. For purposes of determining whether an offense

is a crime of violence under § 16(a), the sole inquiry is whether the "offense . . . has as an element the use, attempted use, or threatened use of physical force against the person," and pays no regard to resultant harm. Therefore, with respect to the intentional theory of assault and battery, the BIA was correct in finding that the common law definition of assault and battery on a police officer requires the use of physical force and thereby qualifies as a crime of violence.[15]

Finally, Mr. Blake, again referencing only the terms of Mass. Gen. Laws ch. 265, § 13D, rather than the common law elements of assault and battery, asserts that the statute is not divisible because it does not distinguish between intentional and reckless conduct. Pet. Br. at 8. As previously discussed, Massachusetts common law recognizes two theories of assault and battery. Nonetheless, the Government agrees with Mr. Blake that assault and battery on a police officer is not divisible, but for the reason that neither the intentional theory of assault and battery nor the wanton or reckless theory "encompasses multiple categories of offense conduct,

[15] Though not entirely clear, Mr. Blake seems to perceive that the BIA construed assault and battery as a disjunctive offense. Pet. Br. at 7. But as the Massachusetts Supreme Court observed in *Burke*, "[a]n assault is an offer or attempt to do a battery. Every battery includes an assault. Hence we need only consider the elements of criminal battery." 390 Mass. at 482 (citations omitted). Thus, even if Mr. Blake is correct in his construction of the BIA's opinion, any suggestion in *dicta* that assault is not a crime of violence would be incorrect.

some, but not all, of which would categorically constitute aggravated felonies under the INA." *Vargas-Sarmiento*, 2006 WL 1223105, at *6; *see Dos Santos*, 440 F.3d at 84.

2. Assault and Battery on a Police Officer Involves a Substantial Risk That Physical Force May Be Used

The alternative theory of liability for assault and battery under the common law of Massachusetts – for wanton or reckless assault and battery – is a crime of violence under § 16(b) for, as the BIA reasoned, "since the respondent's conviction qualifies as a felony,[16] it only need

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[16] Mr. Blake contends that a conviction under Mass. Gen. Laws ch. 265, § 13D, is not a felony. Pet. Br. at 8. Under federal law, a crime is a "felony" if the maximum term of imprisonment is "more than 1 year." 18 U.S.C. § 3559(a); *Sutherland*, 228 F.3d at 175 n.4. However, Mr. Blake effectively concedes the point when he explains that "[t]he distinction between a misdemeanor and a felony in Massachusetts is whether a state prison sentence may be imposed," then cites the language of Mass. Gen. Laws ch. 265, § 13D, specifically the provision for incarceration, stating that "[w]hoever commits assault and battery upon any public employee . . . *shall be punished by imprisonment* for not less than ninety days nor more than two and one-half years in a house of correction . . . ." Pet. Br. at 8. Nor can Mr. Blake argue that the suspension of his two-year sentence removes his conviction from the category of felonies, since 8 U.S.C. § 1101(a)(48)(B) states that "[a]ny reference to a term of imprisonment . . . is deemed to include the period of (continued...)

involve the substantial risk that force will be used under § 16(b)." JA 4. It is significant to the current analysis that Mr. Blake committed assault and battery on a *police officer*, and that § 13D includes two additional elements beyond those required for simple assault and battery: (1) "the officer must be engaged in the performance of his duties at the time," and (2) "the defendant must know that the victim was an officer engaged in the performance of his duties." *Moore*, 36 Mass. App. Ct. at 461. These additional elements underscore the potentially volatile situation the perpetrator risks instigating by his conduct – intentionally committing a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another. *See Burno*, 396 Mass. at 625 (outlining elements). Assault and battery on a police officer thus carries a substantial risk that force will be used.

In what appears to be an attempt to evade the implications of wanton or reckless assault and battery specifically on a police officer, Mr. Blake declares that, "[u]p until 1990, the state actually named" the categories of public officials covered by § 13D. Pet. Br. at 8. Presumably, the thrust of this statement is that it is improper to consider any specifics of his conviction, for assault and battery on a *police officer*, since the current, post-December 1990, version of § 13D is more generally

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[16] (...continued)
incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment . . . in whole or in part."

titled "Assault and battery on a public official." However, as previously discussed, *see supra* note 12, Mr. Blake was convicted on September 20, 1990, *see* JA 234, when the occupational categories were extant. The current version is therefore extraneous to the analysis, and only the pre-December 1990 version is relevant.

Alternatively, one might construe Mr. Blake to argue that the pre-December 1990 version of § 13D allows for conviction for nonviolent offenses – and therefore does not satisfy § 16(b) – because it covers a broad range of public employees. Pet. Br. at 9. He proposes that assault and battery on certain public employees, such as bus drivers and teachers, does not entail the same risk of violence as compared with assault and battery on a police officer. *Id.* Assuming *arguendo* that the occupation of the victim impacts the degree of risk that physical force may be used in the commission of the offense, § 13D is divisible, and it is thereby proper to conduct a § 16(b) analysis on the offense of assault and battery on a police officer. *See Vargas-Sarmiento*, 2006 WL 1223105, at *6 ("[A] criminal statute is 'divisible' if it encompasses multiple categories of offense conduct, some, but not all, of which would categorically constitute aggravated felonies under the INA.") (citing *Abimbola v. Ashcroft*, 378 F.3d 173, 177 (2d Cir. 2004)).

This Court recently held that a Connecticut statute which, as in this case, was broadly titled "Assault of public safety or emergency medical personnel," Conn. Gen. Stat. § 53a-167c(a)(1), was divisible. *Canada*, 2006 WL 1367367, at *5-*6. The Connecticut statute serially listed

categories of public safety personnel covered by the statute. Even so, the Court declared it was divisible into distinct categories based on the petitioner's assertion that assault against certain categories of officers did not inherently involve a risk that force would be used against them. *Id.* at *5. On that basis, the Court found it proper "to move to the record of conviction to identify the category of public safety officer in the statute that Petitioner was convicted of assaulting to determine if assaults against such officers, by their nature, involve a substantial risk that force may be used." *Id.* at *6. The transcript of the plea revealed that the petitioner in *Canada* was convicted of assaulting a police officer, and the Court examined whether that offense was a crime of violence under § 16(b). *Id.*

The scheme of the statute under which Mr. Blake was charged is identical to the statute in *Canada*, and it is thereby similarly divisible. As such, it is permissible to reference the judgment of conviction to ascertain the specific charge under Mass. Gen. Laws ch. 265, § 13D, for which Mr. Blake was convicted. Since Mr. Blake was convicted of assault and battery on a police officer, JA 234, that is the section of the statute at issue in determining whether Mr. Blake committed a crime of violence.

A conviction for assault and battery on a police officer requires the specific intent to strike an individual the perpetrator knows is a police officer. *See Moore*, 36 Mass. App. Ct. at 461 ("The offense of assault and battery on a police officer requires *a specific intent to strike a police*

officer. . . .") (emphasis added); *see Burno*, 396 Mass. at 625 (explaining that the reckless theory of assault and battery requires "the intentional commission of a wanton or reckless act (something more then gross negligence) causing physical or bodily injury")); *see also Commonwealth v. Ford*, 424 Mass. 709, 711 (1997) (same). It is significant that, under the wanton or reckless theory, the perpetrator intends *the conduct*, and that recklessness is the *mens rea* with respect to the likelihood of physical harm. *See Correia*, 50 Mass. App. Ct. at 458-59 ("'Although the [reckless] conduct is intended the result is not.'") (quoting *Welch*, 16 Mass. App. Ct. at 276 n.5) (alteration in original). Whether an offense is a crime of violence within the scope of § 16(b) is not contingent upon a showing of actual or possible harm. *See Vargas-Sarmiento*, 2006 WL 1223105, at *8 (noting that "'physical force need not actually be applied' in the commission of the charged felony for it to qualify as a crime of violence under § 16(b)") (quoting *Leocal*, 543 at 10). Accordingly, the recklessness at issue in the wanton or reckless theory of assault and battery on a police officer is not determinative of the § 16(b) analysis.

The Government is unaware of opinions by this Court directly addressing the impact of a recklessness element on the application of § 16(b). The Ninth Circuit has held that, "[f]or a crime based on recklessness to be a crime of violence under § 16(b), the crime must require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured." *United States v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir.

2002). The Supreme Court has suggested that "[t]he reckless disregard in § 16 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." *Leocal*, 543 U.S. at 10 (first emphasis in original).

It borders on the axiomatic that assault and battery denotes affirmative conduct that involves physical force, or may reasonably be expected to create a situation in which there is a substantial likelihood that physical force will be used. Moreover, when the perpetrator is aware that the victim is a police officer carrying out his duties at the time of the assault and battery on the officer, then *a fortiori*, the perpetrator commits an offense in which there is substantial likelihood that physical force may be used. Hence, unsurprisingly, the First Circuit has held that, in the context of the career offender provision of the United States Sentencing Guidelines, assault and battery on a police officer is a crime of violence. *See Santos*, 363 F.3d at 23 ("'[N]otwithstanding that its statutory definition admits a non-violent means of commission,' we held in *Fernandez* that 'assault and battery upon a police officer, in violation of Mass. Gen. Laws ch. 265, § 13D, is categorically a crime of violence . . . .") (citing *United States v. Fernandez*, 121 F.3d 777, 778 (1st Cir. 1997)) (interpreting post-December 1990 version of § 13D). In *Fernandez*, the First Circuit said that

> [i]t would seem self-evident that assault and battery upon a police officer usually involves force against another . . . . At a minimum, assault and battery

> upon a police officer requires purposeful and unwelcome contact with a person the defendant knows to be a law enforcement officer actually engaged in the performance of official duties.

121 F.3d at 780; *see Santos*, 363 F.3d at 23.[17] Even where there is no contact, but only the substantial possibility that the perpetrator's conduct may result in contact, the perpetrator intentionally commits the conduct that threatens harm to a degree that is clearly distinct from accidental or negligent. As the Supreme Court of Massachusetts wrote,

> [t]he words 'wanton' and 'reckless' are [] not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent. They express a difference in the *degree of risk* and in the *voluntary* taking of risk so marked, as compared with negligence, as to amount substantially and in the eyes of the law to a difference in kind.

Welansky, 316 Mass. at 399 (emphasis added); *see Sabatinelli v. Butler*, 363 Mass. 565, 567 (1973) (commenting that recklessness is materially different from

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[17] In *Fernandez*, the First Circuit collected a plethora of Massachusetts cases in which the defendant was charged with assault and battery upon a police officer, in order to illustrate "the consistent involvement of physical force and risk of injury," as "[e]ach reported case involved actual (not merely threatened) use of force by the defendant and a serious risk of injury to the officer or another." 121 F.3d at 780 n.2.

negligence, and that the two "'are so different in kind that words properly descriptive of the one commonly exclude the other'") (quoting *Miller v. U.S. Fid. & Guar. Co.*, 291 Mass. 445, 447 (1935)).

The wanton or reckless theory of assault and battery can therefore can be distinguished from a conviction for unintentional conduct such as DWI that involves risk of an ensuing accident, as opposed to the risk of use of force. *See Dalton v. Ashcroft*, 257 F.3d 200, 206-08 (2d Cir. 2001). Similarly, it can be distinguished from second-degree manslaughter under N.Y.P.L. § 125.15(1), which this Court found did not necessarily present "a substantial risk that physical force against the person . . . of another may be used," because the scope of the statute extended to "passive conduct or omissions." *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003). To be sure, a conviction for reckless assault and battery cannot be imposed based on mere negligence or even gross negligence, since the conduct itself must be intended, and it must have been apparent to the perpetrator that his intentional conduct (recklessly) posed a grave danger to others. *See Welansky*, 316 Mass. at 398;[18] *Commonwealth v. Zekirias*, 443 Mass.

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[18] In *Welansky*, the Massachusetts Supreme Court affirmed the following excerpted jury charge on wanton or reckless conduct:

> To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct

(continued...)

27, 30 (2004) (countenancing judge's jury instructions on charge of reckless assault and battery, specifically the judge's caution that negligence would not suffice to convict).

On the other hand, assault and battery on a police officer is a crime of violence for the same reason this Court regards burglary as a crime of violence, in that "even though no force is used in a particular instance . . . 'a burglar of a dwelling *risks having to use force* if the occupants are home and hear the burglar.'" *Jobson*, 326 F.3d at 373 (quoting *United States v. Parson*, 955 F.2d 858, 866 (3d Cir. 1992)) (emphasis in original). A perpetrator who intentionally engages in conduct entailing a voluntary and marked risk of injury to a police officer, with knowledge that the victim is a police officer performing his duties, risks having to use force, either as an initial matter, or because the perpetrator may resort to force against the officer if the officer either acts in self-defense or attempts to arrest the perpetrator. *See, e.g., Correia*, 50 Mass. App. Ct. at 458-59.[19]

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[18] (...continued)

> so as to avoid the act or omission which caused the harm.

316 Mass. at 398.

[19] The court in *Correia* recited the events in the case that, it concluded, demonstrated wanton or reckless conduct:

> When the defendant was asked to go inside the cell, he refused. As an officer opened the cell door wider, the

(continued...)

Reckless assault and battery is also comparable to escape, which this Court held is a "violent felony" under 18 U.S.C. § 924(c) because "escape invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public." *United States v. Jackson*, 301 F.3d 59, 63 (2d Cir. 2002); *see United States v. Martin*, 378 F.3d 578, 582 (6th Cir. 2004) (noting that nine circuits, including the Sixth Circuit, have declared that escape constitutes a crime of violence, whether the escape was forceful or a simple a walk away from a halfway house, because escapes "generally end with a confrontation between the officer and the escapee"). *But see United States v. Piccolo*, 441 F.3d 1084, 1089 (9th Cir. 2006) (holding that halfway house inmate who failed to

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[19] (...continued)

> defendant became angry and swung at him with a closed fist. He missed, and the officer attempted to restrain him because he was 'completely out of control.' As the officer wrestled him to the floor, the defendant was kicking his feet and flailing his arms. When two other officers came to assist, he continued to struggle and wrestle. One of the officers who came to assist was kicked in the chest and stomach area, sending him backwards into a metal railing from which he fell onto the floor. That officer sustained injuries requiring treatment at a hospital for a sore back and a slight concussion. The defendant's conduct, as described above, was wanton and reckless.

50 Mass. App. Ct. at 458.

return from authorized leave did not commit an escape amounting to a crime of violence).

Assault and battery on a police officer, reckless or not, invites confrontation in which "violence could erupt at any time," *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (discussing escape), and with it the use of force. Given the assertive and aggressive nature of intentional conduct that risks physical harm to a police officer, it matters not that one could formulate counterfactuals in which the use of physical force does not result. *See Dos Santos*, 440 F.3d at 84 ("It is immaterial that one may imagine various scenarios that violate the statute, yet the perpetrator's conduct does not create a genuine probability that force will be used. . . . What matters is that the *risk* of force is inherent in the offense.") (emphasis in original); *Canada*, 2006 WL 1367367, at *11. The BIA was therefore correct to conclude that assault and battery on a police officer is by its nature a crime of violence under § 16(b) and is thereby an aggravated felony.

Mr. Blake challenges the BIA's reference to the First Circuit's conclusion in *Santos* that assault and battery on a police officer is an aggravated felony. Pet. Br. at 9; JA 9. He argues that the First Circuit found that assault and battery on a police officer was an aggravated felony in the context of determining whether the defendant committed "crimes of violence" under the career offender provision of the Sentencing Guidelines, rather than in the context of deportation or removal. Pet. Br. at 9; *see Santos*, 363 F.3d at 21-22.

To be sure, the First Circuit in *Santos* interpreted "crime of violence" as set forth in the United States Sentencing Guidelines § 4B1.2, which defines "crime of violence" for purposes of the career offender provision. *See Santos*, 363 F.3d at 22. However, a study of the First Circuit's analysis in *Santos* neutralizes Mr. Blake's proffer that, "[i]n 1989, the Sentencing Guidelines removed the reference to Sec. 16 and instead defined a 'crime of violence' by its resultant injury rather than by the use of force." Pet. Br. at 10. This Court addressed the issue of the difference between "crime of violence" under the career offender provision and "crime of violence" under § 16(b), writing that "the Sentencing Guidelines define[] 'crime of violence' under the career offender provision to include any crime involving 'conduct that presents a serious potential *risk of physical injury* to another.'" *Jobson*, 326 F.3d at 373 n.5. (quoting U.S.S.G. § 4B1.2(a)(2) (2002)) (emphasis in original).[20] To the extent, therefore, that the First Circuit's determination that

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[20] In *Dalton*, this Court explained that

> [t]he United States Sentencing Guidelines recognized the difference between "use of force" and "injury" when it broadened the scope of its definition for 'crimes of violence' under the career offender provision in § 4B1.2(a)(2). Before 1989, § 4B1.2(a)(2) referred to 18 U.S.C. § 16 for its definition of a 'crime of violence.' In 1989, the Sentencing Guidelines removed the reference to § 16 and instead defined a 'crime of violence' by its resultant injury rather than by the use of force.

257 F.3d at 207 (internal citation omitted).

assault and battery on a police office is a crime of violence hinged on a finding of a risk of physical injury, it is of course inapposite to a determination under 18 U.S.C. § 16. *See Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003) ("It matters not one whit whether the risk ultimately causes actual harm.") (internal quotation marks omitted). However, *Santos* remains persuasive insofar as the First Circuit remarked that, "[a]t a minimum, assault and battery upon a police officer requires *purposeful and unwelcomed contact* with a person the defendant knows to be a law enforcement officer actually engaged in the performance of official duties." 363 F.3d at 23 (emphasis added). Additionally, the First Circuit observed that "*violence*, *the use of force*, and a serious risk of physical harm are all likely to accompany an assault and battery upon a police officer." *Id.* (emphasis added) (citing *United States v. Winter*, 22 F.3d 15, 20 (1st Cir. 1994)) ("A categorical approach is not concerned with testing either the outer limits of statutory language or the myriad of possibilities girdled by that language; instead, a categorical approach is concerned with the usual type of conduct that the statute purports to proscribe.").

The First Circuit in *Santos* reaffirmed its holding in *Fernandez*, which also addressed whether assault and battery on a police officer was a predicate crime of violence under U.S.S.G. § 4B1.1. In *Fernandez*, the First Circuit articulated that "[i]t would seem self-evident that assault and battery upon a police officer usually involves *force against another*," and that "the conduct proscribed by the statute *nearly always involves the intentional striking* of a police officer while in the performance of

official duty." 121 F.3d at 780 (emphasis added). So although *Santos* had no occasion to apply 18 U.S.C. § 16 to the offense of assault and battery on a police officer, the BIA did not err by citing the case, especially since the BIA simply applied language germane to determining whether assault and battery on a police officer is a crime of violence under 18 U.S.C. § 16.[21]

Since Mr. Blake is removable under 8 U.S.C. § 1227(a)(2)(A)(iii) based on his conviction for an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(F), the Court lacks jurisdiction over Mr. Blake's petition. 8 U.S.C. § 1252(a)(2)(C); *see Vargas-Sarmiento*, 2006 WL 1223105, at *1; *Gattem v. Gonzales*,

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[21] Mr. Blake also objects to the BIA's reliance on *Santos* on the grounds that the First Circuit made reference to the defendant's charging documents to ascertain the specific conduct for which the charges were brought. Pet. Br. at 9. This allegation misrepresents the First Circuit's analysis in *Santos*. The First Circuit considered the charging documents exclusively in the context of discussing whether "Santos' predicate conviction for *simple assault and battery*" was a crime of violence. *Santos*, 363 F.3d at 23-24 (emphasis added). As to assault and battery on a police officer, the Court stated that "'assault and battery upon a police officer, in violation of Mass. Gen. Laws ch. 265, § 13D, is categorically a crime of violence within the meaning of the career offender provisions' . . . ." *Santos*, 363 F.3d at 23 (quoting *Fernandez*, 121 F.3d at 778). The Court emphasized, "We are steadfast in our view that the crime carries a particularly high risk of physical injury and violence. The district court was not required to look any further than the statute itself." *Id.*

412 F.3d 758, 767 (7th Cir. 2005) ("Because [petitioner] is removable by reason of having committed an aggravated felony, we have no jurisdiction to (further) review the BIA's order of removal and do not reach the other issue that [petitioner] has raised, which concerns the IJ's discretionary refusal to continue the removal proceeding pending the adjudication of the I-130 application for adjustment of status that his wife filed on his behalf.").

However, should the Court find that Mr. Blake's conviction for assault and battery on a police officer is not an aggravated felony, Mr. Blake is nonetheless removable based on his presence in the United States after termination of his temporary resident status under 8 U.S.C. § 1227(a)(1). Furthermore, assuming the Court decides that assault and battery on a police officer is not an aggravated felony, the Court should find that the IJ did not abuse his discretion by denying Mr. Blake's request for a continuance.

II. THE IJ DID NOT ABUSE HIS DISCRETION BY DENYING MR. BLAKE'S REQUEST FOR CONTINUANCE PENDING DETERMINATION OF AN I-130 PETITION AND TO PERMIT MR. BLAKE TO SEEK VARIOUS FORMS OF DISCRETIONARY RELIEF

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

1. Continuance

This Court has jurisdiction to review an IJ's denial of a continuance for abuse of discretion. *Sanusi v. Gonzales*, 445 F.3d 193, 199 (2d Cir. 2006) (per curiam); *see* 8 C.F.R. § 1240.6 (2006) ("After the commencement of the hearing, the immigration judge *may* grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.") (emphasis added); 8 C.F.R. § 1003.29 (2006) ("The Immigration Judge *may* grant a motion for continuance for good cause shown.") (emphasis added). The burden of demonstrating abuse of discretion is a difficult one to satisfy, since, according to the Court,

> [j]ust as United States District Judges have broad discretion to schedule hearings and to grant or to deny continuances in matters before them, IJs have similarly broad discretion with respect to calendaring matters. The largely unfettered discretion of a district judge to deny or to grant a continuance is evidenced in our deferential review of challenges to such decisions.

Sanusi, 445 F.3d at 199 (citing *Morris v. Slappy*, 461 U.S. 1, 11 (1983)).

"An IJ would, however, abuse his discretion in denying a continuance if '(1) [his] decision rests on error of law (such as application of the wrong legal principle) or a

clearly erroneous factual finding or (2) [his] decision – though not necessarily the product of a legal error or a clearly erroneous factual finding – cannot be located within the range of permissible decisions.'" *Morgan v. Gonzales*, 445 F.3d 549, 551-52 (2d Cir. 2006) (quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001)) (alterations in original).

2. Adjustment of Status[22]

"'Adjustment of status' is a form of relief that allows a deportable alien who would be admissible to the United States if he were seeking to enter the country to adjust his status to that of an alien seeking entry." *Drax v. Reno*, 338 F.3d 98, 113 (2d Cir. 2003) (citing INA § 245(a), 8 U.S.C. § 1255(a)).

"An alien seeking adjustment of status must (1) apply for adjustment, (2) be eligible to receive an immigrant visa and be admissible to the United States for permanent residence, and (3) have an immigrant visa immediately available to him at the time his application is filed." *Mariuta v. Gonzales*, 411 F.3d 361, 365 (2d Cir. 2005) (citing INA § 245, 8 U.S.C. § 1255(a)). Nevertheless, "an adjustment of status under § 245(a) is entirely discretionary. Thus, even where an alien satisfies the statutory requirements of eligibility for an adjustment of status . . ., 'the [INS] has discretion under section 245 to deny the application.'" *Drax*, 338 F.3d at 113 (quoting *Jain v. INS*, 612 F.2d 683, 687 (2d Cir. 1979)).

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[22] As explained in note 10, *supra*, Mr. Blake did not raise before the BIA the IJ's determination that Mr. Blake was ineligible for either suspension of deportation or § 212(h) waiver. He therefore did not administratively exhaust those issues. Mr. Blake requested the BIA to review the IJ's findings regarding Mr. Blake's eligibility for § 212(c) relief, JA 60, yet he did not address the issue in his brief to this Court. The issue is thereby abandoned and will not be discussed. *State Street Bank*, 374 F.3d at 172.

3. Cancellation of Removal

In 1996, Congress enacted first the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996), and then the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which repealed INA § 212(c) completely, effective April 1, 1997. *See* IIRIRA, Pub. L. No. 104-28, § 304(b), 110 Stat. 3009-546, -597 (1996). "Section 440(d) of AEDPA eliminated § 212(c) waivers of deportation for those aliens deportable for having committed, *inter alia*, an aggravated felony or a controlled substance offense. Subsequently, § 304 of IIRIRA repealed § 212(c) and replaced it with a narrower provision called 'cancellation of removal.'" *United States v. Lopez*, 445 F.3d 90, 92 (2d Cir. 2006). The provision for cancellation of removal is codified at INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).

"The Attorney General is accorded discretion to cancel the removal of a nonpermanent resident if that alien can" satisfy the requirements set forth under 8 U.S.C. § 1229b(b)(1).[23] *De La Vega v. Gonzales*, 436 F.3d 141,

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[23] This section provides that:

The Attorney may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for (continued...)

142-43 (2d Cir. 2006). However, "the Attorney General lacks discretion to cancel the removal of a lawful permanent resident who has, *inter alia*, been convicted of an aggravated felony." *Lopez*, 445 F.3d at 92 (citing 8 U.S.C. § 1229b(a)); *see Mutascu v. Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) ("Cancellation of removal is unavailable if the alien has 'been convicted of any aggravated felony.'") (quoting 8 U.S.C. § 1229b(a)(3)). If the subject offense is an aggravated felony precluding eligibility for cancellation of removal, so, too, is judicial review of the matter precluded. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 909 (9th Cir. 2004).

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[23] (...continued)
a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

C. Discussion

1. Continuance

The IJ did not abuse his discretion by denying Mr. Blake's request for a continuance of the removal hearing to permit adjudication of an I-130 filed by Mr. Blake's son on his behalf, or to otherwise allow Mr. Blake to pursue a range of discretionary relief. Pet. Br. 11-13. It is manifest that the IJ exercised his broad discretion in denying Mr. Blake's request for a continuance. *See Morgan*, 445 F.3d at 55 ("IJs are accorded wide latitude in calendar management, and we will not micromanage their scheduling decisions any more than when we review such decisions by district judges.").

Mr. Blake disputes the IJ's determination that Mr. Blake is statutorily ineligible for the discretionary relief he sought. As discussed *infra*, the IJ correctly concluded that Mr. Blake was ineligible for discretionary relief, and therefore the IJ's decision did not rest on an error of law or a clearly erroneous factual finding. Rather, the IJ's decision and findings fall firmly within the range of permissible decisions.

Courts have affirmed an IJ's denial of continuances under circumstances similar to the present case. *See Abu-Khaliel v. Gonzales*, 436 F.3d 627, 634-35 (6th Cir. 2006) (finding that IJ did not abuse her discretion in denying further continuances because the petitioner had violated the laws of the United States and prior continuances had been granted); *Ahmed v. Gonzales*, 447 F.3d 433, 439 (5th

Cir. 2006) (stating that the petitioner lacked good cause for continuance "because he was ineligible for removal relief under the relevant statutes," and, "[t]herefore, we decline to hold that the decision to end this lengthy and discretionary adjustment of status process was itself an abuse of discretion").

2. Adjustment of Status

The IJ did not abuse his discretion by refusing to continue the hearing to permit Mr. Blake to wait for adjudication of his son's I-130 in advance of an application for adjustment of status. As an initial matter, it is undisputed that Mr. Blake did not have an immigrant visa immediately available as required in the statute. *See Mariuta*, 411 F.3d at 365 ("An alien seeking adjustment of status must . . . have an immigrant visa immediately available to him at the time his application is filed."); *see* INA § 245(a)(3), 8 U.S.C. § 1255(a)(3); *see also Morgan*, 445 F.3d at 552 ("At the time of the hearing, Morgan was not eligible for adjustment of status, and he had no right to yet another delay in the proceedings so that he could attempt to become eligible for such relief."). The mere possibility that adjustment of status might be granted is not good cause for continuance. *See Zafar v. United States Att'y Gen.*, 426 F.3d 1330, 1336 (11th Cir. 2005) ("[S]ince all that the petitioners offered the immigration judges was the 'speculative' possibility that at some point in the *future* they *may* receive . . . labor certification, petitioners have failed to demonstrate that they had a *visa petition* 'immediately available' to them . . . .") (emphasis in original).

That the visa petition filed on Mr. Blake's behalf appears to have been approved on January 12, 2005, JA 62, before he filed his appeal to the BIA on March 21, 2005, JA 61, did not mandate a finding that Mr. Blake ought to have had the opportunity to apply for adjustment of status. First, the petition was not approved until over three months after the October 1, 2004, hearing before the IJ. Second, the approval notice clearly states that "[t]his form is not a visa nor may it be used in place of a visa." JA 62. Mr. Blake thus did not "have an immigrant visa immediately available to him" either when he appeared before the IJ or when he appealed the matter to the BIA. What is more, this Court has held that "the INS's approval of an immigrant visa petition does not, by itself, entitle an alien to permanent resident status. It appears that the Attorney General retains discretion to deny an application for adjustment of status *even where the applicant has an approved immigrant visa petition*." *Firstland Int'l, Inc. v. INS*, 377 F.3d 127, 132 n.6 (2d Cir. 2004) (emphasis in original). The IJ was therefore well within the range of permissible decisions in denying the requested continuance because he possessed neither a visa nor even an approved visa petition at the October 1, 2004, hearing.

Lastly, an IJ does not abuse his discretion by denying a Petitioner's request for continuance pending adjudication of an I-130 petition based upon a determination that the petition or subsequent application for adjustment of status would be statutorily denied. *See Morgan*, 445 F.3d at 553; *see also In re Garcia*, 16 I. & N. Dec. 653, 657 (BIA 1978) ("It clearly would not be an abuse of discretion for the immigration judge to summarily deny a request for a

continuance . . . upon his determination that the visa petition is frivolous or that the adjustment application would be denied on statutory grounds or in the exercise of discretion notwithstanding the approval of the petition."), *modified on other grounds by In re Arthur*, 20 I. & N. Dec. 475 (BIA 1992); *Onyeme v. INS*, 146 F.3d 227, 233 (4th Cir. 1998) ("[U]nder *Garcia*, the IJ retains the discretion to deny a request for a continuance where the adjustment of status application would be denied on statutory grounds."); *see Pede v. Gonzales*, 442 F.3d 570, 571 (7th Cir. 2006) (finding that the IJ "clearly spelled out [] the ultimate hopelessness of [the petitioner]'s adjustment application," which was "a perfectly acceptable basis for the IJ's exercise of discretion"). In this case, the IJ correctly explained that Mr. Blake's conviction for possession of a Class B substance in Massachusetts rendered him inadmissible and therefore ineligible for adjustment of status. JA 87. *See Jenkins v. INS*, 32 F.3d 11, 15 (2d Cir. 1994) (holding that petitioner was statutorily barred from adjusting his status to that of lawful permanent resident because his drug conviction rendered him inadmissible to the United States pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(II), and an adjustment applicant must, *inter alia*, be admissible under 8 U.S.C. § 1255(a)), *overruled on other grounds, Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Drax*, 338 F.3d at 102.

In sum, the IJ did not abuse his discretion by denying Mr. Blake's request for a continuance pending adjudication of the I-130 petition filed on his behalf by his son.

3. Cancellation of Removal

Mr. Blake was convicted of an aggravated felony, and is thereby statutorily barred from obtaining cancellation of removal. *See Swaby v. Ashcroft*, 357 F.3d 156, 159 (2d Cir. 2004) ("IIRIRA replaced § 212(c) relief with a form of relief called 'cancellation of removal,' which allows the Attorney General to cancel removal proceedings for certain resident aliens, excluding those convicted of an aggravated felony."); *see also Tostado v. Carlson*, 437 F.3d 706, 708 (8th Cir. 2006) ("An alien who is removable from the United States for committing an aggravated felony may not seek the relief of cancellation of removal.") (citing 8 U.S.C. § 1229b(a)(3)).

Since the IJ determined that Mr. Blake was convicted of an aggravated felony, he properly denied Mr. Blake's request for a continuance to seek cancellation of removal. *See Castro-Baez v. Reno*, 217 F.3d 1057, 1058 (9th Cir. 2000) (dismissing petition upon determining petitioner's rape conviction constituted an aggravated felony within the meaning of the INA, which had prompted the IJ to pretermit petitioner's application for discretionary cancellation of removal).

CONCLUSION

For the foregoing reasons the instant petition should be dismissed. The Court should affirm the agency's determination that Mr. Blake's conviction in Massachusetts for criminal assault and battery on a police officer is an aggravated felony under 18 U.S.C. § 1101(a)(43)(F), or that he is otherwise removable pursuant to 8 U.S.C. § 1227(a)(1)(B) based on his presence in the United States after his temporary resident status was terminated. Further, in the event the Court determines that Mr. Blake did not commit an aggravated felony, the Court should nonetheless find that the IJ did not abuse his discretion in denying Mr. Blake's request for a continuance to seek discretionary relief.

Dated: June 14, 2006

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 14,000 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

VICTORIA S. SHIN
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1101. Definitions (2006)

(a) As used in this chapter –

....

(43) The term "aggravated felony" means –

....

(F) a crime of violence (as defined in section 16 of Title 18, but including a purely political offense) for which the term of imprisonment is at least one year.

8 U.S.C. § 1160 Special agricultural workers (2006)

(a) Lawful residence

(1) In general

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

(A) Application period

The alien must apply for such adjustment during the 18-month period beginning on the first day of the seventh month that begins after November 8, 1986.

(B) Performance of Seasonal Agricultural Services and residence in the United States

The alien must establish that he has --

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man-days,

during the 12-month period ending May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for mor than one employer on any one day shall be counted as performance of services for only 1 man-day.

(C) Admissible as immigrant

The alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under subsection (c)(2) of this section.

8 U.S.C. § 1227. Deportable aliens (2005)

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . . .

(1) Inadmissible at time of entry or of adjustment of status or violates status

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(1) of this title, is deportable.

(2) Criminal offenses

(A) General crimes

. . . .

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

. . . .

8 U.S.C. § 1229b Cancellation of removal; adjustment of status (2006)

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status fo certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent resident, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252. Judicial review of orders of removal (2005)

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of Title 28.

(2) Matters not subject to judicial review

. . . .

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without

regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

. . . .

(b) Requirements for review of orders of removal

. . . .

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

8 U.S.C. § 1255. Adjustment of status of nonimmigrant to that of person admitted for permanent residence (2006)

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa.

The status of an alien was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 1154(a)(1) of this title or may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

18 U.S.C. § 16. Crime of violence defined (2006)

The term "crime of violence" means--

(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.

18 U.S.C. § 3559. Sentencing classification of offenses (2004)

(a) Classification. An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is –

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

21 U.S.C. § 802. Definitions (2006)

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

8 C.F.R. § 1003.29 Continuances (2006)

The Immigration Judge may grant a motion for continuance for good cause shown.

8 C.F.R. § 1240.6 Postponement and Adjournment of Hearing (2006)

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

United States Sentencing Guidelines § 4B1.2(a)(2) Definitions of Terms Used in Section 4B1.1 (2004)

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Massachusetts General Laws chapter 265, § 13A
Assault or Assault and battery

Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 1/2 years in a house of correction or by a fine of not more than $1,000.

Massachusetts General Laws chapter 265, § 13D
Assault and battery on a public official; penalty

Whoever commits an assault and battery upon a police officer, firefighter, correction officer, sheriff, deputy sheriff, court officer, parole supervisor, constable, an employee of the department of social services, an employee of the registry of motor vehicles having police powers, an employee in the department of youth services with the care and custody of a juvenile offender, a public school teacher, a public school administrator or any person in the public school system having duties similar to a teacher or administrator when such person is engaged in the performance of his duty at the time of such assault and battery, or a bus, trackless trolley, rail or rapid transit motorman, operator, gateman, guard, or collector when such person is engaged in the performance of his duties at the time of such assault and battery, shall be punished by

imprisonment for not less than ninety days nor more than two and one-half years in a house of correction or by a fine of not less than five hundred nor more than five thousand dollars.

ANTI-VIRUS CERTIFICATION

Case Name: Blake v. Gonzales

Docket Number: 05-2586-ag

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 6/14/2006) and found to be VIRUS FREE.

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Dated: June 14, 2006