U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ARELLAN, GABRIEL OCTAVIO **A 043-944-603**

Date of this notice: 11/22/2013

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Hoffman, Sharon
Guendelsberger, John
Manuel, Elise

yungc
Userteam: Docket

File: A043 944 603 – New York, NY Date: NOV 22 2013

In re: GABRIEL OCTAVIO ARELLAN a.k.a. Gabrielo Arellan a.k.a. Gabrill Arellan

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Glenn H. Bank, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

Lodged: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact

The respondent has appealed from the Immigration Judge's February 26, 2013, decision ordering the respondent removed to Peru. The Department of Homeland Security (DHS) did not reply to the respondent's contentions on appeal. The respondent's appeal is limited to challenging the Immigration Judge's findings with respect to the lodged charge of fraud or willful misrepresentation of a material fact under section 212(a)(6)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(C)(i).[1]

We review the findings of fact, including the Immigration Judge's determination of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

We agree with the respondent that the DHS did not meet its burden of proof concerning the lodged charge. First, there was insufficient evidence substantiating that charge, as the documents marked for identification as Exhibit 3 – and purportedly offered to corroborate the fraud charge – were not admitted into evidence. Second, we are not persuaded that the DHS established that the respondent's failure to disclose his November 5, 1992, conviction on his immigrant visa and alien registration application amounted to fraud. Fraud requires an intentional, deliberate, and voluntary misrepresentation; it may not be based on a mistake, mere negligence, or inadvertence. *Emokah v. Mukasey*, 523 F.3d 110, 116-17 (2d Cir. 2008). As the respondent observes, the

[1] Although in the attachment to the notice of appeal the respondent initially challenged the charge that he was convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, he narrowed the issues in his appellate brief to address the fraud charge exclusively.

evidence in the record does not establish that he deliberately omitted his conviction from his application. Thus, we will sustain the respondent's appeal concerning the lodged charge of fraud.

As to the remaining charges, the respondent does not contest the Immigration Judge's findings that the respondent is removable based on his convictions for a crime involving moral turpitude and a controlled substance violation under sections 212(a)(2)(A)(i)(I) and (II) of the Act, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and (II). Therefore, we will affirm the Immigration Judge's findings and removal order with respect to those charges.

ORDER: The appeal is sustained with respect to the lodged charge of fraud or willful misrepresentation of a material fact under section 212(a)(6)(C)(i) of the Act.

FURTHER ORDER: That portion of the Immigration Judge's February 26, 2013, decision, sustaining the charge of fraud or willful misrepresentation of a material fact under section 212(a)(6)(C)(i) of the Act, is vacated.

FURTHER ORDER: The Immigration Judge's decision is otherwise affirmed.

FOR THE BOARD

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

File: A043-944-603 February 26, 2013

In the Matter of

GABRIEL OCTAVIO ARELLAN	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(2)(A)(i)(I) of the Immigration Act - an alien convicted of a crime involving moral turpitude; Section 212(a)(2)(A)(i)(II) of the Immigration Act - an alien convicted of a crime involving a controlled substance; Section 212(a)(6)(C)(i) of the Immigration Act - an alien who through fraud or willful misrepresentation of a material fact seeks to procure, has sought to procure or has procured a visa or other documentation or admission into the United States or other benefit provided under the Act.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: LAUREN KOSSEFF

ON BEHALF OF DHS: XIUFANG CHEN

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent was placed in removal proceedings through the original Notice to Appear, Exhibit No. 1, issued June 21, 2011.

The respondent entered pleadings to those allegations as reflected both in the

previous discussions and also summarized today in the recapitulation between the Judge and the respondent's counsel today.

Based on the admission of allegation 6 and the concession of the second charge in the Notice to Appear, the Court does sustain by clear and convincing evidence the allegation that the respondent was convicted of a crime involving possession of cocaine and is subject to removal on that basis.

The respondent has disputed and denied the charge relating to moral turpitude, which is the first charge referenced above.

The respondent has admitted that he has the convictions in question alleged in allegations 4 and 5 of the Notice to Appear. The respondent is not contending that any of the criminal convictions have been vacated or set aside in any way.

The Court believes that the nature of the two offenses alleged in allegations 4 and 5 are such that each does appear to be a crime involving moral turpitude, and with the conviction records now in the record, the Court believes the charge has been sustained by clear and convincing evidence. So, I sustain that charge relating to moral turpitude.

As far as the third charge, it was stated in Exhibit 1-B, the second amendment to the charging document in this case.

The respondent has admitted allegations 8 and 9, that in applying for his immigrant visa and alien registration, and also subsequently in filing his I-751 petition through the conditional nature of his residence, he failed to disclose certain matters relating to his criminal arrest and convictions as alleged in allegations 8 and 9. These have been admitted by counsel, but the charge of removal was denied on the basis that there was no showing that the respondent's misrepresentation or inaccurate statements in those applications were necessarily made in bad faith, or were willful or knowing on

his part.

The Court would note there has been no attempt to present evidence to the contrary from the respondent, but the Court believes that it would be a difficult procedure to establish removability if the respondent's own statements explaining why he signed certain sworn Immigration applications for benefits would be acceptable evidence to show that it was done without his knowing or comprehending the fraudulent nature of the statements that were contained there.

The Court believes the misrepresentations obviously were material because they stood to create problems for the respondent in terms of obtaining the benefits he was seeking, and it would be an odd coincidence if he just drew a blank on the matter that was potentially most harmful to his plans or his intentions.

The Court, therefore, does believe considering everything there is clear and convincing evidence that the misrepresentations must have been willful and understood by the respondent.

The Court, therefore, sustains the third charge as stated in Exhibit 1-B.

The respondent's counsel has indicated today that he does not seek to benefit from any application for relief. It appears that counsel believes there is no application the respondent currently could qualify for.

ORDER

THE COURT THEREFORE ORDERS that the respondent be removed from the United States to Peru on all charges that have been sustained in this decision.

Please see the next page for electronic signature

ALAN A. VOMACKA
Immigration Judge

//s//

Immigration Judge ALAN A. VOMACKA

vomackaa on May 13, 2013 at 12:49 PM GMT