U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
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DHS/ICE Office of Chief Counsel - SDC
146 CCA Road
Lumpkin, GA 31815

Name: MILLAN-VILLEGAS, OLIVERIO **A091-874-177**

Date of this notice: 1/28/2011

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.

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Name: MILLAN-VILLEGAS, OLIVERIO **A091-874-177**

Date of this notice: 1/28/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.

File: A091 874 177 - Lumpkin, GA Date: JAN 28 2011

In re: OLIVERIO MILLAN-VILLEGAS a.k.a. Jose Hernandez a.k.a. Oscar Ramirez a.k.a. Oliver Millan

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Shirley White Edwards, Esquire

ON BEHALF OF DHS: Abby L. Smith
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony under section 101(a)(43)(G)

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals an Immigration Judge's October 13, 2010, decision granting the respondent's motion to terminate his removal proceedings. The respondent has filed a brief in opposition to the appeal. The DHS's appeal will be dismissed.

The DHS challenges the Immigration Judge's determination that the respondent had not been convicted of an aggravated felony theft offense because the sentence imposed was less than 1 year. The DHS contends that the respondent's sentence, comprised of a term of 4 years' confinement with the respondent to serve 6 months in prison and the remainder on probation, satisfied the requirement for "a term of imprisonment of at least one year" for an offense to constitute an aggravated felony under section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G).

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence). The Board reviews *de novo* questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The record reflects that the respondent pled guilty to and was convicted of theft by receiving stolen property in violation of Georgia Annotated Code section 16-8-7. I.J. at 1-2; Plea Colloquy at 14-15; Respondent's Motion to Terminate Attachment C, Charging Document; Judgment and Sentence. During the plea colloquy, the trial judge articulated the sentence as "four years to serve six months in custody and the rest on probation." Plea Colloquy at 15. The Judgment and

Sentencing document contains a line of preprinted text reading "The said defendant is hereby sentenced to confinement for a period of," followed by a blank line on which is handwritten "4 years to serve 6 months as to Count 1." That document further states "THAT upon service of 6 months of the above sentence, the remainder of sentence may be served on probation." *Id.* An August 13, 2010, "Order to Clarify Sentence" issued by the trial court *nunc pro tunc* to the original sentencing date, explains that the respondent was sentenced to confinement solely for 6 months with the balance of the 4-year sentence imposed to be served on probation.

There is a tension between the Judgment and Sentencing document, which indicates that the respondent was sentenced to "confinement" of 4 years with 6 months to be served[1], and the sentence pronounced at the plea colloquy as clarified by the *nunc pro tunc* order of 4 years with 6 months to be served in custody. Notwithstanding, we find no clear error in the Immigration Judge's factual finding that the respondent was sentenced to a term of imprisonment of less than 1 year. We concur that a fair reading of the sentencing document and the "Order to Clarify Sentence" shows that the trial court ordered a period of confinement of 6 months. As the DHS points out, the Act defines a term of imprisonment as including "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." Section 101(a)(48)(B). Although the trial court imposed a four-year sentence on the respondent, the plea colloquy and the subsequent "Order to Clarify Sentence" confirm that the term of confinement was limited to 6 months. The trial court explained that the confinement component of the 4-year sentence was 6 months, so this is not a sentence where any portion was suspended. Thus, the respondent's conviction does not qualify as an aggravated felony under section 101(a)(43)(G), the sole charge of removability.

The DHS asserts that the trial court's clarification order has no effect for immigration purposes, as it does not modify the respondent's original sentence. The DHS further contends that the order is null and void under Georgia law. The DHS does not identify, and we are unaware of, any authority that precludes an Immigration Judge from considering a trial court order that clarifies, rather than modifies, a sentence. Further, the Board has no authority to weigh in on what types of orders a state trial court may issue.

We find no basis to disturb the Immigration Judge's decision to terminate these proceedings. Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed.

Patricia A. Cole

FOR THE BOARD

[1] It is not unlikely that completing a form with a preprinted sentencing threshold creates difficulty in clearly articulating a sentence that deviates from that boilerplate language.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Atlanta, Georgia

File No.: A 091 874 177 October 13, 2010

In the Matter of	)	
	)	
OLIVERIO MILLAN-VILLEGAS	)	IN REMOVAL PROCEEDINGS
	)	
Respondent	)	

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Shirley Edwards	Abby Smith

ORAL DECISION OF THE IMMIGRATION JUDGE

On the basis of the respondent's admissions, the Court finds removability has been established by clear, convincing, unequivocal evidence. The respondent is not a native or citizen of the United States but a native and citizen of Mexico, who entered illegally but later adjusted to lawful permanent residence under 245(a) of the Act, March 28, 1996. However, on July 3, 2007, in Decatur, Georgia, he was convicted of theft by receiving stolen property for which he was sentenced to ten years. The record before this Court shows that the respondent was convicted of theft by receiving stolen property, four years to serve six months as to count one, 12 months to serve and six

months on counts three and four. All counts then to run concurrent. Okay. That was involving the two counts of driving on a suspended or revoked license, giving a false name, birth certificate and one count of the driving suspended under a false license was six months. He was convicted of violating Georgia Controlled Substances Act and sentenced to 12 months. See Exhibit 2.

A review of the conviction record, the Court finds removability has been established by clear, convincing, unequivocal evidence. The respondent is not a native or citizen of the United States but a native and citizen of Mexico. Despite adjusting to lawful permanent resident in 1996, on July 3, 2007, in Decatur, Georgia he was convicted of theft by receiving stolen property and sentenced to confinement of four years. Respondent, through counsel, attempted to have this case reviewed by the signing court. The signing court, there is an order to clarify sentence issued in this matter on August 13, 2010, nunc pro tunc to the 3rd of July, 2003. As such, it clarifies the sentence as follows: negotiated plea of theft by receiving stolen property, count one, in violation of Georgia Controlled Substances Act, misdemeanor possession of marijuana less than 28 grams, driving under a suspended license count four, called for a total sentence of four years, with the first six months to be served in confinement and the balance three years to be of six months entirely on probation, a total of 12 months with the first six

months served in confinement, the balance of probation. The Court accepted negotiated plea and its intention to negotiate should be reflected on the sentencing sheet. The defendant was and is hereby sentenced to four years with the first six months to be served in confinement, the balance of these three years, six months entirely on probation, 12 months, with six months to be served in confinement and the balance entirely on probation and four years of the terms, the sentence to remain the same as reflected in negotiation. The motion to clarify did not or does not now impose any confinement whatsoever on the defendant above the six months previously mentioned. This is the most inartfully drawn decision of a lower court. He first sentenced to four years and then it is a sentence, and breaks it out in a balance. It appears that a fair reading of this is that the respondent is sentenced to six months confinement and three years and six months probation. That is a fair reading of this and as such, despite its inartful application, will agree with the counsel for the respondent and terminate these proceedings. I will reserve on behalf of the Government.

It appears that no greater sentence of six months term of confinement. It appears that, to the satisfaction of the Court, that it was not sentenced to four years confinement to be served, a portion and then the remainder, the clarification indicated the sentence to confinement was six months, no greater than six months. As such it is not an aggravated felony. So as to this

NTA this would terminate proceedings. However, since this individual is still detained my termination of these proceedings, given the fact that he has a drug offense, may have to also be dealt with. But you can talk that out with the Government, but as to this filing I do not believe that I have any alternative. I must accept under (indiscernible) the decision of the court. No matter how I personally determine it is inartfully drawn, I think the intent of the court was, my reading is at least consistent.

I find that the Government therefore cannot meet the aggravated felony requirement of a sentence to confinement of a year or more on a theft related offense. Proceedings are terminated.

WILLIAM A. CASSIDY
Immigration JUDGE