



U.S. Department of Justice

Executive Office for Immigration Review

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Name: RIOS RODRIGUEZ, ERNESTO

A 073-814-738

Date of this notice: 12/2/2019

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:
Wilson, Earle B.

36 11/12/19
User team: Docket

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27

Falls Church, Virginia 22041

File: A073-814-738 – San Francisco, CA

Date: **DEC - 2 2019**

In re: Ernesto RIOS RODRIGUEZ a.k.a. Jorge Murillo Lozano a.k.a. Jorge Morillo Lazano

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Zachary Nightingale, Esquire

ON BEHALF OF DHS: Erin D. Lopez
Assistant Chief Counsel

APPLICATION: Reopening

This case was last before the Board on January 10, 2019, when we dismissed the respondent's appeal of an Immigration Judge's August 1, 2018, decision, denying his applications for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), and a waiver of inadmissibility under section 212(h)(1)(B) of the Act, 8 U.S.C. § 1182(h)(1)(B), and ordering the respondent's removal from the United States. On August 7, 2019, the respondent filed a motion to reopen and remand this matter to the Immigration Court for further proceedings based on new, material, and previously unavailable evidence. *See* 8 C.F.R. § 1003.2(c)(4). Specifically, the respondent's request is premised on a claim that the two-year sentence he received for his 2016 California conviction for the offense of Criminal Threats, in violation of CAL. PENAL CODE § 422(a), which was a critical element in both the determination of his removability and the denial of relief in this case, has now been vacated by the California criminal sentencing court.¹

A motion to reopen in any case previously the subject of a final decision by the Board must be filed within 90 days of the administratively final order. *See* 8 C.F.R. § 1003.2(c)(2). The motion was therefore filed out of time. Although the motion is untimely, we will reopen proceedings under our *sua sponte* authority pursuant to 8 C.F.R. § 1003.2(a); *Matter of J-J*, 21 I&N Dec. 976, 984 (BIA 1997). The record will be remanded to the Immigration Court for further proceedings in accordance with this opinion and for the entry of a new decision.

Although the *vacatur* of the sentence for the respondent's 2016 California conviction is sufficient to warrant *sua sponte* reopening, the full implications of that *vacatur* will necessarily

¹ In support of the motion, the respondent presented evidence that on July 25, 2019, the presiding Superior Court Judge for Los Angeles County, California, granted the respondent's Motion to Vacate under CAL. PENAL CODE § 1473.7(a)(1), and entered an Order Vacating Sentence in the Interest of Justice pursuant to CAL. PENAL CODE § 1385(A). Specifically, the Judge's order vacated the sentence imposed by that court on June 10, 2016, to two-years imprisonment for the offense of Criminal Threats, and placed the respondent on three-years felony probation with 364 days in the county jail with credit for 364 days time-served and terminated probation (Respondent's motion to reopen, Exh. A).

depend upon the California trial court's rationale. *See Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) (holding that a conviction vacated solely on the basis of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings, is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its *vacatur*).

The DHS opposes the motion on the ground that the respondent has not demonstrated that the *vacatur* was due to procedural or substantive defects in the original conviction. We recognize that there is a conflict among the Federal circuit courts of appeals regarding which party bears the burden of proving why a conviction has been vacated in the context of a motion to reopen. *See Matter of Chavez-Martinez*, 24 I&N Dec at 273. However, in the jurisdiction of the Ninth Circuit, wherein this case arises, the burden to establish that the conviction remains valid for immigration purposes rests with the DHS. *See Reyes-Torres v. Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011); *Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107 n.3 (9th Cir. 2006).

Nonetheless, while the California criminal court record here does not indicate the specific reason for the California court's action, it appears to the Board that a *vacatur* under CAL. PENAL CODE § 1473.7(a)(1) is available only in cases of legal invalidity or actual innocence.² *See Padilla v. Kentucky*, 559 U.S. 356 (2010); *Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018); *see also Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (holding that if a court vacates an alien's conviction because of a procedural or substantive defect, rather than for reasons solely related to rehabilitation or immigration hardships, the conviction is eliminated for immigration purposes), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

In view of the California criminal court's sentence modification and *vacatur*, the respondent contends that there no longer exists a conviction with a sentence of imprisonment of one year or more to support finding him removable as having been convicted a crime of violence aggravated felony as defined under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F). Under the circumstances, we find it appropriate to *sua sponte* reopen and remand the record for further proceedings to enable the Immigration Judge to consider the new evidence offered by the respondent relating to the *vacatur* of the sentence for the conviction underlying the crime of violence aggravated felony charge of removability, and to determine whether the respondent can

² The statute provides in pertinent part:

(a) A person no longer imprisoned or restrained may prosecute a motion to vacate a conviction or sentence for either of the following reasons:

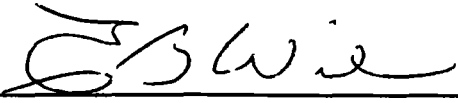
(1) The conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.

(2) Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice.

now establish his eligibility for any relief from removal for which he may qualify, or whether the proceedings should be terminated.³

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.



FOR THE BOARD

³ We note, parenthetically, that on remand the Immigration Judge will have an opportunity to re-examine the basis for the *vacatur* of the respondent's 2016 California conviction with the burden of proof on the DHS to show that the conviction was set aside solely to avoid immigration consequences. *See Nath v. Gonzales*, 467 F.3d at 1188-89.