



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**EDUARDO A. MASFERRER, ESQUIRE
MASFERRER & ASSOCIATES, P.C.
6 BEACON STREET, SUITE 815
BOSTON, MA 02108**

**DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114**

Name: ALVAREZ TRONCOSO, FRANCISCO

A057-287-860

Date of this notice: 1/6/2011

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:
Pauley, Roger

For more unpublished BIA decisions, visit www.irac.net/unpublished



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

*5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041*

**ALVAREZ TRONCOSO, FRANCISCO
20 BRADSTON STREET
A#057-287-860
BOSTON, MA 02118**

**DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114**

Name: ALVAREZ TRONCOSO, FRANCISCO

A057-287-860

Date of this notice: 1/6/2011

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:
Pauley, Roger**

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 22041

File: A057 287 860 - Boston, MA

Date: JAN 06 2011

In re: FRANCISCO JOSE ALVAREZ TRONCOSO a.k.a. Francisco Alvarez Troncoso
a.k.a. Tony Motana a.k.a. Francisco Troncoso

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Eduardo A. Masferrer, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Remand, termination

The respondent, a native and citizen of the Dominican Republic, who was admitted to the United States as an immigrant on or about August 30, 2005, filed a timely appeal of an Immigration Judge's September 28, 2010, decision, sustaining the charges of removability against him; denying his request for a continuance while awaiting action from the Massachusetts state courts on his motion for a new trial; and ordering his removal to the Dominican Republic. While the respondent's appeal was pending before the Board, 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. The respondent's request is premised on the claim that the conviction which forms the basis for the grounds of removal has been vacated. Specifically, the respondent has presented evidence that on November 23, 2010, the Milford District Court, Milford, Massachusetts, granted the respondent's Motion to Withdraw Guilty Plea and Order a New Trial.¹ We observe that the respondent's motion was properly served on the Department of Homeland Security ("DHS"), and the DHS as yet has filed no opposition or other response to this motion, and the motion is deemed unopposed. See 8 C.F.R. § 1003.2(g)(3).

The Board in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), held that if a court vacates a conviction based upon a procedural or substantive defect in the underlying proceedings, there is no longer a conviction for immigration purposes. However, an alien remains convicted of a removable offense when the predicate conviction is vacated simply for rehabilitative purposes or to aid the alien in avoiding adverse immigration consequences and not because of any procedural or substantive defect in the original conviction. *Id.* at 624; *see also Saleh v. Gonzales*, 495 F.3d 17, 25 (2d Cir. 2007) (joining and citing to the decisions of the various circuits in support of the Board's decision in *Pickering* that

¹ The record reflects that the respondent had been convicted on June 8, 2006, for the offense of Drug Possession Class B, to wit: Cocaine, in violation of MASS. GEN. LAWS Ch. 94C, § 34 (Exh. 3).

if a court vacates an alien's criminal conviction 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, the conviction is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its *vacatur*; see also *Matter of Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007) (in order for immigration consequences to be eliminated, alien's conviction cannot be vacated solely for immigration purposes).

In the matter before us, however, it is clear that the criminal court judge's ruling, granting the respondent's Motion to Withdraw Guilty Plea and Order a New Trial, was based on a procedural and substantive defect in the plea entered by the respondent at his criminal trial. Specifically, the respondent maintains that he was provided ineffective assistance of counsel, and that his plea was not knowingly, voluntarily, or intelligently made, in violation of state and federal due process. See *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976); *Commonwealth v. Foster*, 368 Mass. 100, 102 (1975). Therefore, the Massachusetts criminal court's action was premised upon what it perceived to be a procedural defect in the underlying proceedings, rather than some form of post-conviction relief. See *Rumierz v. Gonzales*, 456 F.3d 31, 34-35 (1st Cir. 2006) (a vacated conviction is no longer a "conviction" within the meaning of the immigration laws only "if a court with jurisdiction vacates [the] conviction based on a defect in the underlying criminal proceedings."); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000).

The question here is whether there is now a conviction for a "controlled substance" violation, or any conviction rendering the respondent not only removable but also precluding his eligibility for relief, or whether the proceedings should be terminated. Consequently, in view of the foregoing, the respondent's motion will be granted, and the record will be remanded to Immigration Court for further proceedings, in order to enable the Immigration Judge to consider the new evidence offered by the respondent relating to his removability under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), and to determine whether the respondent can now establish his eligibility for relief from removal, or whether the proceedings should be terminated.

Accordingly, the record will be remanded to the Immigration Court for further proceedings consistent with the foregoing opinion, and the entry of a new decision.

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


FOR THE BOARD

UNITED STATES IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

IN THE REMOVAL CASE OF
ALVAREZ TRONCOSO, FRANCISCO
RESPONDENT

CASE NO.: A057-287-860

ORDERS

- [] This is a memorandum of the Court's Decision and Orders entered on _____ . This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. () Both parties waived issuance of a formal oral decision in the case.
- X [] The respondent was ordered REMOVED from the United States to Dominican Republic in absentia.
- [] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.
- [] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of \$ _____ to DHS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to DHS within () thirty days () sixty days from the date of this Order, all necessary travel documents for voluntary departure.
- [] Respondent's application for ASYLUM was () granted () denied () withdrawn with prejudice. () subject to the ANNUAL CAP under the INA section 207(a)(5). () Respondent knowingly filed a FRIVOLOUS asylum application.
- [] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for WITHHOLDING of removal under the Torture Convention was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for DEFERRAL of removal under the Torture Convention was () granted () denied () withdrawn with prejudice.
- [] Respondent's application for CANCELLATION of removal under section () 203(b) of NACARA, () 240A(a) () 240A(b)(1) () 240A(b)(2) of the INA, was () granted () denied () withdrawn with prejudice. If granted, it was ordered that the DHS issue all appropriate documents necessary to give effect to this Order. Respondent () is () is not subject to the ANNUAL CAP under INA section 240A(e).
- [] Respondent's application for a WAIVER under the INA section _____ was () granted () denied () withdrawn or () other _____. () The conditions imposed by INA section 216 on the respondent's permanent resident status were removed.
- [] Respondent's application for ADJUSTMENT of status under section _____ of the () INA () NACARA () _____ was () granted () denied () withdrawn with prejudice. If granted, it was ordered that DHS issue all appropriate documents necessary to give effect to this Order.

CASE NUMBER: 057-287-860

RESPONDENT: ALVAREZ TRONCOSO, FRANCISCO

- [] Respondent's status was RESCINDED pursuant to the INA section 245.

- [] Respondent's motion to WITHDRAW his application for admission was
 () granted () denied. If the respondent fails to abide by any of
 the conditions directed by the district director of DHS, then the
 alternate Order of removal shall become immediately effective without
 further notice or proceedings: the respondent shall be removed from
 the United States to _____.
- [] Respondent was ADMITTED as a _____ until
 _____. As a condition of admission, the respondent was
 ordered to post a \$ _____ bond.
- [] Case was () TERMINATED () with () without prejudice
 () ADMINISTRATIVELY CLOSED.
- [] Respondent was orally advised of the LIMITATION on discretionary
 relief and consequences for failure to depart as ordered.
 [] If you fail to voluntarily depart when and as required, you shall
 be subject to civil money penalty of at least \$1,000, but not more than
 \$5,000, and be ineligible for a period of 10 years for any further
 relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B(d)).
 [] If you are under a final order of removal, and if you willfully fail
 or refuse to 1) depart when and as required, 2) make timely application
 in good faith for any documents necessary for departure, or 3) present
 yourself for removal at the time and place required, or, if you conspire
 to or take any action designed to prevent or hamper your departure, you
 shall be subject to civil money penalty of up to \$500 for each day under
 such violation. (INA section 274D(a)). If you are removable pursuant
 to INA 237(a), then you shall further be fined and/or imprisoned for up
 to 10 years. (INA section 243(a)(1)).
- X Other: Motion to continue denied.

Date: Sep 28, 2010

Bonnelly
 BRENDA O'MALLEY, Judge

APPEAL: () waived (X) reserved by (X) Respondent () DHS () Both
 DUE BY:

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY [] MAIL [] PERSONAL SERVICE
 TO: P [] DHS [] ALIEN A Alien's ATT/REP [] ALIEN c/o Custodial Officer
 DATE: 9/28/10 BY: A COURT STAFF [] JUDGE

Y2