U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: CERVANTES, ALDAIR IVAN **A200-630-917**

Date of this notice: 12/8/2011

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
Malphrus, Garry D.

File: A200 630 917 - San Diego, CA

Date: DEC 08 2011

In re: ALDAIR IVAN CERVANTES

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Kerri Calcador
Senior Attorney

APPLICATION: Change in custody status

The Department of Homeland Security has appealed the Immigration Judge's April 25, 2011, bond order granting the respondent's request for a change in custody. The appeal will be sustained.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(I). *See also Matter of S-H-*, 23 I&N Dec. 462, 464-65 (BIA 2002). The Board reviews questions of law, discretion, and judgement and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The record indicates that the respondent was convicted on March 4, 2011, based upon a guilty plea in the Superior Court for the State of California, County of San Diego, for the offense of Possession of a Controlled Substance in violation of section 11377(a) of the Health and Safety Code. The record of conviction includes the judgment, which refers to the respondent's guilty plea to Count 1 of the Criminal Complaint. The Criminal Complaint reveals that the controlled substance possessed by the respondent was methamphetamine. The record of conviction further reveals that the respondent was placed in a diversion program and ordered to pay court costs as a result of his plea agreement.

The DHS argues on appeal that the Immigration Judge erred in concluding that the respondent was not subject to the mandatory detention provisions of section 236(c) of the Immigration and Nationality Act; 8 U.S.C. § 1226(c) because the Criminal Complaint refers to the controlled substance as methamphetamine and because he was "convicted" as that term is defined in section 101(a)(48)(A) of the Act.

The Act prescribes mandatory detention for certain aliens, including those who have committed a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance. *See* section 236(c)(1)(A) of the Act. The regulations generally do not confer jurisdiction on an Immigration Judge over custody or bond determinations governing those aliens

who are subject to mandatory detention. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). However, an alien may seek a determination by an Immigration Judge that the alien is "not properly included within" certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue in this matter. *See* 8 C.F.R. § 1003.19(h)(2)(ii); *see also Matter of Joseph,* 22 I&N Dec. 799, 802 (BIA 1999). An alien will not be considered "properly included" within a mandatory detention category only when an Immigration Judge determines that the Department of Homeland Security is substantially unlikely to establish, at the merits hearing, the charge or charges that subject the alien to mandatory detention. *See Id.*

Upon de novo review we conclude that the Immigration Judge lacked jurisdiction over the respondent's custody redetermination because the respondent did not establish that the DHS is substantially unlikely to prove the charge of removal based on the Criminal Complaint and the Plea Agreement. *Matter of Joseph, supra*; *see also Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010). Consequently, we find that the respondent has not established that he is not properly included in the category of aliens subject to the mandatory detention provisions of section 236(c) of the Act. *See* 8 C.F.R. § 1003.19(d); *see also Matter of West*, 22 I&N Dec. 1405 (BIA 2000). The record of conviction reveals that the respondent was referred to a diversion program under California Penal Code section 1000, however he was assessed court costs. This Board has held that the assessment of court costs constitutes a "penalty" within the definition of section 101(a)(48)(A) of the Act sufficient to qualify as a conviction. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008). In sum, we conclude that the respondent has not established that he is not subject to the mandatory detention provisions of section 236(c) of the Act, therefore the Immigration Judge's decision is vacated for lack of jurisdiction pursuant to 8 C.F.R. § 1003.19(h)(2)(ii).

ORDER: The appeal is sustained and the Immigration Judge's decision granting the respondent's request for custody redetermination is vacated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN DIEGO, CA

FILE: A200-630-917

IN THE MATTER OF:

CERVANTES, ALDAIR IVAN

RESPONDENT

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE
WITH RESPECT TO CUSTODY

Request having been made for a change in the custody status of respondent pursuant to 8 CFR 236.1(c), and full consideration having been given to the representations of the Department of Homeland Security and the respondent, it is hereby

_____ ORDERED that the request for a change in custody status be denied.

__✓__ ORDERED that the request be granted and that respondent be:

_____ released from custody on his own recognizance

__✓__ released from custody under bond of $ 5,000.00

_____ OTHER _____

Copy of this decision has been served on the respondent and the Department of Homeland Security.

APPEAL: waived -- ~~reserved~~ APRIL 25, 2011

SAN DIEGO -- CORRECTIONS CORPORATION OF AMERICA-SAN DIEGO,CA

Date: Mar 24, 2011

Z. DePaolo
ZSA ZSA DEPAOLO
Immigration Judge

XS

PC 1000.1 guilty plea under California law is not a conviction
101(a)(48)(A) No judgment of conviction; deferred entry of judgment
101(a)(48)(a)(i) guilty plea condition precedent to PC 1000 treatment
101(a)(48)(A)(ii) rehabilitation Statute not punishment, penalty, or restraint on liberty

A200 630 917
Aldair Ivan Cervantes

Decision and Order of the Immigration Court relating to Redetermination of Custody Application by Respondent

The underlying facts as they relate to Respondent are not in dispute. Aldair Ivan Cervantes is a 23 year old native and citizen of Mexico. Respondent was brought into the United States unlawfully when he was 2 years old, on January 1, 1990. On February 25, 2011, Respondent was charged with the unlawful possession of methamphetamine in violation of California Health and Safety Code (CHSC) § 11377(a); a crime designated by the trial court as a misdemeanor pursuant to California Penal Code (CPC) § 17(b)(4). On March 4, 2011, Respondent's entered a guilty plea that states: "I possessed a controlled substance."

It is undisputed that Respondent is a first offender who was given a deferred entry of judgment pursuant to California Penal Code §1000. On March 24, 2011, Respondent appeared for a bond hearing. The Court found that Respondent was eligible for bond pursuant to § 236(a) of the Immigration and Nationality Act, as amended ("the Act."). The Court found that Respondent was neither a danger to the community or a flight risk and entered an order granting release on bond in the amount of $5,000.00. Government counsel has appealed the Court's bond order arguing that Respondent is subject to the mandatory custody provisions of § 236(c). The sole issue on appeal is whether the Court erred in finding Respondent eligible for release pursuant to § 236(a) of the Act prior to the completion of first offender treatment and the dismissal of Respondent's guilty plea.

CPC §1000.1(3) requires that a defendant enter a plea of guilty and a waiver of time for the pronouncement of judgment as a condition precedent to first offender treatment under California's PC 1000 program. This allows the trial judge upon successful completion of drug treatment to dismiss the charge . . . *the arrest upon which the judgment was deferred shall be deemed to have never occurred. See, CPC 1000.4(a).* CPC §1000.1(d) provides that the guilty plea pursuant to the PC 1000's deferred entry of judgment program ***shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to §1000.3***[1] *(emphasis added).* In the event a defendant fails to successfully complete the PC 1000 program . . *.the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in this code. See, CPC 1000.3.*

Despite the fact that Respondent does not have a conviction under California law, the issue remains whether he has a "conviction" for immigration purposes that would warrant his mandatory custody pursuant to §236(c) of the Act. §101(a)(48) of the Act defines a conviction as *a formal judgment of guilt of the alien entered by a court, or if*

[1] The standardized language on California's guilty plea forms state in the "Court's Finding and Order" that. . . *the defendant is convicted.* . . Where it is undisputed that guilty pleas per PC 1000 are not convictions, this language is not relevant to the issues regarding whether or not Respondent has a "conviction" for immigration purposes.

adjudication of guilt is withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Despite the fact that first offender treatment in California involves the entry of a guilty plea, the formal adjudication of guilt is withheld pending treatment. Respondent's guilty plea can only be considered a "conviction" for immigration purposes if, in addition to the entry of a guilty plea, there has been. . . *ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.* It is undisputed that in conjunction with his release on the deferred entry of judgment, Respondent was assessed a $200 deferred entry of judgment administrative fee, pursuant to CPC §1001.16(a) and a $100 deferred entry of judgment restitution fee, pursuant to CPC § 1001.90. The Board of Immigration Appeals in *Matter of Cabrera*, 24 I & N Dec. 459 (BIA 2008) has held that despite individual State characterizations, the imposition of costs, surcharges and restitution following a guilty plea in a criminal case is the imposition of a "punishment" or "penalty" within the meaning of § 101(a)(48)(ii) of the Act. On this record, the Board would find, consistent with its decision in *Cabrera* that Respondent stands convicted and is therefore subject to mandatory custody based upon the imposition of non-incarceratory administrative fees and restitution imposed to cover the costs of PC 1000's 18 month period of treatment and testing.

It is not as clear whether the Ninth Circuit Court of Appeals would reach the same conclusion. In *Retuta v. Holder*, 591 F.3d 1181, 1188-1189 (9th Cir. 2010) the Ninth Circuit Court of Appeals engaged in an analysis of the BIA decisions in *Matter of Ozkok*, 19 I & N Dec. 546 (BIA 1988) and *Matter of Cabrera*, supra. The Court found that in the absence of a formal judgment of guilt Congress chose to define a conviction by adopting the exact statutory language in *Oskok;* finding evidence of a conviction where a guilty plea is entered and when . . . *the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. . . .*

Ozkok held that "minor sanctions" such as . . *.a fine or restitution, community based sanctions such as a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community based service. . . .* are forms of *punishment, penalty, or restraint. . .to be imposed. Ibid. 1186, quoting Ozkok, supra.551-52. Retuta* founds that Congress intentionally omitted this list of exemplars adopted by the BIA in *Ozkok* from the definition of a conviction pursuant to Section 101(a)(48)(ii) of the Act, finding that IRIRA's definition of a conviction was intentionally limited and did not repeal the Federal First Offender Act; preserving the prohibition from removal for individuals who have had first time drug offenses expunged. The Ninth Circuit decision in *Retuta,* supra. reinforces the legitimacy of first offender treatment in *Lujan-Almendariz* v. INS, 222 F.3d 728, 746, at FN 28 (9th Cir. 2000).

> *FN28. Construing the statute as determining the time at which a conviction occurs, as a general matter,*

> *would leave open the question whether the Act precludes deportation of an alien who has received a deferred adjudication but has not yet had his proceedings expunged because he has not completed his term of probation and therefore has not yet satisfied a judge that dismissal of the offense is warranted. Our review of the history and purpose of the Act strongly suggests that such a person is protected by the (FFOA) Act's provisions, and our analysis of the law regarding repeals by implication suggest that no implied repeal occurred in that respect either.*

Despite the Ninth Circuits analysis of first offender treatment, the Court acknowledges that the Board's holding in *Cabrera, supra.,* supports the Department's position that Respondent is subject to mandatory custody pursuant to § 236(c)(1)(A) of the Act. Nonetheless, the Court finds that Respondent is eligible for bond when it is unlikely that the government will prevail on the sufficiency of the evidence to sustain a violation of Section 212(a)(2)(A)(i)(II) of the Act as it relates to convictions relating to a "controlled substance." *Matter of Joseph,* 22 I&N Dec. 799, 803 (BIA 1999).

Although the charging document alleges that Respondent possessed "methamphetamine" Respondent's guilty plea contains the factual basis "I possessed a controlled substance" without naming the controlled substance alleged in the criminal complaint; leaving out an essential element of the factual basis required to establish that Respondent's conviction constitutes a predicate offense for removal purposes. *Taylor v. United States*, 495 U.S. 575 (1990). It is undisputed that the State of California regulates the possession of numerous substances not regulated as controlled substances under federal law. *S-Yong v. Holder*, 600 F.3d 1028, 1034 (9th Cir. 2010); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004). CAL. HEALTH & SAFETY CODE § 11377(a), does not categorically establish a violation of Section 212(a)(2)(A)(i)(II) of the Act unless the government can prove that Respondent possessed a substance that is defined by state and federal controlled substance schedules as a "controlled substance." The government's evidence can only prevail as a basis for Respondent's removal if the record of conviction establishes sufficient evidence to prove that the controlled substance Respondent possessed was, in fact, methamphetamine; a substance regulated by both State and Federal Controlled Substance laws.

The set of judicially noticeable documents the Court reviews in making a determination as to the sufficiency of evidence includes the indictment (but only in conjunction with a signed plea agreement), the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea, or the transcript from the plea proceedings. *S-Yong v. Holder*, supra. at 1035. Respondent's conviction documents include the criminal complaint and the guilty plea signed by Respondent on March 4, 2011. Respondent's plea does not make specific reference that he pled guilty to

the same offense charged in Count I of the criminal complaint, particularly when CAL. HEALTH & SAFETY CODE § 11377(a) can include the possession of methamphetamine and/or any number of controlled substances punished under state but not federal law. In order for the Court to find that the government has met its burden of proof in removal proceedings the Court would have to speculate that Respondent pled guilty to possessing the same controlled substance charged in the criminal complaint when there is no factual or legal nexus between the charging document and Respondent's guilty plea. The Court is compelled to find that the government has failed to prove that the conduct for which Respondent was convicted is a predicate offense that can be used as a basis for removal. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078-1079 (9th Cir. 2007).

For the foregoing reasons, the Court finds that Respondent is eligible for release on bond pursuant to Section 236(a) of the Act.

Dated this 9th day of June, 2011.