



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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130 Delaware Avenue, Room 203
Buffalo, NY 14202**

Name: THOMAS, HARVEY NEVILLE

A 027-043-777

Date of this notice: 2/27/2015

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:
Guendelsberger, John

U.S. DEPARTMENT OF JUSTICE

User team: Docket

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**THOMAS, HARVEY NEVILLE
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**DHS/ICE Office of Chief Counsel - BTW
130 Delaware Avenue, Room 203
Buffalo, NY 14202**

Name: THOMAS, HARVEY NEVILLE

A 027-043-777

Date of this notice: 2/27/2015

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:
Guendelsberger, John

USCIS
User team: [redacted]

Immigrant & Refugee Appellate Center | www.irac.net

Falls Church, Virginia 20530

File: A027 043 777 - Batavia, New York

Date:

FEB 27 2015

In re: HARVEY NEVILLE THOMAS

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Siana J. McLean, Esquire

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) (B) of the Act

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

APPLICATION: Continuance, termination

The respondent, a native and citizen of Barbados, and a lawful permanent resident of the United States, has filed a timely appeal from an Immigration Judge's December 16, 2014, decision, finding the respondent removable, as charged (I.J. at 2), based on his record of conviction (Group Exh. 2) as to his 2014 New York conviction for Criminal Sale of a Controlled Substance in the Third Degree, which the Immigration Judge found to constitute not only a controlled substance violation, but also a "drug-trafficking" aggravated felony as defined under section 101(a)(43)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B). In addition, the Immigration Judge denied the respondent's request for a continuance pending adjudication of the respondent's motion before the New York courts for permission to file a late appeal of the New York controlled substance conviction underlying these proceedings. The record will be remanded to the Immigration Court for further proceedings consistent with this opinion and the entry of a new decision.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, judgment, and all other issues in an appeal from an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

Subsequent to the Immigration Judge's decision, and while the respondent's appeal was pending before the Board, the respondent filed a motion to remand to terminate proceedings. In support of the motion, the respondent presents evidence that, on December 18, 2014, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, granted the respondent's motion filed pursuant to NY CRIM. PROC. LAW § 460.30, and deemed the notice of appeal of his 2014 conviction timely filed. *See* Respondent's Motion to Remand.

In his motion, the respondent argues that, once accepted for late appeal, the appeal is indistinguishable from a timely appeal. In this regard, we note that, on May 24, 2010, the United States Court of Appeals for the Second Circuit found, in an unpublished decision, that the Board “abused its discretion” when issuing its decision in *Matter of Cardenas-Abreu*, 24 I&N Dec. 795 (BIA 2009). In *Abreu v. Holder*, 378 Fed. Appx. 59 (2d Cir. 2010), the Court found that a late-reinstated appeal “. . . is equivalent to any other direct appeal for the purposes of finality.”

We observe the respondent’s motion was properly served on the Department of Homeland Security (“DHS”), and the DHS 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 will therefore remand the record to the Immigration Court for additional fact-finding as to whether direct appellate review has been exhausted as to the respondent’s criminal conviction, and whether or not these removal proceedings against the respondent should be terminated.

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 entry of a new decision.



FOR THE BOARD

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

File: A027-043-777

December 16, 2014

In the Matter of

HARVEY NEVILLE THOMAS
RESPONDENT

)
)
)
)

IN REMOVAL PROCEEDINGS

CHARGES: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (the Act) - an alien who has been convicted of a controlled substance violation;
 Section 237(a)(2)(A)(iii) of the Act - an alien who has been convicted of an aggravated felony and drug trafficking crime pursuant to Section 101(a)(43)(B) of the Act.

APPLICATIONS: Further continuance of proceedings.

ON BEHALF OF RESPONDENT: SHAUNA JODIE MCLEAN

ON BEHALF OF DHS: MICHAEL EL DREHER

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent appears to be a male native and citizen of Barbados. He is charged with being removable from the United States, as set forth above, pursuant to a Notice to Appear dated September 5, 2014 (Exhibit 1).

The respondent first appeared before this Court on October 30 of this year. He was represented by present counsel at that time. The Court adjourned this

matter, at the request of counsel, to November 18 to allow the counsel to prepare.

On November 18, we did not have a hearing, I believe, because of a snow emergency. The matter was reset to December 2 of this year. On December 2, the counsel for the respondent again asked for an adjournment to prepare until today's date.

On today's date, the attorney for the respondent is seeking an additional continuance. The purpose of the continuance is to allow the respondent to try to get his criminal conviction, which forms the basis of the Government's charges, either vacated or getting an opportunity to file a late appeal. The continuances being sought by the respondent through his attorney would be to allow a collateral attack on his conviction. The conviction is a final conviction unless and until it is vacated or a late-filed direct appeal is granted.

The Court realizes that the respondent has been a permanent resident of this country since 1985. The Court has, however, given the attorney for the respondent over a month and a half in adjournments. The Court finds that there is not good cause for a further continuance and the continuance request is denied.

On today's date, the respondent, through counsel, admitted all of the factual allegations contained in Exhibit 1 of these proceedings and conceded both charged grounds of removability. Notwithstanding those pleadings, the Government introduced into evidence, without objection, Group Exhibit 2 in these proceedings. That group exhibit, among other things, contains a certified copy of a record of conviction showing the respondent's conviction on or about May 7, 2014 for criminal sale of a controlled substance in the third degree with a sentence of imprisonment of three years with three more years of post-conviction supervision.

Based upon the respondent's admissions through counsel, along with my

consideration of the documentation contained in Group Exhibit 2 of these proceedings, I find that the respondent is removable from the United States on both charged grounds of removal by evidence which is clear and convincing.

The respondent declined to designate a country of removal, if necessary. This Court designated Barbados. There is no indication of any relief being sought based upon that designation.

Since the respondent is an aggravated felon, he is statutorily ineligible for almost all forms of relief from removal, including the minimal relief of voluntary departure.

Based upon the foregoing, the following order of the Court shall enter:

ORDER

ORDERED: The respondent is hereby ordered removed from the United States to Barbados on both charged grounds of removability.

Please see the next page for electronic

signature

JOHN B. REID
Immigration Judge

//s//

Immigration Judge JOHN B. REID

reidj on January 14, 2015 at 1:45 PM GMT