



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: MENDEZ-ACEVEDO, WILSON IVAN

A073-868-517

Date of this notice: 3/11/2011

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:
Holmes, David B.

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Falls Church, Virginia 22041

File: A073 868 517 - Los Angeles, CA

Date:

MAR 11 2011

In re: WILSON IVAN MENDEZ-ACEVEDO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Keli M. Reynolds, Esquire

ON BEHALF OF DHS: Jailuk Parrino
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: Reopening; termination of proceedings

The Board dismissed the respondent's appeal from the Immigration Judge's decision on March 31, 2010. On August 5, 2010, the respondent filed an untimely motion to reopen, alleging that his criminal conviction for assault to commit rape was vacated by a California criminal court. The Department of Homeland Security opposes the respondent's motion. We will reopen the proceedings sua sponte.

The respondent was removed from the United States on January 12, 2010, after a stay was denied by the Board on January 11, 2011.

It is our view that the provisions of 8 C.F.R. § 1003.2(d), which have the force and effect of law as to the Board,¹ preclude the respondent from making a motion subsequent to his removal from the United States, and we would deny the motion on that basis.

However, the United States Court of Appeals for the Ninth Circuit has held that 8 C.F.R. § 1003.2(d) cannot be applied to cause the withdrawal of a motion filed by an alien who

¹ This regulatory provision was promulgated by the Attorney General. See 62 Fed. Reg. 10311, 10331 (March 6, 1997); see also *Matter of Ponce de Leon*, 21 I&N Dec. 154, 158 (BIA 1996) (a regulation "promulgated by the Attorney General has the force and effect of law as to this Board and Immigration Judges").

has been forcibly removed while the motion is pending before the Board. *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010). Thus, we will further consider this motion.

The respondent's motion to reopen is untimely. We find an exceptional situation which warrants sua sponte reopening. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) (the Board's power to reopen or reconsider cases sua sponte is limited to exceptional situations and is not meant to cure filing defects or circumvent the regulations, where enforcing them might result in hardship).

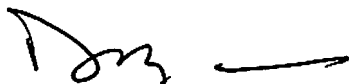
The pertinent facts and history of the case are as follows. The respondent was convicted in 1988 in a California criminal court for assault to commit rape (Exhs. 6, 10). The respondent was found inadmissible as an alien convicted of a crime involving moral turpitude. The respondent moved to vacate the judgment and withdraw his guilty plea based on the failure to advise him of the immigration consequences of his guilty plea following the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) [Motion Exh. D]. On May 25, 2010, the California criminal court granted the respondent's motion to vacate judgment. On July 9, 2010, the California criminal court granted the respondent's motion to dismiss (Motion Exh. C).

Vacation of the respondent's 1988 conviction is recognized for immigration purposes. *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (a conviction vacated pursuant to a State statute for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). The respondent filed the present motion to reopen on August 5, 2010, less than 30 days after the California criminal court granted his motion to dismiss. We find that the respondent shows due diligence in filing his motion to reopen within this time period. Because the respondent was charged with inadmissibility solely as an alien convicted of a crime involving moral turpitude, we will reopen sua sponte and will order the proceedings terminated.

Accordingly, the following orders will be entered.

ORDER: We reopen the proceedings sua sponte.

FURTHER ORDER: The proceedings in this case are terminated.



FOR THE BOARD