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Name: JAIMES, CARLOS

A 207-897-108

Date of this notice: 7/24/2020

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:
Grant, Edward R.
Mann, Ana
Mullane, Hugh G.

Userteam: Docket

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File: A207-897-108 – Adelanto, CA

Date: JUL 24 2020

In re: Carlos JAIMES a.k.a. Carlos Jaimes-Vivero

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa Danella Ramirez, Esquire

APPLICATION: Adjustment of status, cancellation of removal

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's January 15, 2020, decision pretermitting his applications for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), and cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). The appeal will be sustained and the record will be remanded.

We review findings of fact, for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, de novo. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The respondent conceded that he is removable by virtue of his unlawful presence in the United States (Exh. 1; Tr. at 2-3). *See* section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i). As the respondent's removability is undisputed, the only issue before us on appeal is whether the respondent is statutorily eligible for relief.

The Immigration Judge pretermitted the respondent's application for adjustment of status under section 245(i) of the Act, finding that his controlled substance convictions render him inadmissible under section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2). The Immigration Judge also pretermitted the respondent's application for cancellation of removal finding that the respondent cannot establish that he does not fall within certain grounds of inadmissibility or removability. *See* section 240A(b)(1)(C) of the Act. In denying these applications, the Immigration Judge determined that the respondent's controlled substance convictions, which were vacated pursuant to Cal. Penal Code §§ 1473.7 and 1016.5, remain convictions for immigration purposes, citing *Matter of Thomas & Thompson*, 27 I&N Dec. 674 (A.G. 2019).

On appeal, the respondent continues to argue that his controlled substance convictions were vacated for procedural or substantive defects in his underlying criminal proceedings (Respondent's Br. at 2). He further asserts that the Immigration Judge erred in relying on *Matter of Thomas & Thompson* to determine that the respondent's convictions were vacated solely to avoid immigration consequences and erroneously placed the burden on him to prove they were not vacated on this basis (Respondent's Br. at 4-15).

An applicant for relief from removal must demonstrate eligibility for the relief sought. Section 240(c)(4)(A) of the Act ; 8 U.S.C. § 1229a(c)(4)(A) of Act; *see also* 8 C.F.R. § 1240.8(d). "If the

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evidence indicates" that a mandatory bar to relief may apply, "the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. §§ 1208.13(c), 1208.16(d)(2); *see also Id.* § 1240.8(d) (describing burden of proof for relief applications generally). Thus, we agree with the Immigration Judge that it is the respondent's burden to establish that he is statutorily eligible for adjustment of status and cancellation of removal, including submitting evidence that his conviction is no longer valid for immigration purposes (IJ at 3). It is not the DHS's burden to prove that the conviction was vacated for immigration reasons for purposes of relief, only for removability purposes. *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).

However, we agree with the respondent that he has met this burden based on the evidence he submitted to the court, i.e. the moving papers supporting the motions to vacate as well as the court orders granting the motions and vacating the convictions (Exh. 2, tab E, Exh. 3).

Cal. Penal Code § 1473.7(2019) provides in relevant part:

> (a) A person no longer in criminal custody may file 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. A finding of legal invalidity may, but not need to, include a finding of ineffective assistance of counsel.
>
> (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.

While the state court's orders do not indicate the specific reason for the state court's action, a vacatur under Cal. Penal Code § 1473.7 is available only in cases of legal invalidity or actual innocence. *See, e.g.*, *People v. Perez*, 19 Cal. App. 5th 818, 826 (Ct. App. 2018). Unlike Cal. Penal Code § 1203.43, there is no rehabilitative or ameliorative component to § 1473. 7. Further, the legislative history for Cal. Penal Code § 1473.7, reflects that the purpose of this section was to fill a gap in California criminal procedure to allow defendants no longer in custody to challenge the legal validity of their criminal convictions, and specifically relies on the Supreme Court's decision in *Padilla v. Kentucky*, 599 U.S. 356 (2010), as the rationale for the amendment. 2015 CA A.B. 813 Committee Report at 7 (May 11, 2016).

Moreover, the Immigration Judge erred in his analysis when he said that because the California code allows vacatur when the alien defendant was not advised of the immigration consequences of a plea, this means the plea was vacated "for immigration purposes" (IJ at 3). The Immigration Judge's rationale is clearly incorrect under *Padilla v. Kentucky*, 559 U.S. at 356. *See also Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds by Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *see also Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018) (reaffirming the holding of *Matter of Pickering* and applying it to give it nationwide effect). Failure to advise or understand immigration consequences is a substantive and/or procedural defect that vitiates a conviction, not a vacatur to avoid immigration consequences.

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Additionally, the Immigration Judge's reliance on *Matter of Thomas & Thompson* is misplaced (IJ at 3). In that case, the Attorney General held that a sentence modification will remain valid for immigration purposes unless the modification is based on a procedural or substantive defect in the underlying criminal proceeding. The Attorney General overruled our decisions in *Matter of Cotas Vargas,* 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001); and *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016), and held that the test articulated in *Matter of Pickering* should apply to sentence modifications as it does to conviction vacaturs. Here, the respondent's sentence was not modified, rather the conviction itself was vacated based on a substantive or procedural defect in the underlying proceeding.

Accordingly, the state court vacated the respondent's controlled substance convictions as legally invalid under Cal. Penal Code § 1473.7; therefore, these convictions no longer remain valid for immigration purposes. *See Padilla v. Kentucky*, 559 U.S. at 356; *Matter of Marquez Conde*, 27 I&N Dec. at 251. Given that the respondent's convictions are no longer valid for immigration purposes, the respondent has met his burden of proving he is not inadmissible under section 212(a) of the Act for purposes of adjustment of status and the absence of a disqualifying conviction for cancellation of removal purposes. We will therefore remand the record for further consideration of the respondent's eligibility for adjustment of status, cancellation of removal, and any other relief that may now be available to him. The parties shall be permitted to update the record with evidence pertinent to the respondent's applications for relief. Finally, we express no opinion on whether the respondent qualifies for adjustment of status and cancellation of removal or warrants such relief as a matter of discretion.

Accordingly, the following orders are entered.

ORDER: The appeal is sustained.

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

FOR THE BOARD

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