U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: PACHECO-SANCHEZ, ARMANDO **A 205-462-394**

Date of this notice: 3/10/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: A205 462 394 – El Paso, TX

Date: MAR 10 2017

In re: ARMANDO PACHECO-SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lorena Navar Gutierrez, Esquire

ON BEHALF OF DHS: Adrian Paredes V.
Assistant Chief Counsel

APPLICATION: Adjustment of status

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 15, 2016, decision pretermitting his application for adjustment of status pursuant to section 245(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255(i). The Department of Homeland Security ("DHS") has filed an opposition to the appeal. The record will be remanded for further proceedings consistent with this decision.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Before the Immigration Judge, the respondent conceded that he is removable under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled (I.J. at 2; Tr. at 1-2). As relief from removal, the respondent sought adjustment of status pursuant to section 245(i) of the Act, based on an approved Immigrant Petition for Alien Relative (Form I-130) (Exh. 2).

The Immigration Judge, however, found that the respondent had a conviction for immigration purposes under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), in relation to his arrest for possession of a controlled substance, specifically cocaine, in violation of Cal. Pen. Code § 11350(A) ("§11350(A)") (I.J. at 2-3; Exhs. 2A, 2B). The Immigration Judge determined that this conviction rendered the respondent inadmissible for a criminal offense that could not be cured by a waiver, and as such, he was statutorily ineligible for adjustment of status (I.J. at 3; Exhs. 2A, 2B). *See* 212(a)(2)(A)(i)(II) of the Act (providing that an alien be deemed inadmissible if he has been convicted of a controlled substance violation); section 245(i)(2)(A) of the Act (requiring an applicant for adjustment of status to establish that he is admissible to the United States). On appeal, the respondent challenges the Immigration Judge's determination that he is statutorily ineligible for adjustment of status, arguing that he does not have a conviction for immigration purposes, and thus, he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act (Respondent's Brief at 4).

The record reflects that the respondent pled not guilty to the charge under §11350(A) (Exhs. 2A, 2B). The record also reflects that the respondent eventually received a diversion for the aforementioned offense, and was required to enter a drug diversion program under the supervision of the probation department, as well as pay a diversion administrative fee (Exhs. 2A, 2B). In September 1994, the Superior Court found that the respondent successfully completed the diversion program, and thus, his charge under § 11350(A) was dismissed pursuant to section 1000.3 of the California Penal Code (Exhs. 2A, 2B).

Section 101(a)(48)(A) of the Act defines the term "conviction" to mean a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been 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.

The respondent argues that the charge against him under §11350(A) did not result in a conviction under section 101(a)(48)(A) of the Act because he was granted diversion and successfully completed the diversion program at a time when the California diversion statutes did not require a guilty plea; the effect of his successful completion of the diversion program was to suspend his criminal proceedings (Respondent's Brief at 4). *See* section 101(a)(48)(A)(i) of the Act.

In its opposition brief, the DHS discusses the 1997 amendment to California's diversion statutes, which thereafter required that the offender offer a plea of guilty before participating in the program (DHS's Motion for Summary Affirmance at 2-3). Cal. Pen. Code §§ 1000.-1000.5 (1997). From this, the DHS postulates that prior to the 1997 amendment, the imposition of a mandatory drug diversion program necessarily required a California state court to enter a formal judgment and a finding of guilt against the respondent (DHS's Motion for Summary Affirmance at 3).

Upon review of the statutory language in question, however, as well as case law arising from the California appellate courts, we conclude that the record does not sufficiently establish that the respondent's charge under §11350(A) resulted in a conviction for immigration purposes. Prior to the 1997 amendment, the California diversion statutes did not expressly require that a finding of guilt or admission of guilt be made in order for the respondent to participate in the diversion program. *Cf.* Cal. Pen. Code §§ 1000.1(a)(3) (1997) (indicating that "the court may grant deferred entry of judgment with respect to any crime specified in subdivision (a) of Section 1000 that is charged, provided that the defendant pleads guilty to each such charge and waives time for the pronouncement of judgment . . .") *with* Cal. Pen. Code §§ 1000.1 (1994) (not

expressly requiring that the defendant plead guilty to any charges or that a finding of guilt be made as a precondition to a grant of diversion).[1]

Further, California precedent prior to 1997 held that the then-existing diversion statutes did not include any provision authorizing a trial court to impose additional conditions upon a defendant eligible for diversion; as such, a trial court's imposition of an admission of guilt by the defendant or the submission by the defendant to warrantless search and seizure was error. *Parra v. Mun. Court*, 83 Cal. App. 3d 690, 695 (Ct. App. 1978) ("No admission of guilt is expressed as a precondition of eligibility; nor is such a condition to be implied as a necessary prerequisite of a defendant's recognition of his or her behavioral misconduct. Such an interpretation 'free from restrictive conditions not actually written into the statute' is compelled under familiar principles of construction of penal statutes.") (citation omitted); *People v. Fleming*, 22 Cal. App. 4th 1566, 1570-72 (1994) (holding that a defendant's waiver of search and seizure protections as a condition of a grant of diversion in lieu of criminal prosecution for a drug offense was improper as such condition was not expressly authorized by statute).

We therefore conclude that there is insufficient evidence to establish that the Superior Court found the respondent guilty or that he pled guilty or nolo contendere when adjudication was withheld and costs, as well as the drug diversion program, were imposed. Thus, the respondent's offense is not a conviction for immigration purposes under section 101(a)(48)(A) of the Act, and he is not inadmissible on the basis of that offense under section 212(a)(2)(A)(i)(II) of the Act. *See* section 101(a)(48)(A)(i) of the Act.

Based on the foregoing, we conclude that a remand is appropriate so that the Immigration Judge may determine the respondent's eligibility for relief from removal. Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing decision.

FOR THE BOARD

[1] The exact language of Cal. Pen. Code §§ 1000.1(a)(3) (1994) read as follows: "If the district attorney determines that this chapter may be applicable to the defendant, he or she shall advise the defendant and his or her attorney in writing of that determination. This notification shall include the following . . . [a] clear statement that the court may decide in a hearing not to divert the defendant and that he or she may have to stand trial for the alleged offense."

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
EL PASO, TEXAS

File: A205-462-394 June 15, 2016

In the Matter of

ARMANDO PACHECO-SANCHEZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration Act - present in the United States without admission or parole.

APPLICATION: Adjustment of status.

ON BEHALF OF RESPONDENT: LORENA GUTIERREZ, Attorney
El Paso, Texas

ON BEHALF OF DHS: ADRIEN PRATIS, Assistant Chief Counsel
Homeland Security

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a married male native and citizen of Mexico. On September 11, 2012, the Department of Homeland Security issued a Notice to Appear (Exhibit 1) charging that the respondent would be removable from the United States under the provisions of Section 212(a)(6)(A) of the Act in that he has alien present in the United States without being admitted or paroled.

The respondent, through counsel, before a prior Court did admit to the four factual allegations and conceded the charge of removability. This Court was also satisfied that the respondent was removable as charged and so did find. Mexico is designated for the country of removal.

During the pendency of this case, there was documentation to initially demonstrate that the respondent would be eligible for adjustment of status. Toward that end, the case was continued several times culminating in the Individual hearing on today's date. Parties were aware previous to today's hearing that the respondent did have some criminal history that may or may not require a 601 waiver.

On today's date, the Court reviewed all documents being filed. They include Exhibit 2, the initial application, adjustment of status, supporting documents; Exhibit 2A, brief in support of eligibility for adjustment of status and documentation; and 2B, other supporting documents in support of the request for relief; Exhibit 3, was the Government's submission of evidence, to include a Form I-213 and some criminal matters.

The Court reviewed all the documents of record with both respondent's counsel and Government counsel. To that end, the following determinations were made. It did appear to this Court, which was moved by the Government, that the respondent's conviction records included, among other matters, a conviction for drugs in California before 1997. Apparently, after 1997 or thereabouts, the California statute and laws were changed as to how criminal convictions in that state would be considered as to basically Immigration consequences. Nonetheless, the conviction that the respondent suffered for drugs, which was determined to relate to cocaine based on the evidence of record, did result in pretrial diversion where certain punishment was imposed on the respondent.

The Court is satisfied, again based on the documents of record and legal arguments by both sides, that because the conviction occurred before 1997, in this case 1994 ultimately, that there was, in fact, a conviction for Immigration purposes that was never actually dismissed in all entirety to no longer make it a conviction. Since the Court finds that there is a conviction for drugs, to wit: cocaine, the Court cannot and will not find the respondent eligible for adjustment of status since that is not a wavable offense where a 601 waiver could be utilized. Since that conviction is a part of the record, no further testimony or consideration was made for the request of adjustment of status, that form of relief being hereby denied.

Turning to a potential alternative form of relief of voluntary departure, respondent's counsel indicated that based on discussions with her client they would not seek that limited form of relief that did not require an application since today's case was an Individual hearing and the case would not be continued for any other purposes. Respondent's counsel, which was confirmed by questioning of respondent, would not seek voluntary departure before this court. Therefore, that form of relief will not be considered by this court.

Based on the above, the following order is hereby entered.

ORDER

The respondent's application for adjustment of status is hereby denied, pretermitted.

Since no other form of relief is before this Court, the respondent shall be removed from the United States on the charge contained on the Notice to Appear.

Please see the next page for electronic signature

ROBERT S. HOUGH
Immigration Judge

//s//

Immigration Judge ROBERT S. HOUGH

houghr on August 19, 2016 at 9:40 PM GMT