



**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals  
Office of the Clerk*

5107 Leesburg Pike, Suite 2000  
Falls Church, Virginia 22041

**Lewis, Jessica  
Federal Immigration Counselors, AZ, PC  
141 E. Palm Lane  
Suite 112  
Phoenix, AZ 85004**

**DHS/ICE Office of Chief Counsel - EAZ  
Eloy Detention Ctr, 1705 E. Hanna Rd  
Eloy, AZ 85131**

**Name: M [REDACTED], S [REDACTED] A [REDACTED]**

**A [REDACTED] 071**

**Date of this notice: 12/6/2017**

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:  
Pauley, Roger  
Creppy, Michael J.  
Mullane, Hugh G.

Report to:  
User team: Docket

For more unpublished BIA decisions, visit  
[www.irac.net/unpublished/index](http://www.irac.net/unpublished/index)

*WB*

Falls Church, Virginia 22041

---

File: [REDACTED] 071 – Eloy, AZ

Date: DEC - 6 2017

In re: S [REDACTED] A [REDACTED] M [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jessica A. Lewis, Esquire

ON BEHALF OF DHS: Hoyt Hoyt  
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Jamaica, appeals from the Immigration Judge's decision dated June 27, 2017,<sup>1</sup> finding him removable as an aggravated felon under sections 101(a)(43)(U) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §§ 1101(a)(43)(U), 1227(a)(2)(A)(iii), and premitting his application for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The record will be remanded.

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

The Immigration Judge found without clear error that on March 20, 2015, the respondent was convicted of conspiracy under Maryland common law to possess marijuana in a sufficient quantity to indicate an intent to distribute (IJ at 3; Exhs. 1, 3). The respondent admitted that on June 21, 2016, he was convicted of solicitation to possess under 2 pounds of marijuana for sale under sections 13-1002 and 13-3405(A)(2) of the Arizona Revised Statutes (IJ at 3; Exh. 1A). According to the conviction documents, the respondent committed the Arizona offense on September 22, 2015, more than 7 years after his admission to the United States (IJ at 2; Exh. 3). The Immigration Judge relied only on the respondent's Maryland conviction as a basis for his decision, and only addressed the aggravated felony charge in his decision (IJ at 5).

However, the respondent contends on appeal that his Maryland conspiracy conviction does not constitute an aggravated felony under sections 101(a)(43)(U) and 237(a)(2)(A)(iii) of the Act, and that he would be eligible for cancellation of removal if found removable on other grounds. The Department of Homeland Security (the "DHS") argues that the result of the Immigration Judge's decision is correct for reasons other than those stated in his decision. The DHS contends that the respondent's convictions qualify as two crimes involving moral turpitude and that the respondent is ineligible for cancellation of removal because his accrual of continuous physical presence was

---

<sup>1</sup> The Immigration Judge's oral decision issued on June 27, 2017, incorporated his written decision ("IJ") also dated June 27, 2017, which provided additional analysis.

interrupted by the commission of the Maryland offense triggering a “reason to believe” the respondent was an illicit trafficker in a controlled substance.

We agree that the respondent’s Maryland offense does not qualify as a “U” aggravated felony, as charged, because conspiracy under Maryland common law does not require an overt act, which the United States Court of Appeals for the Ninth Circuit requires for an aggravated felony determination under section 101(a)(43)(U) of the Act. *See United States v. Garcia-Santana*, 774 F.3d 528, 543 (9th Cir. 2014) (declining to follow *Matter of Richardson*, 25 I&N Dec. 226 (BIA 2010)); *Townes v. State*, 314 Md. 71, 75 (1988). As a result, we reverse the Immigration Judge’s determination that the respondent is removable on the conspiracy-based aggravated felony charge. (IJ at 5; Exh. 1). Additionally, the Immigration Judge’s stop-time analysis based on the respondent’s Maryland offense as an aggravated felony is incorrect because commission of an aggravated felony does not stop the accrual of continuance residence (IJ at 5). *See Matter of Campos-Torres*, 22 I&N Dec. 1289, 1295 (BIA 2000) (en banc) (holding that offenses that are “not referred to in section 212(a)(2) of the Act [do] not ‘stop time’ under section 240A(d)(1)” of the Act).

Remand is appropriate for the Immigration Judge to consider the remaining removal charges in the first instance and, if the respondent is determined to be removable as charged, to adjudicate the respondent’s application for cancellation of removal.<sup>2</sup> To the extent that the respondent’s conspiracy offense may support a “reason to believe” that he is or has been an illicit trafficker in a controlled substance, additional factfinding would be necessary to determine when “appropriate immigration officials” became aware of the offense, so as to determine if the respondent’s period of continuous residence could have been interrupted by inadmissibility based on such a “reason to believe.”<sup>3</sup> *See Gomez-Granillo v. Holder*, 654 F.3d 826, 835-36 (9th Cir. 2011). Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the record of proceedings is remanded for further proceedings consistent with the foregoing opinion and entry of a new decision.

  
FOR THE BOARD

<sup>2</sup> Inchoate illicit trafficking offenses, even without an overt act, may still constitute crimes involving moral turpitude under section 237(a)(2)(A) of the Act. *See Matter of Gonzalez Romo*, 26 I&N Dec. 743, 748 (BIA 2016); *Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903-04 (9th Cir. 2007).

<sup>3</sup> In this respect, the Immigration Judge may also consider, if necessary, whether an offense that gives rise to an appropriate immigration official’s “reason to believe” under section 212(a)(2)(C)(i) qualifies as “an offense referred to in section 212(a)(2) that renders the alien inadmissible,” thereby stopping the accrual of continuous residence under section 240A(d)(1)(B) of the Act. *See Matter of Campos-Torres*, 22 I&N Dec. at 1295.

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
ELOY, ARIZONA

File: [REDACTED] 071

June 27, 2017

In the Matter of

S [REDACTED] A [REDACTED] M [REDACTED]  
RESPONDENT

)  
)  
)  
)

IN REMOVAL PROCEEDINGS

**CHARGES:** Section 237(a)(2)(B)(i) - at any time after admission conviction of violating any law or regulation of a state or the United States relating to a controlled substance as defined in the Controlled Substance Act of the United States other than a single offense involving possession for one's own use of 30 grams or less of marijuana;

Section 237(a)(2)(A)(iii) of the Act in that the respondent has at any time after admission been convicted of an aggravated felony as defined in Section 101(a)(43)(U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in Section 101(a)(43)(B) of the Act, an offense relating to illicit trafficking in a controlled substance as described in Section 102 of the Controlled Substances Act including a drug trafficking crime as defined in Section 924(c) of Title 18 United States Code; and

Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act - at any time after admission conviction of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

**APPLICATION:** Cancellation of Removal for Certain Permanent Residents pursuant to the provisions of Section 240A(a) of the Immigration and Nationality Act

ON BEHALF OF RESPONDENT: KATHRYN E. STAPLES, Esquire  
Law Offices of Matthew Green  
130 West Cushing Street  
Tucson, Arizona 85701

ON BEHALF OF DHS: HOYT HOYT, Assistant Chief Counsel  
United States Department of Homeland Security  
Phoenix District  
1705 East Hanna Road  
Eloy, Arizona 85131

**ORAL DECISION OF THE IMMIGRATION JUDGE**

This matter first came before the Court on the 7th of March 2016. The Department of Homeland Security filed with this Court a Notice to Appear. See Exhibit 1 herein. That document made the following factual allegations: 1) that the respondent is not a citizen or national of the United States of America, 2) that he is a native of Jamaica and a citizen of Jamaica, 3) that his status was adjusted to that of a conditional resident (CR6) on April 14, 2012, under Section 245 of the Act. Factual allegation four alleged that on the 29th of October 2014 the conditions were removed from respondent's permanent residency. Factual allegation five was that the respondent was on the 20th of March, 2015, convicted in the district court Prince George's county, Maryland, for conspiracy to possess with intent to distribute marijuana in violation of the common law of Maryland.

Based upon those factual allegations the Department charged that the respondent was removable pursuant to Section 237(a)(2)(B) of the Act, that any time after admission conviction of violating any law or regulation of the state or the United States relating to a controlled substance other than a single offense involving 30 grams or less of marijuana as well as removability under Section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined in Section 101(a)(43)(U) of the Act, a law relating to an attempt or conspiracy to commit an offense described in

Section 101(a)(43)(B) of the Act, an offense relating to illicit trafficking in controlled substances described in Section 102 of the Controlled Substances Act. That document was accepted by the Court on the 25th of April 2016. In the interim, the matter was administratively closed by this Court because the respondent was facing additional charges in Pima County, Tucson, Arizona.

The respondent was ultimately returned to the Department of Homeland Security's custody and on the 18th of May the respondent was back in court where he pled to a previously provided I-261, Exhibit 1A in this Record of Proceedings. That I-261 had one additional factual allegation. That is that the respondent was on the 21st of June 2016 convicted in the Arizona Superior Court, Pima County, for solicitation to possess marijuana for sale having a weight of less than two pounds, a class four felony in violation of Arizona revised statute Section 13-1002 at 133405A2 committed on September 22, 2015, for which the respondent was sentenced to one year incarceration.

The respondent with regard to the pleadings admitted factual allegations one through four on the original Notice to Appear, denied factual allegation five, denied the charge of removability under 237(a)(2)(B) as well as 237(a)(2)(A)(iii) of the Act. With regard to the 261 the respondent admitted the conviction alleged in factual allegation six but denied the 237(a)(2)(A)(ii) charge of removability. Respondent through counsel indicated that he would be seeking relief in the form of cancellation of removal. Exhibit 2 in these proceedings is respondent's written pleadings. As the Court has stated, respondent indicated that he would be seeking relief in the form of cancellation of removal under the provisions of Section 240A(a) of the Act.

The Department, when it heard this, indicated that they believed that the respondent was not eligible so the Court set a Briefing schedule requiring the

Department to submit a written motion to pretermitt. The Department did that. The Court allowed Ms. Staples to respond and those documents are also contained in this Record of Proceedings as exhibits as the eligibility for 240A(a) relief is the respondent's only form of relief, and the Court's decision on it is dispositive in this case. As the Court has said, the Court required of the Department of Homeland Security a written motion requesting pretermission. That is found as Exhibit 5. Ms. Staples responded to that. That is in Exhibit 6 and the Court provided to the parties today Exhibit 7, which is the Court's decision with regard to the motion to pretermitt so those are all exhibits in this matter. The Court in essence is agreeing with the Department. That is that the respondent is not statutorily eligible for the requested relief for the reasons set forth in the six page motion to pretermitt the decision.

The respondent has indicated that he will be appealing the Court's decision and he will have 30 days from the receipt of the Court's written decision to do so. However, as the Court has said for the decisions set forth in the motion to pretermitt, which essentially agreed with the Department that the respondent has been convicted of an aggravated felony and further the criminal offenses engaged the stop time rule which preclude the respondent from accruing the statutory required amount of time. It is set forth in its entirety as the Court has said in Exhibit 7. The respondent is not eligible for any other forms of relief nor is he seeking any forms of relief. Therefore, the following orders shall be appealed.

#### ORDER

IT IS HEREBY ORDERED that the charges against the respondent be and hereby are sustained.

IT IS FURTHER ORDERED that the respondent's application for cancellation of removal be and hereby is pretermitted and denied.

IT IS FINALLY ORDERED that the respondent be removed from the United States to Jamaica on the charge that the Court has sustained against him.

**Please see the next page for electronic**

**signature**

JOHN W. DAVIS  
Immigration Judge



//s//

Immigration Judge JOHN W. DAVIS

i:05.t|doj federation services rp-sts|john.davis@usdoj.gov on  
September 11, 2017 at 3:52 PM GMT

Immigrant & Refugee Appellate Center, LLC | www.irac.net