**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

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**Los Fresnos, TX 78566**

**Name: MOYA MONCADA, ALFREDO** **A 097-738-641**

**Date of this notice: 9/18/2019**

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:
Noferi, Mark
Greer, Anne J.
Wendtland, Linda S.

Userteam: Docket



mg

File: A097-738-641 – Los Fresnos, TX Date: SEP 10 2019

In re: Alfredo MOYA MONCADA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alejandro Martinez, Esquire

ON BEHALF OF DHS: Cassie Daniels
Assistant Chief Counsel

APPLICATION: Termination

The respondent appeals from an Immigration Judge's January 24, 2019, decision ordering him removed from the United States.[1] The Department of Homeland Security ("DHS") opposes the appeal. The record will be remanded.

The respondent is a native and citizen of Mexico and has been a lawful permanent resident ("LPR") of the United States since 2004. In January 2014, a grand jury in Hidalgo County, Texas, returned an indictment charging the respondent with two felonies: (1) possession of more than 50 pounds but less than 2,000 pounds of marijuana in violation of TEX. HEALTH & SAFETY CODE § 481.121(b)(5); and (2) possession of less than 1 gram of cocaine in violation of TEX. HEALTH & SAFETY CODE § 481.115(b). In August 2014, after the respondent pled not guilty to these charges, the district attorney's office recommended that he be allowed to participate in Hidalgo County's pre-trial drug court diversion program. TEX. GOVT. CODE §§ 123.001-123.009. The respondent agreed to participate in that program and successfully completed its requirements, with the result that his felony charges were dismissed on the district attorney's motion in November 2015.

Three years later, in November 2018, the respondent presented himself for DHS inspection at the Brownsville, Texas, port of entry and requested permission to reenter the United States as a returning LPR after having made a short trip to Mexico. The border inspector asked the respondent about his dismissed drug charges in Texas, and the respondent acknowledged he was arrested for possessing marijuana and cocaine, and that the conduct for which he was arrested involved possession of a small amount of cocaine, as well as placing a box that he knew contained marijuana into the back of a friend's truck (Exh. 2C).

[1] Though the Immigration Judge ordered the respondent removed on January 24, 2019, he did not prepare a separate written or oral decision at that time. Accordingly, on April 22, 2019, this Board returned the record to the immigration court for preparation of such a decision. In response to that order, the Immigration Judge issued a written opinion on April 26, 2019, and administratively returned the record to this Board for review.

Based on the respondent's border statements, the DHS arrested him and initiated these removal proceedings, charging him with inadmissibility under section 212(a)(2)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(C)(i) (2012), as an "alien who the ... Attorney General knows or has reason to believe ... is or has been an illicit trafficker in any controlled substance or ... a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled ... substance...." According to the Immigration Judge, the acts described in the respondent's border statement (Exh. 2C)—and also in the police report prepared at the time of his drug arrest (Exh. 2B)—establish his inadmissibility under section 212(a)(2)(C) of the Act because they amount to aiding and abetting illicit marijuana trafficking (IJ at 2-3). The respondent challenges that determination on appeal.

We conclude that the record must be remanded because the Immigration Judge's removability determination is not supported by sufficient findings of fact or legal analysis. *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). Section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), establishes a presumption against treating a returning LPR such as the respondent as an applicant for admission in removal proceedings. That presumption can be rebutted if the DHS establishes by clear and convincing evidence that one or more of six statutory exceptions applies. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). The Immigration Judge's decision does not address section 101(a)(13)(C), including whether any of the six statutory exceptions justifies the respondent's treatment as an inadmissible alien.

If the DHS argues on remand that the respondent is covered by section 101(a)(13)(C)(v) of the Act—which applies to an alien who "has committed an offense identified in section 212(a)(2)"—it will be necessary to reconcile that argument with *Vartelas v. Holder*, 566 U.S. 257 (2012), in which the Supreme Court determined that "[t]he entire § 1101(a)(13)(C)(v) phrase 'committed an offense identified in section 1182(a)(2),' on straightforward reading, appears to advert to a lawful permanent resident who has been *convicted* of an offense under § 1182(a)(2) (or *admits* to one)." *Id.* at 275 n.11 (emphasis added), *cited approvingly in Munoz v. Holder*, 755 F.3d 366, 371 (5th Cir. 2014). The DHS has not argued, and the Immigration Judge did not find, that the respondent's participation in Hidalgo County's pre-trial drug court diversion program qualified as a "conviction" for immigration purposes. Nor has the DHS argued that the respondent's border statements amounted to an "admission" under *Matter of K-*, 7 I&N Dec. 594, 596-98 (BIA 1957), and its attendant requirements. *See also Matter of J-*, 2 I&N Dec. 285, 287-88 (BIA 1945), *as modified by Matter of E-V-*, 5 I&N Dec. 194, 196 (BIA 1953).

Accordingly, the record will be remanded for the Immigration Judge to more fully explain the factual and legal bases for his conclusion that the respondent is inadmissible despite his LPR status and despite not having any criminal conviction. If either party objects to the Immigration Judge's decision on remand, the judge shall certify the matter back to this Board for our further review.[2]

[2] The respondent questions the Immigration Judge's competency and neutrality, and urges us to remand the matter to a different judge (Respondent's Br. at 1, 6, 17). We discern no grounds for such action. Absent evidence of pervasive judicial bias, which has not been shown here, a party's objections to a judge's rulings do not warrant recusal or disqualification. *Liteky v. United States*, 510 U.S. 540, 555–56 (1994); *Matter of Exame*, 18 I&N Dec. 303, 306 (BIA 1982).

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

FOR THE BOARD

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**PORT ISABEL IMMIGRATION COURT**
**LOS FRESNOS, TX**

File: A097-738-641 April 26, 2019

In the Matter of

| | | |
|---|---|---|
| **Alfredo MOYA MONCADA,** | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

APPLICATION: None

ON BEHALF OF THE APPLICANT: Alejandro Martinez, Esq.

ON BEHALF OF DHS: Cassie Daniels, Assistant Chief Counsel

## WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

## I. BACKGROUND

On January 24, 2019, for the reasons stated on the record that day (*see* Jan. 24, 2019 Tr. at 31-34, 37-38), this Court entered an Order that Respondent be removed from the United States to Mexico. Respondent appealed that Order, and by written Order dated April 22, 2019, the Board of Immigration Appeals ("the Board") concluded that "there is no oral or written decision." Therefore, the Board returned the record "to provide an oral or written decision" and "certification to the Board by the Immigration Judge thereafter."

## II. PROCEDURAL AND FACTUAL HISTORY

On December 17, 2018, Respondent, through counsel, admitted allegations 1, 2, 3, and 5 in the Notice to Appear (Ex. 1), but denied allegation 4 and the charge of removability. (Dec. 17, 2018 Tr. at 2.) Respondent "definitely object[ed]" to a continuance to determine the contested issues (*id.* at 7), so after reviewing Exhibits 2A-2D, which were submitted by the Department of Homeland Security that day, the Court sustained allegation 4 and the charge of removal. (*Id.* at 7-10.)

In particular, on November 25, 2013, McAllen, Texas police officers observed Respondent and a second individual ("Vega") exit an apartment with Vega carrying a large, brown cardboard

box. (*Id.* at 9.) Respondent then accepted the box from Vega and carried the box to a Trail Blazer and placed the box in the vehicle. (*Id.*) Respondent then drove away in a second car, and Vega drove the Trail Blazer following Respondent. (*Id.*) Subsequently, officers stopped Vega in the Trail Blazer, and after receiving consent to search the cardboard box, discovered that it contained several Tupperware containers with marijuana inside. (*Id.*) Simultaneously, Respondent was stopped and conceded that once arriving at the apartment and seeing the marijuana, he helped Vega package the marijuana in the cardboard box, which was going to be shipped. (*Id.*) In all, officers found nearly 69 pounds of marijuana. (*Id.*)[1]

Subsequently, on November 20, 2018, Respondent was interviewed by Customs and Border Protection officers about the November 25, 2013 incident. (Ex. 2C.)[2] Respondent admitted that he knowingly accepted the marijuana-laden box and placed it in his friend's truck. (*Id.* at 10.) Based on this evidence, the Court sustained allegation 4, finding that Respondent "was . . . at a minimum . . . aiding and abetting marijuana trafficking" on November 25, 2013. (*Id.* at 10.) The Court also found that there was thus sufficient evidence to conclude by clear and convincing evidence "that the Attorney General . . . has reason to believe that the respondent is or has been an illicit trafficker in any controlled substance," *see* INA § 212(a)(2)(C)(i), and sustained the charge of removability. (*Id.* at 11-12, 14; Jan. 24, 2019 Tr. at 34.)

Having sustained allegation 4 and the charge of removability, the Court then invited – nay, implored – Respondent to seek a continuance to consider what relief from removal he might seek. (Dec. 17, 2018 Tr. at 14, 15, 17.) Thus, the matter was continued to January 2019.

On January 14, 2019, a paralegal from Respondent's attorney's office appeared in Court and submitted an application for cancellation of removal for permanent residents ("42A Application"), and with input from Respondent's attorney's office, the matter was scheduled for an individual hearing on January 24, 2019. (Jan. 14, 2019 Tr. at 20-21.)

At the outset of the January 24 individual hearing, Respondent invoked his "right to remain silent" and, following the advice of counsel, refused to swear to the 42A Application and, thus, refused to proceed with the scheduled hearing. (Jan. 24, 2019 Tr. at 24-25, 31, 37.) Respondent also submitted motions for the Court to recuse itself, for a continuance, and to terminate proceedings, which the Court denied *seriatim*.

The Court denied the motion to continue because, after sustaining allegation 4 and the charge of removability on December 17, the Court urged a continuance on Respondent to consider seeking relief from removal. Four weeks later, the 42A Application was submitted, and at Respondent's request, the matter was scheduled for an individual hearing on January 24. On January 22, Respondent submitted numerous supporting documents in preparation for the hearing,

[1] It is not clear whether this quantity includes marijuana found in the apartment or was only recovered from the box. Either way, this is an immaterial issue.

[2] In the interim, on November 5, 2015, after completion of a Drug Court program, a two-count indictment resulting from the November 25, 2013 incident and charging Respondent with possessing more than 50 pounds, up to 2,000 pounds, of marijuana, and less than one gram of cocaine was dismissed. (*See* Ex. 2A.) That the charges, in particular the marijuana charge, were ultimately dismissed is of no moment. *See Castano v. INS*, 956 F.2d 236 (11th Cir. 1992); *Matter of Favela*, 16 I&N Dec. 753 (BIA 1979); *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977).

and while the submission was late, the Court informed Respondent that it would accept the late filing and proceed on January 24. (*Id.* at 32.) With no articulated rationale for a continuance, the Court denied the motion. (*Id.*)[3]

The Court denied the motion to recuse because, as explained, "I have no personal knowledge of any facts in dispute here." (*Id.* at 33.) Likewise, "I don't know the respondent . . . I have no personal bias towards him, or prejudice." (*Id.*) And with respect to Respondent's attorney, "I have no bias or prejudice against Mr. Martinez and would give . . . his arguments every consideration that I would give any other attorney." (*Id.*)

The Court also denied the motion to terminate proceedings based on the findings already made on December 17. (*Id.* at 33-34.)

Accordingly, because the allegations in the Notice to Appear had previously been conceded or sustained by clear and convincing evidence, and because Respondent refused to proceed on his 42A Application, and because Respondent sought no other relief from removal, the Court ordered Respondent removed to Mexico. (*Id.* at 38.)

## ORDERS

**IT IS ORDERED** that Respondent be removed to Mexico; and it is further

**ORDERED** that the Record of Proceedings be administratively returned to the Board of Immigration Appeals.

FRANK T. PIMENTEL
United States Immigration Judge

**CERTIFICATE OF SERVICE**
**THIS DOCUMENT WAS SERVED BY:**
**(M) MAIL-(P) PERSONAL SERVICE**
**TO:( ) ALIEN (P) c/o CUSTODIAL OFFICER**
**( ) ALIEN'S ATTY REP ( ) DHS**
**DATE: 5/1/19 BY: COURT STAFF**
**Attachments: ( )EOIR-33 ( ) EOIR-28 ( )**
**( ) Legal Services List ( ) Other**

[3] Respondent also notified the Court that he had purported to file an "interlocutory appeal." This "interlocutory appeal" afforded neither Respondent nor the Court a basis on which to continue proceedings.