U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MICHAUD, REGINE ANGELA

A 037-986-431

Date of this notice: 11/21/2019

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:
Guendelsberger, John

Humadyl
Userteam: Docket

File: A037-986-431 – Charlotte, NC

Date: **NOV 2 1 2019**

In re: Regine Angela MICHAUD

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Daniel Christmann, Esquire

ON BEHALF OF DHS: Susan Lecker
Assistant Chief Counsel

APPLICATION: Reconsideration

On September 23, 2019, this Board granted the respondent's motion to reopen and terminate proceedings. The Department of Homeland Security has filed a motion to reconsider. The motion will be denied.

A motion to reconsider must identify an error of fact or law in the Board's prior decision or argue a relevant change in the law. *See* section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.2(b); *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006) *Matter of Cerna*, 20 I&N Dec. 399, 402 (BIA 1991) (noting that the very nature of a motion to reconsider is that the original decision was defective in some regard).

As we explained in our last decision, the respondent is a lawful permanent resident of the United States who was charged as seeking admission to the United States, notwithstanding her lawful permanent resident status, under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). This is because section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v), states that returning lawful permanent residents who have "committed" an offense identified in section 212(a)(2) of the Act, 8 U.S.C. § 1182(a)(2), may be regarded as applicants seeking admission unless they have been granted relief under section 212(h)of the Act, 8 U.S.C. § 1181(h), or section 240A(a) of the Act, 8 U.S.C. § 1229b(a).

The respondent was determined to have committed an offense described in section 212(a)(2) of the Act because of her 2007 conviction for violating South Carolina Code Section 44-53-375(B)(1) (possession, manufacture, and trafficking of methamphetamine and cocaine base and other controlled substances). Based on the same criminal conviction, the respondent was determined to be inadmissible.

Our last decision terminated proceedings based on the respondent's evidence that her criminal conviction had been vacated and that it was vacated based on a constitutional infirmity. The DHS argued in its opposition that the conviction was still a conviction for immigration purposes and further argued that reopening should be denied in discretion. Neither of these arguments had merit.

The DHS alternatively alleged that a remand was appropriate because the DHS intended to proceed with an additional charge that the respondent is inadmissible pursuant to section 212(a)(2)(C)(i) of the Act, which provides, in relevant part, that an alien is inadmissible if he is an alien who the consular officer or the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance. The DHS did not state in its opposition that it intended to charge the respondent as an alien seeking admission to the United States based on allegations that she committed the "offense" underlying the vacated conviction. Nor did the DHS explain the basis for such a "seeking admission" charge. The DHS instead included a Form I-261 that contained allegations of the conviction but not of the vacatur.

We explained in our last decision that, even assuming the DHS could establish that the respondent is described in section 212(a)(2)(C)(i) of the Act, being a person described in section 212(a)(2)(C)(i) is not "an offense" within the meaning of section 101(a)(13)(C)(v). Without a basis for charging the lawful permanent resident respondent as an applicant seeking admission to the United States under section 101(a)(13)(C)(v) of the Act (which requires evidence of an "offense"), a charge of inadmissibility under section 212(a)(2)(C)(i) of the Act ("reason to believe") would have no relevance.

The DHS now argues that the respondent is appropriately charged as an applicant seeking admission based on the "offense" underlying her vacated criminal conviction. The DHS also now argues for the first time that it would rely on the prior conviction records, notwithstanding the vacatur of the conviction, to support the charge that the respondent actually committed the relevant offense, even though she does not stand convicted of the offense. No such argument was advanced previously. The DHS did not set out any theory in its opposition under which a remand was appropriate. It was for this reason that we terminated proceedings. Contrary to the arguments of the DHS in its motion, the Board did not engage in impermissible fact-finding.[1]

Motions to reconsider based on a legal argument that could have been raised earlier in the proceeding but was not will be denied. *Matter of O-S-G-*, 56 I&N Dec. at 58. Accordingly, the motion to reconsider will be denied.

[1] The Board's last decision observed that the DHS would have to prove in reopened proceedings, by clear and convincing evidence that the respondent committed an offense identified in section 212(a)(2) of the Act so as to render her chargeable as an alien seeking admission under section 101(a)(13)(C)(v) of the Act, despite her lawful permanent resident status, but did not make any findings as to the likelihood of success using the legal theory now advanced, since the DHS did not set out that theory in its opposition.

ORDER: The motion to reconsider is denied.

FOR THE BOARD