U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted] A[redacted], C[redacted]

A [redacted]-329

Date of this notice: 2/23/2018

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
Snow, Thomas G
Kelly, Edward F.

Userteam: Docket

File: [redacted] 329 – Dallas, TX

Date: FEB 23 2018

In re: C[redacted] R[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sanjay S. Mathur, Esquire

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

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's September 12, 2017, decision pretermitting his application for cancellation of removal for nonpermanent residents under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The respondent's appeal will be sustained, and the record will be remanded.

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

In pretermitting the respondent's application for cancellation of removal, the Immigration Judge determined that the respondent was statutorily ineligible for such relief as he had been convicted of two or more offenses, for which the aggregate sentences to confinement were 5 years or more (IJ at 2). *See* section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B). In making such determination, the Immigration Judge relied, in part, on the respondent's 2007 conviction for the offense of driving under the influence of liquor, third degree felony, for which he received a term of imprisonment of 10 years, despite the conviction having been vacated by the state court in August 2017, on constitutional grounds (IJ at 2; Exh. 3).

We agree with the respondent's argument on appeal that his 2007 conviction no longer constitutes a "conviction" within the meaning of section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). While the Fifth Circuit determined in *Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002) that a conviction falls within the meaning of section 101(a)(48)(A) of the Act even if it is subsequently vacated on the merits, the Fifth Circuit later determined that it would not apply that decision. *Gaona-Romero v. Gonzales,* 497 F.3d 694 (5th Cir. 2007). Accordingly, we conclude that the respondent's vacated conviction does not constitute a conviction within the meaning of section 101(a)(48)(A) of the Act. Consequently, we will sustain the respondent's appeal, vacate the Immigration Judge's September 12, 2017, decision, and remand these proceedings to the Immigration Judge for further consideration of the respondent's eligibility for cancellation of removal.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Immigration Judge's September 12, 2017, decision is vacated, and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

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

IN THE MATTER OF:	)	IN REMOVAL PROCEEDINGS
	)	(DETAINED)
R[redacted], C[redacted]	)	
	)	A [redacted]329
RESPONDENT	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA or Act), as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: INA § 240A(b)(1) Cancellation of Removal for Certain Non-Permanent Residents

ON BEHALF OF RESPONDENT:
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ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
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WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent is a forty-four-year-old male native and citizen of Mexico. Ex. 1. When he entered the U.S., he was not admitted or paroled after inspection by an immigration officer. *Id.* On June 30, 2017, the Department of Homeland Security (DHS or the Government) served Respondent with a Notice to Appear (NTA), charging him with removability under INA § 212(a)(6)(A)(i). *Id.* Respondent requested relief in the form of a cancellation of removal for certain non-permanent residents (non-LPR cancellation of removal). The Court will now pretermit and deny Respondent's application for non-LPR cancellation of removal as set forth below.

II. APPLICABLE LAW & ANALYSIS

The Attorney General may cancel the removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the U.S. if the alien—

(A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;
(B) has been a person of good moral character during such period;
(C) has not been convicted of an offense under Section 212(a)(2), 237(a)(2), or 237(a)(3) . . . ; and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

INA § 240A(b)(1). If an alien has been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3), the court may pretermit the application. *See generally Matter of Velasquez*, 25 I&N Dec. 278 (BIA 2010); 8 C.F.R. § 1240.21(c).

The alien bears the burden of proof on all applications for relief. 8 C.F.R. § 1240.8(d). If the evidence indicates that one or more grounds for mandatory denial may apply, the alien bears the burden of proving by a preponderance of the evidence that such grounds to do not apply. *Id.* In particular, INA § 212(a)(2)(B) states that

> [a]ny alien convicted of 2 or more offenses . . . regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

Under this provision, the actual time the alien spent in confinement and suspensions of the sentence are irrelevant. *See Fonseca-Leite v. INS*, 961 F.2d 60, 62 (5th Cir. 1992).

Here, Respondent has several convictions. He was first convicted of "Driving Under Influence Liquor" on October 16, 1997, and sentenced to 120 days. Ex. 2 at 2. He was next convicted for violating his probation on July 6, 2001, and sentenced to 120 days. *Id.* He was then convicted of "Driving under Influence Liquor" a second time on November 13, 2002, and sentenced to 160 days. *Id.* Finally, he was convicted of "Driving under Influence Liquor" a third time on January 2, 2007, and sentenced to 10 years. *Id.* In the aggregate, Respondent's sentences of confinement add up to over 11 years. *See id.* Consequently, Respondent is inadmissible under § 212(a)(2)(B) as he has been convicted of two or more offenses for which the aggregate sentences to conferment were five years or more.

Respondent argues that he is not inadmissible under § 212(a)(2)(B) because on August 16, 2017, the Dallas County trial court that sentenced him to 10 years for driving under the influence granted his motion for new trial, motion to withdraw plea, and motion in arrest of judgment. Thus, Respondent claims that he has been has not been sentenced to 10 years confinement and his last conviction in January 2007 is not a conviction for immigration purposes.

The Fifth Circuit has held that "a vacated conviction, federal or state, remains valid for purposes of the immigration laws." *Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002). The Court acknowledges that the Government follows *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), which states a vacated conviction is not a conviction for immigration purposes if it was vacated for a procedural or substantive defect in the underlying criminal proceeding and not for reasons solely related to post-conviction events such as rehabilitation or immigration hardship. *Id.* at 624. However, this Court is bound by Fifth Circuit law, even when there is a conflict between case law issued by the Board of Immigration Appeals (Board) and the Fifth Circuit. *See Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989). Under *Renteria*, Respondent's January 2007 conviction and sentence are still valid for immigration purposes, rending him inadmissible under § 212(a)(2)(B) and, thus, ineligible for non-LPR cancellation of removal.

The Court also notes that this case is distinguishable from *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005). In *Cota-Vargas*, the Board held that full faith and credit should be given by the Immigration Court to a trial court's decision to modify or reduce an alien's criminal sentence nunc pro tunc. *Cota-Vargas* dealt specifically with a sentence modification or reduction. Here, however, it is not clear from the face of the documents that Respondent produced that his sentence has been modified or reduced nunc pro tunc. Rather the documents merely show that the Dallas County trial court has agree to arrest Respondent's judgment, allow Respondent to withdraw his plea, and pursue a new trial. This is not the same as a nunc pro tunc order modifying or reducing an alien's sentence. *See Boar v.* Holder, 475 Fed. App's 61 (6th Cir. 2012) (recognizing the vacatur of a conviction is different from the modification or reduction of a sentence). Moreover, in *Renteria,* the Fifth Circuit treated a "conviction" as encompassing the sentence, applying *Cota-Vargas* then would render *Renteria* moot. *See generally Renteria-Gonzalez*, 322 F.3d at 804. In sum, even in light of *Cota-Vargas*, Respondent's conviction is still a conviction under *Renteria* for immigration purposes. Consequently, Respondent's 10 year sentence stands, and he is inadmissible under § 212(a)(2)(B).

Accordingly, the Court will pretermit and deny Respondent's application for non-LPR cancellation of removal. *See* 8 C.F.R. § 1240.21(c)(1). The following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's Application for Cancellation of Removal for Certain Nonpermanent Residents, INA § 240A(b)(1) is **PRETERMITTED** and **DENIED**.

IT IS FURTHER ORDERED that the Respondent be removed from the United States to Mexico on the charge on the Notice to Appear.

Date: 12th day of September, 2017
Dallas, Texas

Deitrich H. Sims
United States Immigration Judge