**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*

**Allison Lukanich**
**201 S. Brightleaf Blvd., Ste 4**
**Smithfield, NC 27577**

**DHS/ICE Office of Chief Counsel - SDC**
**146 CCA Road**
**Lumpkin, GA 31815**

**Name: SANCHEZ-VAZQUEZ, BRYAN** **A 205-213-774**

**Date of this notice: 8/30/2013**

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:
Mullane, Hugh G.

SchwarzA
Userteam: Docket

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**Date of this notice: 8/30/2013**

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Mullane, Hugh G.

schwarzA
Userteam: Docket

File: A205 213 774 – Lumpkin, GA

Date: AUG 30 2013

In re: BRYAN SANCHEZ-VAZQUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Allison Lukanich, Esquire

ON BEHALF OF DHS: Diane Dodd
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

APPLICATION: Voluntary departure

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's March 29, 2013, decision granting the respondent's application for voluntary departure. Section 240B(a)(1) of the Immigration and Nationality Act, 8 U.S.C. §1229c(a)(1). The respondent, a native and citizen of Mexico, opposes the appeal.[1] The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

We affirm the Immigration Judge's grant of voluntary departure under safeguards to the respondent. We disagree with the DHS that the Immigration Judge impermissibly shifted the burden of proving that the respondent's conviction for maintaining a place for controlled substances in violation of section 90-108(a)(7) of the North Carolina General Statutes was for an aggravated felony. There is no dispute that it is the respondent's burden to establish eligibility for the relief that he seeks and thus to show that he was not convicted of an aggravated felony (Respondent's Reply Brief at 4-5). *See* 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.26(b)(1)(i)(E).

[1] The respondent contends that the DHS did not properly serve him its appeal brief and consequently requests summary dismissal of the DHS's appeal. We conclude that summary dismissal is not warranted as a result of this procedural irregularity in this instance but grant the respondent's request to accept his late reply brief.

We affirm the Immigration Judge's conclusion that the respondent met his burden in this case. The record of conviction reflects that the respondent was convicted of a misdemeanor (Exh. 2). The DHS asserts that the respondent's offense is a drug trafficking aggravated felony because it is equivalent to a felony under the Federal Controlled Substances Act, specifically 21 U.S.C. § 856(a). *See Lopez v. Gonzales*, 549 U.S. 47 (2006); *see also* section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

Presuming that the conviction rested upon nothing more than the least of the acts criminalized, we conclude that the minimum conduct necessary to sustain a conviction under N.C. Gen. Stat. § 90-108(a)(7) does not satisfy the elements of the federal statute. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684 (2013). To obtain a conviction under the respondent's statute of conviction, the State must prove a defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance. *State v. Fuller*, 196 N.C.App. 412, 424, 674 S.E. 2d 824, 832 (2009). Thus knowingly, but not intentionally, keeping a place being used by another person, but not oneself, for merely "keeping" a controlled substance would meet the requirements of N.C. Gen. Stat. § 90-108(a)(7). However, this conduct falls short of the conduct that would sustain a conviction under section 856(a)(1) of Title 21, which requires that the individual personally intend to engage in prohibited drug manufacturing, distribution, or usage but does not prohibit mere keeping of a controlled substance and does not reach the conduct of others. Similarly, the minimum conduct under N.C. Gen. Stat. § 90-108(a)(7) falls short of that required to sustain a conviction under section 856(a)(2) of Title 21, which requires a "knowing[] and intentional[]" mens rea. Accordingly, violation of the respondent's statute of conviction is not categorically an drug trafficking aggravated felony offense. *See Moncrieffe v. Holder*, *supra*, at 1685 n.4 (providing that the analysis required to determine what an alien was convicted of is the same in both the removability and relief contexts).

The record does not conclusively establish which of the offenses encompassed by N.C. Gen. Stat. § 90-108(a)(7) is the basis for the respondent's conviction, and thus under the modified categorical approach, it does not establish that the respondent's conviction was for an aggravated felony. *See Descamps v. U.S.*, 133 S.Ct. 2276 (2013) (providing that the modified categorical approach is appropriate when a statute of conviction is divisible). However, because the record of conviction reflects that the respondent's conviction was for a misdemeanor, he has established that his offense is not equivalent to 21 U.S.C. § 856(a)(2), which includes the mens rea of "knowingly and intentionally." *See* N.C. Gen. Stat. § 90-108(b) (providing that violation of this section is a Class I misdemeanor, except that a violation committed intentionally is a Class I felony). Moreover, the respondent presented a complete record of conviction, and the record does not support the conclusion that other judicially cognizable documents exist that would shed additional light on the respondent's conviction. We conclude that the respondent has met his burden by showing by a preponderance of the evidence that he was not convicted of an aggravated felony and therefore that he is not precluded from otherwise establishing eligibility for voluntary departure.

The DHS does not challenge the Immigration Judge's favorable exercise of discretion in this case. Accordingly, the DHS's appeal will be dismissed and voluntary departure will be reinstated.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the DHS. *See* section 240B(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(a); *see also* 8 C.F.R. §§ 1240.26(b), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LUMPKIN, GEORGIA

File: A205-213-774 March 29, 2013

In the Matter of

| | | |
|---|---|---|
| BRYAN SANCHEZ-VAZQUEZ | ) | IN REMOVAL PROCEEDINGS |
| RESPONDENT | ) | |

CHARGES: Section 212(a)(6)(A)(i) - present without being admitted or paroled.

APPLICATIONS: Pre-conclusion voluntary departure.

ON BEHALF OF RESPONDENT: ALLISON LUKINICH

ON BEHALF OF DHS: DIANE DODD

ORAL DECISION OF THE IMMIGRATION JUDGE

EXHIBITS

Exhibit 1, Notice to Appear; Exhibit 2, record of respondent's conviction; Exhibit 3, Form I-213; Exhibit 4, respondent's memorandum of law in support of his request for voluntary departure; Exhibit 5, respondent's prehearing brief; Exhibit 6, statement from Detective Mao.

WITNESS

Respondent:

In arriving of my finding of facts and conclusions of law, I have considered all the

documentary and testimonial evidence in this case. My failure to comment of a specific exhibit or particular testimony does not mean that I failed to consider it.

CREDIBILITY

Based upon the totality of the circumstances, I find respondent to be credible.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Exhibit 1 was served on respondent on October 5, 2012. On December 27, 2012, in accordance with the respondent's pleas, the allegations in Exhibit 1 were sustained and respondent was found by clear and convincing evidence to be removable as charged in Exhibit 1. Mexico was designated as the country of removal. Respondent is not an arriving alien.

Respondent's request for voluntary departure is timely. Respondent has made no additional requests for relief. Respondent concedes removability and waived appeal of all issues.

Respondent is not deportable under Section 237(a)(2)(A)(iii) as an aggravated felon or under Section 237(a)(4) for security or related grounds. Although the Department of Homeland Security argues that respondent is an aggravated felon, I am unable to conclude that respondent has been convicted of any offense related to trafficking in a controlled substance.

I find that respondent does merit a favorable exercise of my discretion in granting voluntary departure.

Respondent has a criminal history which demonstrates a troubled childhood. Respondent is now 19 years of age. Respondent admits that he has two convictions involving drugs, one for possessing marijuana and one for possessing cocaine. Indeed, respondent admits that he enjoys smoking marijuana. Exhibit 2 shows that respondent's arrest for possessing cocaine was disposed of by his conviction for

maintaining a vehicle for purposes of a controlled substance. Respondent explained that he was found possessing cocaine while traveling as a passenger in a car occupied and driven by others.

Respondent was brought to the United States in 1993 when he was only two months old. The United States is the only home that he has ever known. Respondent has two aunts who are lawful permanent residents, several U.S. citizen cousins and a 15-year-old U.S. citizen brother.

Since the respondent has turned 18, he admits that he has been arrested twice. Respondent has been convicted since he turned 18 for possession of an alcoholic beverage, consuming alcoholic beverages and driving without a license. He has also been convicted as shown in Exhibit 2.

Notwithstanding respondent's criminal history, I conclude that as a matter of discretion, respondent still warrants a voluntary departure in this case. I am mindful that much of respondent's criminal encounters occurred while he was a juvenile and not as an adult. I am also mindful of the fact that essentially respondent's criminal matters are relatively minor in nature.

Accordingly, I am going to enter the following order:

ORDER

IT IS HEREBY ORDERED respondent's request for voluntary departure is granted. A written order reflecting the above decision will be provided separately and made part of the record.

***Please see the next page for electronic signature***

DAN TRIMBLE
Immigration Judge

//s//

Immigration Judge DAN TRIMBLE

trimbled on May 2, 2013 at 11:28 AM GMT