U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Lumpkin, GA 31815

Name: MORRIS, WAYNE LINTON

A 074-303-761

Date of this notice: 7/23/2015

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
Mullane, Hugh G.
Pauley, Roger

Userteam: Docket

File: A074 303 761 – Lumpkin, GA

Date: JUL 23 2015

In re: WAYNE LINTON MORRIS

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Rebecca Rojas, Esquire

ON BEHALF OF DHS: Tracy Short
Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination

The respondent, a native and citizen of Jamaica and lawful permanent resident of the United States, appeals from the Immigration Judge's decision dated August 28, 2014, finding him removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. 1227(a)(2)(B)(i), based on a conviction for possession with intent to use drug paraphernalia under section 90-113.22 of the North Carolina General Statutes (2008), and ordering him removed from the United States.[1] Oral argument was presented in this case on March 26, 2015, regarding the issue of res judicata.[2]

[1] The respondent was also convicted for possession of up to one-half ounce of marijuana under section 90-95(d)(4) of the North Carolina Revised Statutes (1996), which would not qualify as a controlled substance violation, standing alone (I.J. at 3, 5; Exh. 3). *See* section 237(a)(2)(B)(i) of the Act ("other than a single offense involving possession for one's own use of thirty grams or less of marijuana").

[2] On appeal, the respondent initially contended that the Immigration Judge incorrectly concluded that the Department of Homeland Security ("DHS") is not precluded by res judicata (also known as claim preclusion) from pursuing his removal as charged in these proceedings because the DHS could have so charged him in prior proceedings. The prior proceedings, based on a charge under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii) (convicted of two or more crimes involving moral turpitude), were terminated by the Immigration Judge on February 4, 2014, and the DHS's appeal was dismissed by this Board on June 17, 2014 (I.J. at 2; Exh. 5, tab C). As a prudential matter, we decline to reach the issue of res judicata.

After we heard oral argument in this case, the United States Supreme Court issued its decision in *Mellouli v. Lynch*, 135 S.Ct. 1980 (June 1, 2015), holding that a drug paraphernalia conviction must relate to a controlled substance as defined in section 102 of the Controlled Substances Act ("CSA"), 21 U.S.C. § 802, to qualify as a controlled substance violation under section 237(a)(2)(B)(i) of the Act.

The respondent moves for termination based on *Mellouli*, *supra*, arguing that a controlled substance is not identified in the record of conviction. The DHS initially opposed termination and requested remand to provide it an opportunity to demonstrate either that the North Carolina drug schedules include only federally-controlled substances as defined in the CSA, or that the conviction record identifies a federally-controlled substance. However, the DHS has withdrawn its opposition to the respondent's motion to terminate.[3]

Based on the agreement of the respondent and the DHS that termination is appropriate under the circumstances of this case, we will grant the respondent's motion to terminate these proceedings. *See Matter of Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) ("We believe the parties have an important role to play in these administrative proceedings, and that their agreement on an issue or proper course of action should, in most instances, be determinative.").

Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's decision dated August 28, 2014, is vacated.

FURTHER ORDER: These removal proceedings are terminated.

FOR THE BOARD

[3] The DHS requests that termination be without prejudice, but it has not identified a specific justification under the regulations to support that request. *See* 8 C.F.R. §§ 239.2(a), 1239.2(c).

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

File: A074-303-761 August 28, 2014

In the Matter of

WAYNE LINTON MORRIS	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE:

APPLICATIONS: None. Respondent's counsel wishes to accept the Oerder of Rremoval to Jamaica and reserve her client's right to appeal. (The Court designated Jamaica as the country of removal following respondent's counsel's declining to designate a country of removal. Respondent's counsel has advised the Court that her client does not have a fear of being tortured or persecuted in Jamaica, and that he is seeking no relief before the Court.)

ON BEHALF OF RESPONDENT: REBECCA ROJAS
Kuck Immigration Partners, LLC.
365 Northridge Road, Suite 300
Atlanta, GA 30350

ON BEHALF OF DHS: ANTHONY M. CACAVIO, Assistant Chief Counsel
146 CCA Road
Lumpkin, GA 31815

ORAL DECISION OF THE IMMIGRATION JUDGE

Today is August 28, 2014, and the question before the Court today is whether

the Department of Homeland Security's, which the Court will refer to as the Department or DHS, new charge of removability under INA Section 237(a)(2)(B)(i) is barred by res judicata following termination of the prior removal proceedings.

This Court finds that the new charge of removability is not barred and, accordingly, this Court finds that the respondent is removable as charged by clear and convincing evidence. The Court sustains Allegations 3, 4 and 5, and the charge under 237(a)(2)(B)(i). This Court finds that the respondent has not shown that the new charge of removability stems from the same nucleus of operative facts prior, but the Department's new charge of removability is not barred by res judicata.

EXHIBITS

Exhibit 1, Notice to Appear.

Exhibit 2, respondent's criminal records, including warrant for arrest and judgment.

Exhibit 3, printout from the Clerk of the Superior Court, Orange County.

Exhibit 4, Department of Homeland Security's memorandum of law in opposition to respondent's motion to terminate.

Exhibit 5, respondent's motion to terminate proceedings with memorandum in support.

- Tab A, Notice to Appear.
- Tab B, Form I-213, Record of Deportable/Inadmissible Alien.
- Tab C, Board's decision dated June 17, 2014.
- Tab D, Notice to Appear of June 27, 2014.
- Tab E, bond order of this Court dated May 13, 2014.

PROCEDURAL HISTORY

On June 27, 2014, the Department of Homeland Security initiated removal

proceedings against respondent through its issuance of a Notice to Appear. See Exhibit 1. The Department alleged the following: (1) the respondent is not a citizen or a national of the United States; (2) respondent is a native and citizen of Jamaica; (3) respondent's status was adjusted to that of lawful permanent resident on or about September 18, 1997, under Section 245 of the Immigration and Nationality Act; (4) on August 20, 1996, respondent was convicted of possession of marijuana up to half ounce, in violation of Section 90-95(D)(4) of the North Carolina General Statutes Annotated, in Orange County, North Carolina; (5) on September 24, 2008, respondent was convicted of possession of drug paraphernalia in violation of North Carolina General Statute Section 90-113.22, in Durham County, North Carolina. See Exhibit 1.

The Department charged respondent with removability under INA Section 237(a)(2)(B)(i) in that at any time after admission, respondent was convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own used of 30 grams or less of marijuana.

Respondent allegesations that the charge of removability and, in turn, the instant removal proceedings, are barred by the doctrine of res judicata. See motion to terminate proceedings with memorandum of support, Exhibit 5. According to respondent, the prior proceedings were terminated and the instant charge of removability was not brought in those proceedings. Thus, under the doctrine of res judicata, the Department cannot now institute proceedings with a charge that could have been brought in the prior proceedings.

For the reasons to follow, the charge of removability under INA Section 237(a)(2)(B)(i) is not barred by res judicata.

STATEMENT OF LAW

Generally speaking, the doctrine of res judicata bars the filing of claim which were raised or could have been raised in an earlier proceeding. See Maldonado v. U.S. Attorney General, 664 F.3d 1369, 1375 (11th Cir. 2011) (citing Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999)). However, according to the Eleventh Circuit, res judicata applies more flexibly in the administrative context than it does when a second court of competent jurisdiction is reviewing the decision of a first court. See Maldonado v. U.S. Attorney General, 664 F.3d at 1377-78 (citing AM. Heritage Life Ins. Co. v. Heritage Life Insurance Company, 494 F.2d 3, 10 (5th Cir. 1974).

The party asserting res judicata bears the burden of proving the following elements: (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) both cases involved the same parties; and (4) both cases involved the same causes of action. See Dormescar v. U.S. Attorney General, 690 F.3d 1258, 1268 (11th Cir. 2012) (citing In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001)).

APPLICATION TO FACTS

As conceded by the Department, respondent has shown the first three elements. See Exhibit 4. However, respondent's res judicata claim fails at the fourth element. See Dormescar v. U.S. Attorney General, 690 F.3d at 1268. More specifically, respondent cannot show that both cases involve the same causes of action.

According to the Eleventh Circuit, two cases are generally considered to involve the same cause of action if the latter case "arises out of the same nucleus of operative fact, or is based upon the same factual predicate," as the former one. See Maldonado

v. U.S. Attorney General, 664 F.3d at 1375-76 (citing Ragsdale v. Rubbermaid, Inc., 193 F.3d at 1239).

Here, the Court finds that the instant NTA and charges of removability do not arise out of the same nucleus of operative fact, or stem from the same factual predicate as the prior. The prior NTA involved a charge of removability under INA Section 237(a)(2)(A)(ii), which stemmed from a 2006 conviction for communicating threats, and a 2005 conviction for assault with a deadly weapon. See motion to terminate, Exhibit 5, Tab A. On the contrary, the instant proceedings involve a charge of removability under INA Section 237(a)(2)(B)(i), which stems from two unrelated controlled substance violations — a 1996 conviction for possession of marijuana up to half ounce, and a 2008 conviction for possession of drug paraphernalia. See Exhibit 11.

Indubitably, those convictions involved substantially different facts and evidence and require wholly separate proof for conviction. As such, it cannot be said that they arise out of the same nucleus of operative fact, or are based upon the same factual predicate, as the former one. See Maldonado v. U.S. Attorney General, 664 F.3d at 1375-76 (citing Ragsdale v. Rubbermaid, Inc., 193 F.3d at 1239). In addition, the Court notes that the applicable Federal regulations do not mandate that the Department bring all potential charges in one removal proceeding. See 8 C.F.R. Sections 1003.30, 1240.10(e).

CONCLUSION

As such, it appears that the Department acted within its authority in issuing another Notice to Appear, and the new charge of removability and corresponding removal proceedings are not barred by the doctrine of res judicata. Accordingly, the Court sustains the allegations, sustains the charge, and finds the respondent removable as charged by clear and convincing evidence.

For the foregoing reasons, the Court enters the following order:

ORDER:

The respondent is hereby ordered removed from the United States to Jamaica.

As to the issue of voluntary departure under safeguards, respondent's counsel has represented to this Court that she~~r client~~ is not pursuing voluntary departure under safeguards on behalf of her client. Therefore, the Court will not address that issue.

Again, based on the foregoing, it is hereby ordered that the respondent be removed from the United States to Jamaica based on the charge contained in the Notice to Appear.

Please see the next page for electronic signature

BARRY S. CHAIT
Immigration Judge
Thursday, August 28, 2014

Respondent's counsel has advised this Court today during this hearing that she is reserving her client's right to appeal and any appeal that either party chooses to file will be due not later than September 29, 2014.

//s//

Immigration Judge BARRY S. CHAIT

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