



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: ISAAC NAPOLES, PEDRO RAIDEL A 202-143-020

Date of this notice: 4/22/2019

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:
Malphrus, Garry D.
Creppy, Michael J.
Mullane, Hugh G.**

**SCHWARZA
User team: Docket**

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Falls Church, Virginia 22041

APR 22 2019

File: A202-143-020 – Miami, FL

Date:

In re: Pedro Raidel ISAAC NAPOLES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nathaly D. Henriquez, Esquire

APPLICATION: Reopening

The respondent, a native and citizen of Cuba and a lawful permanent resident of the United States, appeals the Immigration Judge's October 17, 2018, decision denying his motion to reopen. The record will be remanded.

We review findings of fact determined by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On May 11, 2017, the respondent pled *nolo contendere* to battery, resisting officer with violence, reckless driving/damage to property, and criminal mischief (Exh. 2). On May 8, 2018, the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida granted the respondent's motion to vacate plea (Exh. 5, Tab D). On August 7, 2018, the respondent was ordered removed from the United States as an alien convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).

On August 30, 2018, the Circuit Court for the 11th Judicial Circuit of the State of Florida in and for Miami-Dade County issued an "Order on Defendant's Motion to Vacate Plea, Judgment and Sentence," which states, "The Defendant was not advised by his attorney that his plea would subject him to deportation" (Respondent's Motion, dated Aug. 30, 2018, at Tab H). On the same day, the respondent filed a motion to reopen his removal order based on his vacated conviction. The Immigration Judge denied the respondent's motion because she determined that the respondent did not establish that the vacatur was not entered solely for immigration purposes (IJ Order, dated Sept. 13, 2018). Specifically, the Immigration Judge noted that the respondent did not submit a copy of the motion to vacate or the transcript of the hearing on the motion to vacate to show that the Court did not advise the respondent of immigration consequences even if the attorney did not (IJ Order, dated Sept. 13, 2018). The respondent did not appeal the decision.

On October 11, 2018, the respondent filed a second motion to reopen. The respondent included in his motion an "Affidavit of Non-Retrieveable Data" from the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, which stated that the hearing files for the respondent's case were no longer available (Respondent's Motion, dated Oct. 11, 2018, at Tab I). The Immigration Judge again denied the respondent's motion, noting that the respondent did not

establish that he was not advised by the Court of the deportation consequences of his plea pursuant to Fla. R. Crim. P. 3.172(c)(8) (IJ Order, dated Oct. 17, 2018). The respondent appealed the decision.

We generally give full faith and credit to a State court decision purporting to vacate an alien's criminal conviction. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1380 (BIA 2000). However, if a State court vacates an alien's criminal conviction solely on the basis of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes and will continue to serve as a valid factual predicate for a charge of removability despite its vacatur. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). An alien seeking to reopen proceedings to establish that a conviction was vacated bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez*, 24 I&N Dec. 272, 274 (BIA 2007).

To show that his conviction was not vacated solely for immigration or rehabilitation purposes, the respondent submitted an "Order on Defendant's Motion to Vacate Plea, Judgment and Sentence" from the Circuit Court for the 11th Judicial Circuit of the State of Florida in and for Miami-Dade County, which states "The Defendant was not advised by his attorney that his plea would subject him to deportation" (Respondent's Motion, dated Aug. 30, 2018, at Tab H). In addition, in an attempt to satisfy the Immigration Judge's concern that the Court may have advised him of the deportation consequences of his plea even if his attorney did not, the respondent submitted an "Affidavit of Non-Retrieveable Data" from the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, which states that the hearing files for his case were no longer available (Respondent's Motion, dated Oct. 11, 2018, at Tab I). The Department of Homeland Security did not challenge the respondent's evidence or submit any evidence indicating that the respondent's criminal conviction was vacated solely for immigration or rehabilitation purposes.

In this case, we conclude that the respondent made an adequate showing that his criminal conviction was vacated on the basis of a substantive or procedural defect, rather than on the basis of immigration hardships or rehabilitation, such that the vacatur is entitled to full faith and credit in the immigration context. *See, e.g., Matter of Chavez*, 24 I&N Dec. at 274 ("In this case, *no evidence* was ever submitted either before the Immigration Judge or the Board to establish why the respondent's conviction was vacated.") (emphasis added). The Immigration Judge's denial of the respondent's second motion to reopen was based on the same legal error as the denial of the respondent's first motion to reopen. Therefore, we will sustain the respondent's appeal and grant the respondent's motion to reopen. We will remand the proceedings to the Immigration Judge to take further action as he deems appropriate. Accordingly, the following order will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.



FOR THE BOARD