U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: GUERRERO-SILVA, ERICK

A 071-914-925

Date of this notice: 5/7/2013

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:
Mann, Ana

yungc
Userteam: Docket

File: A071 914 925 – El Centro, CA

Date: MAY - 7 2013

In re: ERICK GUERRERO-SILVA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Judith Seeds Miller, Esquire

ON BEHALF OF DHS: John D. Holliday
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, appeals from the Immigration Judge's decision dated November 26, 2012, finding him removable. The respondent's appeal will be dismissed.

The respondent's appeal is untimely. The respondent's Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) must have been received by this Board within 30 days of the Immigration Judge's decision. 8 C.F.R. §§ 1003.38(b), (c). The Immigration Judge's decision was dated November 26, 2012. Thus, the respondent's Notice of Appeal was due on Wednesday, December 26, 2012. As the respondent's Notice of Appeal was received by this Board on Friday, December 27, 2012, 31 days after the entry of the Immigration Judge's decision, we deem the respondent's appeal untimely.

In his motion to accept late-filed Notice of Appeal, the respondent's counsel provided evidence that she place the respondent's appeal in the hands of an overnight delivery service on December 24, 2012. Rather than delivering the appeal to the Board on its guaranteed delivery date, which was December 26th because the intervening day was Christmas, the delivery service delivered the appeal on December 27th.

Although the Board's filing deadline is not jurisdictional in the Ninth Circuit, *Irigoyen–Briones v. Holder*, 644 F.3d 943, 948 (9th Cir. 2011), we decline to use our discretion to accept this late-filed appeal. While the respondent missed his appeal deadline by only 1 day, he has not established any "rare" or "extraordinary" events that required waiting until the last day or 2 of the mandated filing period, just before a holiday, and relying so completely on the delivery company's overnight guarantee. The respondent's situation does not present exceptional circumstances. *See Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

Irigoyen–Briones involved a pro se alien who lost his case before the Immigration Judge just before Christmas. The court described the subsequent days and traced the activities of the alien and his counsel in concluding that "[b]oth client and lawyer acted with reasonable diligence to comply with the filing deadline." *Irigoyen–Briones v. Holder, supra*, at 950 (the delays involved several holidays, the need for the alien to raise money, the attorney listening to tapes of the

hearings and researching the applicable law necessary to formulate the notice of appeal and prepared the notice, etc.); *c.f. Matter of Liadov*, 23 I&N Dec. 990 (BIA 2006) (holding that a short delay by an overnight delivery service is not a rare or extraordinary event that would warrant consideration of an untimely appeal on certification), *aff'd sub nom. Liadov v. Mukasey*, 518 F.3d 1003 (8th Cir. 2008).

Unlike the situation in *Irigoyen–Briones*, the respondent's counsel represented the respondent before the Immigration Judge, and she has not provided details regarding her client's actions or her representation following the Immigration Judge's decision. In short, the respondent has not established that he and counsel acted with reasonable diligence in waiting until the end of the filing period and relying on the overnight guarantee of the delivery service.

Thus, the Immigration Judge's decision is now final, and the record will be returned to the Immigration Court without further action. *See* 8 C.F.R. §§ 1003.3(a), 1003.38, 1003.39, 1240.14 and 1240.15. Because we are dismissing the appeal as untimely, either party wishing to file a motion in this case should follow the following guidelines: If you wish to file a motion to reconsider challenging the finding that the appeal was untimely, you must file your motion with the Board. However, if you are challenging any other finding or seek to reopen your case, you must file your motion with the Immigration Court. *See Matter of Mladineo*, 14 I&N Dec. 591 (BIA 1974); *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998). You should also keep in mind that there are strict time and number limits on motions to reconsider and motions to reopen. *See* sections 240(c)(6)(A) & (B) and 240(c)(7)(A) & C of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(6)(A) & (B) and (c)(7)(A) & C; 8 C.F.R. §§ 1003.2(c)(2), 1003.23(b)(1).

In light of the foregoing, the following order is entered.

ORDER: The record is returned to the Immigration Court without further action.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
EL CENTRO, CALIFORNIA

File: A071-914-925 November 26, 2012

In the Matter of

ERICK GUERRERO-SILVA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(1)(E)(i), (Alien smuggling), Immigration and Nationality Act (INA); lodged charge, Section 212(a)(2)(A)(i)(II), (admits controlled substance offense), INA 212(a)(2)(C), (illicit trafficking in a controlled substance), INA.

APPLICATION: Termination.

ON BEHALF OF RESPONDENT: JUDITH SEEDS MILLER, ESQUIRE, 300 18TH STREET, BAKERSFIELD, CALIFORNIA 93301

ON BEHALF OF DHS: JOHN HOLLIDAY, ESQUIRE, 1115 NORTH IMPERIAL AVENUE, EL CENTRO, CALIFORNIA 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is an adult man who is a native and citizen of Mexico, and who has been a legal permanent resident of the United States. The matter is before me after having been remanded by an order of the Board of Appeals of June 4, 2012.

At a prior hearing, I found that Respondent was removable. The Board determined that there were issues about the Respondent's "evident lack of understanding of the nature of the proceedings," so the matter was remanded for an evaluation of his competency under the framework of Matter of M-A-M-, 25 I&N Dec. 474 (BIA 2011).

The Respondent's mental competence has been reassessed. I'm persuaded that the Respondent is competent, though he does not always act in his own best interests. The issue of competence concerns ultimately whether he can understand the charges and consequences of his actions and can cooperate with his counsel in his own defense. In this case, the Respondent clearly in my view understands the consequences. He is, to use the term, obstinate. He rejects the idea that he should be called upon to defend himself against Immigration charges. Consequently, he is uncooperative even in his own defense. Bad decision-making, however, does not mean that he is a person who is incompetent. Indeed, I think the evidence is replete with the instances of his clear understanding of these proceedings. In the prior hearing, he made objections which were competent objections. He made comments and observations which were astute in the circumstances. His protestations, which he continues to make about not "understanding," are simply his protestations and his expression of outrage of it being called upon to defend himself in such circumstances. However,

it is plain to me that he does indeed understand the nature of the proceedings of the consequences of the proceedings. He is able to cooperate, though it seems that he has not been willing to readily accept the help of his attorney. Thus, he is competent.

The matter was again considered. The evidence in a nutshell is that the Respondent appeared at the port of entry driving his own vehicle, which he had owned for 13 years. Secreted within the bed of the pickup truck he was driving was more than 11 kilos of marijuana. The Respondent has never taken the witness stand to deny the ownership of it and he has refused to testify under oath. He protests that he was exonerated in the criminal courts. However, he was not exonerated. Simply, the case was not pursued. He refuses to note the distinction between the criminal proceedings and the Immigration proceedings. In criminal proceedings, the Government must shoulder a heavy burden of showing it is clear beyond a reasonable doubt that he was guilty of his offense. In Immigration Court, the Government must show either that there is clear and convincing evidence of his removability, or, because of the particular nature of this case, that as a consequence of that, there is reason to believe that he has been a trafficker in drugs.

The Respondent's case on remand took a certain twist. It appears that the Respondent applied for entry. He was taken

into custody without being admitted. He was handed over to the authorities for prosecution. Prosecution was declined. He was returned to the custody of the border agents who then released him into the United States. I was persuaded then that the Respondent was admitted to the United States and thus charges under Section 212(a)(2) could no longer be sustained. The Government had long ago abandoned the charge of Alien smuggling. The Government therefore lodged yet another charge. In this charge, the Government says that the Respondent is removable because he was inadmissible at the time of entry because there was reason to believe that he was a trafficker in a controlled substance. See Exhibit 3.

Ultimately, I find that this charge can and must be sustained. The Respondent has indeed been found to be the driver of his own automobile, which he owned for 13 years. There were more than 11 kilograms of marijuana concealed in the vehicle. No explanation has been offered for how that illicit cargo found its way into his vehicle. Knowledge may reasonably be inferred when a Respondent drives an automobile laden with illegal substances and the mere possession of such a quantity of drugs can support an inference of knowledge. See U.S. v. Quintero-Barraza, 78 F.3d 1344 (9th Cir. 1995), cert. denied, 117 S. Ct. 135 (1996). The net worth of the payload can also permit an inference of knowledge. U.S. v. Castro, 972 F.2d 1107, 1111 (9th Cir. 1992).

The Respondent's case does present an interesting issue. It's clear to me that there was reason to believe at the time of the Respondent's arrival that he had been a trafficker in drugs. However, owing to the fact that he was subsequently admitted when the Government did not pursue a case against him after the criminal case was dismissed but instead allowed him into the United States, the issue then becomes who had to know what and when. Specifically, information that's not known to the examining agents at the border where the Alien sought admission can be properly received and considered by the Immigration Judge when determining whether there was reason to believe the Alien was knowingly transporting the marijuana when he arrived to the United States. See Gomez-Grenillo v. Holder, 654 F.3d 826 (9th Cir. 2011).

The issue arises I think in a slightly different context because the Respondent was admitted and now we must look backwards. I think this backwards look simply requires, though, that there has been information at the time of the Respondent's attempted entry which would support the view that there is reason to believe that he'd been a trafficker in a controlled substance. Of course, such an inquiry does not require that there be a conviction in order for the Respondent to be found removable. Lopez-Molina v. Ashcroft, 368 F.3d 1206, 1209 (9th Cir. 2007); see also Matter of Rico, 16 I&N Dec. 181, 184 (BIA 1977).

Much of the Respondent's protest, though, as I note, he never took an oath actually, has been that he didn't see the substance. His visual inspection of the substance is not of ultimate consequence. The issue is whether the substance existed and whether there is reason to believe that it did. There's no challenge to the determination that there was marijuana, that it field-tested positive, that it weighed more than 11 kilos. Consequently, I am persuaded by the officers' testimony and their reports also of record which show that there were indeed more than 11 kilos of marijuana found in the Respondent's vehicle.

While it is the burden of the Government to prove its case against the Respondent, once the Government comes forward with evidence supporting its burden, then the Respondent has the burden of going forward with the evidence to overcome the evidence against him. The Respondent has offered nothing. He's refused to testify or take the oath. Consequently, the Government's evidence basically stands unchallenged. This case might be in some ways compared to receiving-stolen-property cases. While it is indeed the Government's burden to show that the property is stolen, the fact that one has stolen property without any explanation can be sufficient in the circumstances for a finding of guilt beyond a reasonable doubt. In this case, the Respondent has been found to be the driver of his vehicle laden as it were with more than 11 kilos of marijuana. He

offers no explanation. He simply complains that the process is not fair. Therefore, I'm constrained to find that the Government has shown by clear and convincing evidence that there is indeed reason to believe that the Respondent has been an illicit trafficker in marijuana or has at least been the knowing aider, abettor, assister, conspirator, or colluder with others. He is therefore removable as charged.

The Respondent has declined throughout these proceedings to seek cancellation of removal. At a hearing on November 26, 2012, much discussion was had with the Respondent as to the consequences of what would happen to him. While he acknowledges that deportation means that he will depart to Mexico and be separated from his family, he nevertheless refuses to undertake any effort to avoid that consequence. Therefore, I find that in the end he has knowingly, intelligently, and voluntarily waived the opportunity for cancellation of removal. There is no other remedy under the circumstances.

His role in drug trafficking means he lacks good moral character. See Section 101(f) INA. Lacking good moral character, he cannot receive voluntary departure. See Section 240B(b) INA. Furthermore, he cannot adjust his status because his involvement in drug smuggling is not a single offense which involves 30 grams or less of marijuana. Thus, Section 212(h) could not waive those grounds of inadmissibility. I am unaware of any relief that is available in circumstances such as these.

Therefore, after having considered all of the evidence of record whether discussed above or not, I must make the following order:

ORDER

IT IS HEREBY ORDERED that the Respondent be removed from the United States to Mexico on the basis of the allegations in the charges in the lodged charge (Exhibit 3).

Please see the next page for electronic signature
JACK W. STATON
Immigration Judge

//s//

Immigration Judge JACK W. STATON

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