U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ANDRADE MADRIGAL, JAIME **A 043-463-680**

Date of this notice: 2/22/2018

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:
Malphrus, Garry D.
Guendelsberger, John
Liebowitz, Ellen C

Userteam: Docket

File: A043 463 680 – Los Angeles, CA Date: FEB 22 2018

In re: Jaime ANDRADE MADRIGAL

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Thomas J. Greco, Esquire

ON BEHALF OF DHS: Carolyn M. Thompkins
Assistant Chief Counsel

APPLICATION: Termination; remand

This matter is before us by way of an order from the United States Court of Appeals for the Ninth Circuit, granting the government's unopposed motion to remand. The parties request that we consider the impact, if any, of California Penal Code § 18.5 on the respondent's motion to reopen, particularly with respect to his removability. Both parties have submitted additional briefing. Upon consideration of the arguments presented, the respondent's motion will be granted and these proceedings terminated.

The respondent was originally convicted of assault with a firearm in violation of California Penal Code § 245(a)(2) in 2003, and was sentenced at that time to 365 days in jail. Then on May 5, 2005, the respondent's conviction was reclassified as a misdemeanor and dismissed pursuant to a rehabilitative statute. The respondent was subsequently placed into removal proceedings on March 13, 2013, and was found removable under sections 237(a)(2)(C) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(C), (a)(2)(A)(iii). The specific definition of aggravated felony for which the respondent was alleged to be convicted was the definition in section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), of a crime of violence for which the term of imprisonment ordered was at least one year.

California Penal Code § 18.5, which took effect on January 1, 2015, reduced the maximum possible sentence for misdemeanors from one year of incarceration to 364 days of incarceration. California subsequently enacted additional legislation, which came into effect on January 1, 2017, which stated that the sentence modification in CPC § 18.5 was intended to be retroactive. The respondent's sentence was reduced by criminal court nunc pro tunc to 364 days on February 14, 2017.

We give full faith and credit to the reduction of the respondent's sentence, notwithstanding the reason for the reduction. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001). The Department of Homeland Security (DHS) requests we reexamine this principle, arguing it contradicts our equally longstanding principles regarding vacaturs and expungements of criminal convictions. *See, e.g.*, *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). More specifically, the DHS argues that CPC § 18.5 was crafted in an attempt by the state of California to remove the immigration consequences for certain convictions, and

analogizes sentence reductions under this provision to vacaturs or expungements for rehabilitative reasons.

We are not persuaded of any contradiction in these holdings. In *Matter of Cota-Vargas*, we explained that the distinction between our treatment of vacaturs, in which we examine the underlying rationale of the trial court's decision for the vacatur, and our treatment of sentence reductions in which we do not, is based in differences between the definitions of the terms "conviction" and "sentence" in section 101(a) of the Act. The DHS's arguments, which rely in significant part on an unrelated case addressing federal sentencing enhancements, do not persuade us to revisit the rationale in *Matter of Cota-Vargas*. Accordingly, we accept the reduction of the respondent's sentence to 364 days.[1] Given this sentence reduction, the respondent's conviction no longer meets the definition of an aggravated felony in section 101(a)(43)(F) of the Act, and he is no longer removable under section 237(a)(2)(A)(iii) of the Act.

The respondent also contends that he is no longer removable under section 237(a)(2)(C) of the Act based on intervening case-law. *See Medina-Lara v. Holder*, 771 F.3d 1106 (9th Cir. 2014) (concluding the California definition of "firearm" includes antique firearms and that there is a realistic probability that the state will prosecute offenses involving antique firearms); *US v. Aguilera-Rios*, 769 F.3d 636 (9th Cir. 2014); *see also Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999) (providing for reopening sua sponte based on a "fundamental," material change in law). The DHS has not meaningfully addressed this portion of the respondent's brief. Given the changes in law at issue here, we agree that reopening and termination are warranted. We therefore enter the following orders.

ORDER: The respondent's motion to reopen is granted.

FURTHER ORDER: These proceedings are terminated without prejudice.

FOR THE BOARD

[1] The issue of the length of the respondent's sentence is separate and distinct from the issue of whether we accept the "retroactive" change of California law regarding the maximum sentence which could have been imposed. As the effect of the California legislation on that issue is not before us in this case, we do not further address it.

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CONCURRING OPINION: Garry D. Malphrus, Board Member

I respectfully concur in the result. While I would reconsider the Board's precedent in *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), the case is controlling here and must be followed until or unless it is modified by the full Board.

Garry D. Malphrus