



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Name: BARA, ZSOLT

A 205-668-646

Date of this notice: 7/24/2015

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:
Holmes, David B.
Miller, Neil P.
Holiona, Hope Malia

Userteam: Docket

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Falls Church, Virginia 20530

File: A205 668 646 – Charlotte, NC

Date: JUL 24 2015

In re: ZSOLT BARA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Matthew D. Pierce, Esquire

ON BEHALF OF DHS: Colleen E. Taylor
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Continuance; remand

The respondent appeals from the Immigration Judge's January 15, 2014, decision denying his motion to continue the proceedings.¹ The respondent sought the continuance to await the adjudication of a pending visa petition filed on his behalf in order then to apply for adjustment of status. The Department of Homeland Security opposes the appeal. While the appeal remained pending, the respondent offered evidence that the visa petition has now been approved. With the following comments, we will remand the record to the Immigration Judge to enable the respondent to apply for adjustment of status as the spouse of a United States citizen.

In his January 15, 2014, decision, the Immigration Judge granted the respondent's motion to amend his pleadings and to vacate his removability under 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (alien convicted of a controlled substance violation) based on a conviction for possession of cocaine. The respondent offered evidence that the criminal court had amended the underlying drug-related offense and found him guilty of accepting money in order to conceal an offense involving a felony, which is a misdemeanor offense punishable by not more than 1 year. *See* Immigration Judge's Decision at 1-2; Exhibit 7.

¹ The Board reviews the Immigration Judge's findings of fact under a "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). If the Board determines that an Immigration Judge's findings of fact are not clearly erroneous, it may review de novo whether the facts are sufficient to meet an applicable legal standard. *See Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008); 8 C.F.R. § 1003.1(d)(3)(ii).

While the Immigration Judge determined that the amended conviction no longer supported the charge of removability under section 237(A)(2)(B)(i) of the Act, he nevertheless concluded that the respondent is statutorily ineligible for adjustment of status because he did not show that he is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). Although the drug-related conviction was amended, the Immigration Judge found that the criminal court order was ambiguous and “inconclusive regarding the rationale for the vacatur.” See Immigration Judge’s Decision at 4.

We note that the criminal court’s decision specifically states that the respondent’s conviction was amended “in the interests of justice and a cure for any possible violations of the Sixth Amendment to the United States Constitution that may have occurred in (the respondent’s) prior adjudication.” On review, we find that the language of the amended order supports the respondent’s assertion that the conviction was amended due to a defect in the underlying criminal proceedings. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). See also *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (“It has been held that a finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed”); 8 C.F.R. § 1003.1(d)(3)(i).

Accordingly, the following order will be entered.²

ORDER: The record is remanded to Immigration Judge for further proceedings consistent with this decision.



FOR THE BOARD

² The respondent’s request to terminate the proceedings is denied.

IMMIGRATION COURT
5701 EXECUTIVE CENTER DR. #400
CHARLOTTE, NC 28212

In the Matter of

Case No.: A205-668-646

BARA, ZSOLT
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 1/15/14.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

- ☐ The respondent was ordered removed from the United States to ROMANIA or in the alternative to .
- ☒ Respondent's application for voluntary departure was denied and respondent was ordered removed to ROMANIA ~~or in the alternative to~~ *per minute order of 1/15/14*
- ☐ Respondent's application for voluntary departure was granted until upon posting a bond in the amount of \$ _____ with an alternate order of removal to ROMANIA.

Respondent's application for:

- ☐ Asylum was () granted () denied () withdrawn.
- ☐ Withholding of removal was () granted () denied () withdrawn.
- ☐ A Waiver under Section _____ was () granted () denied () withdrawn.
- ☐ Cancellation of removal under section 240A(a) was () granted () denied () withdrawn.

Respondent's application for:

- ☐ Cancellation under section 240A(b)(1) was () granted () denied () withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
- ☐ Cancellation under section 240A(b)(2) was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Adjustment of Status under Section _____ was () granted () denied () withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.
- ☐ Respondent's application of () withholding of removal () deferral of removal under Article III of the Convention Against Torture was () granted () denied () withdrawn.
- ☐ Respondent's status was rescinded under section 246.
- ☐ Respondent is admitted to the United States as a _____ until _____.
- ☐ As a condition of admission, respondent is to post a \$ _____ bond.
- ☐ Respondent knowingly filed a frivolous asylum application after proper notice.
- ☐ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
- ☐ Proceedings were terminated.
- ☒ Other: *Matic L continue DENIED per minute order.*

Date: Jan 15, 2014

V. Stuart Couch
V. STUART COUCH
Immigration Judge

Appeal: Waived/Reserved *R* Appeal Due By:

2/14/14

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

IN THE MATTER OF)	IN REMOVAL PROCEEDINGS
)	
ZSOLT BARA,)	File No: A 205-668-646
)	
Respondent.)	MINUTE ORDER
)	
)	January 15, 2014
)	

COMES NOW the Court and renders its decision on Respondent's motion to reopen and/or amend pleadings filed on October 25, 2013; the Department of Homeland Security's (DHS') response filed on November 6, 2013; and Respondent's reply brief filed on November 8, 2013. The Court has considered evidence of Respondent's record of criminal proceedings filed by him on October 29, 2013, which is marked and admitted to the record as Exhibit 2.¹

After review of the record, the Court finds the following facts:

1. That at a master calendar hearing held on June 17, 2013, Respondent appeared *pro se* and admitted the factual allegations in the Notice to Appear (NTA), including the fact he was convicted on October 10, 2012 for the offense of possession of cocaine in Horry County, South Carolina.² Exhibit 1. Respondent advised he is married to a United States citizen who may be pregnant with his child. The DHS argued Respondent is barred from relief through adjustment of status due to his drug conviction. Respondent advised he had assisted a local narcotics detective with an investigation based upon their mutual agreement the detective would use his "ICE connections" to help Respondent, but the detective did not keep his end of the bargain.³ The Court granted Respondent a continuance in order to consult with counsel.

2. That on September 9, 2012, the Horry County Court of General Sessions entered an order of "amended judgment" which vacated Respondent's "prior adjudication on October 10, 2012 for possession of cocaine," and found him "now adjudicated guilty of accepting money in order to conceal an offense involving a felony" (hereinafter "bribery conviction"), a

¹ The Court notes Respondent has filed several copies of the same documents at different times, all of which are contained in the record of proceedings.

² Possession of cocaine is a violation of South Carolina Code § 44-53-370(d)(3).

³ "ICE" refers to Immigration and Customs Enforcement.

misdemeanor offense punishable for imprisonment of not more than one year.⁴ Exhibit 2, tab M. In its order, the South Carolina court stated the amended judgment was “done in the interests of justice and [sic] a cure for any possible violations of the Sixth Amendment to the United States Constitution that may have occurred in [Respondent’s] prior adjudication.” *Id.*

3. That at a master calendar hearing held on September 25, 2013, Respondent appeared with counsel, and moved to reopen the pleadings to the NTA in light of the amended judgment of his criminal conviction in South Carolina. Respondent filed evidence of a pending Form I-130 family-based visa petition by his wife, and moved for a continuance to await adjudication of the petition by the United States Citizenship and Immigration Service (USCIS) under *Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (hereinafter “*Hashmi* motion”). The DHS opposed Respondent’s motion to reopen pleadings, and his *Hashmi* motion. The Court set a deadline of October 25, 2013 for Respondent to file, *inter alia*, evidence of any motion for appropriate relief (MAR) filed by him in the South Carolina court, which led to the amended judgment of his conviction, and evidence of the *bona fides* of his marriage. The Court advised Respondent of the consequences of failure to file the MAR documents by that deadline. 8 C.F.R. § 1003.31(c).

4. That on October 25, 2013, Respondent filed evidence of the *bona fides* of his marriage, and a “case history” report from the South Carolina court which reflects a guilty plea to the offense of “Bribes/Acceptance of money to conceal an offense involving a Felony” with a disposition date of October 10, 2012. Exhibit 2, tab I at 1. The report also reflects payments by Respondent to the court of \$50 on November 8, 2012, and \$25 on January 22, 2013; and filing of the amended judgment on September 9, 2013. *Id.* at 2. Respondent did not file any documents related to the MAR in the South Carolina court, and his counsel “contends that there are no other documents associated with [the South Carolina court’s amended judgment] order.” Respondent’s Motion to Reopen and/or Amend Pleadings at 5.

Motion to Reopen Pleadings

The respondent’s motion to reopen pleadings is hereby granted. 8 C.F.R. § 1003.23(b). The record of proceedings will now reflect that the respondent denies factual allegation 5 of the

⁴ A violation of South Carolina Code § 16-9-370(a). *Id.*

NTA. Exhibit 1 at 1. The Court vacates its earlier finding that the second charge of removability under INA § 237(a)(2)(B)(i) is sustained, and need not determine his removability in light of his counsel's concession he is removable to the first charge as an overstay under INA § 237(a)(1)(B).

Motion to Continue under *Matter of Hashmi*

The Court may grant a motion for continuance only “for good cause shown,” within its sound discretion. *Matter of Sanchez-Sosa*, 25 I&N Dec. 87, 812 (BIA 2012) (citing 8 C.F.R. § 1003.29); *Matter of Silva-Rodriguez*, 20 I&N Dec. 448, 449-50 (BIA 1992); *Matter of Sibrun*, 18 I&N Dec. 354, 355-58 (BIA 1983).

In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is *prima facie* approvable; (3) the respondent's statutory eligibility for adjustment of status; (4) whether the respondent's application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors. *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009). To establish eligibility for adjustment of status under INA § 245, an alien must establish, *inter alia*, that he is not inadmissible due to criminal convictions of certain drug offenses. INA §§ 212(a)(2)(A)(i)(II); 245(a)(2). When there is evidence that an alien may be statutorily barred from relief, the alien has the burden to prove by a preponderance of the evidence that such bar does not apply. INA § 240(c)(4)(A)(i); 8 C.F.R. § 1240.8(d); *see also Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011).

Where a conviction is vacated for reasons unrelated to the merits of the underlying criminal proceedings, the conviction remains for immigration purposes. *Phan v. Holder*, 667 F.3d 448, 452 (4th Cir. 2012) (citing *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003)) (“A conviction vacated for rehabilitative or immigration reasons remains valid for immigration purposes, while one vacated because of procedural or substantive infirmities does not.”) *rev'd sub nom.*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)). In making its determination in *Matter of Pickering*, the Board of Immigration Appeals espoused the consideration of three factors: (1) the law under which the court issued its order vacating the conviction; (2) the terms of the court's order; and (3) the respondent's reasons in requesting that the conviction be vacated. *Matter of Pickering*, 23 I&N Dec. at 625.

Based on the totality of the record, the Court finds that the respondent has failed to demonstrate that his conviction for possession of cocaine was *not* vacated for immigration purposes, and was instead vacated for reasons related to the merits of the underlying criminal proceeding. First, the South Carolina court's order did not reference the law under which it was vacating the guilty plea, and amending his conviction to the offense of bribery. The state court's failure to reference any statutory provision for its action does not adequately support the respondent's claim that the vacatur was not related to the adverse immigration consequences he suffers as a result of a conviction for cocaine possession.

Second, the amended judgment order's terms vacating the guilty plea are ambiguous in that the state court failed to adequately explain the rationale for vacating the respondent's prior guilty plea to cocaine possession. In its order, the South Carolina court stated the amended judgment was "done in the interests of justice and [sic] a cure for any *possible violations* of the Sixth Amendment to the United States Constitution that *may have occurred* in [Respondent's] prior adjudication." Exhibit 2, tab M (emphasis added). While this speculative language reflects the state court judge's concern for the respondent's right to counsel under the Sixth Amendment to the United States Constitution, it is vague and ambiguous as to whether the respondent's conviction was infirm resulting from an actual procedural or substantive defect in the underlying criminal proceeding, rather than for immigration reasons.

In the absence of the actual MAR which led to the state court to amend the respondent's initial conviction for cocaine possession, this Court is unable to discern the factual basis or legal conclusions which formed the basis for the state court to adjudicate a wholly different conviction for bribery. Moreover, this Court is unable to determine what effect, if any, the adverse immigration consequences of the respondent's earlier drug conviction had on the state court's decision to amend it. The respondent suffers the consequences of an inconclusive record of conviction to establish his eligibility for relief from removal. *Salem v. Holder*, 647 F.3d at 116.

The Court finds that the South Carolina court order is inconclusive regarding the rationale for the vacatur of the respondent's guilty plea to possession of cocaine, such that it does not satisfy his burden to show his initial conviction was not vacated solely to avoid immigration hardships. *Matter of Pickering*, 23 I&N Dec. at 624. The Court finds that the respondent has not met his burden of proving he is not inadmissible due to a conviction for possession of cocaine, and is therefore statutorily eligible for adjustment of status. INA §§ 212(a)(2)(A)(i)(II),

245(a)(2). Therefore, the Court finds that the respondent has not demonstrated good cause exists to continue his case, over the DHS' objection, to await adjudication of the Form I-130 petition filed on his behalf with the USCIS. 8 C.F.R. § 1003.29; *Matter of Hashmi*, 24 I&N Dec. at 790. Accordingly, the Court enters the following:

ORDERS

IT IS HEREBY ORDERED that Respondent's motion to amend his pleas to the Notice to Appear is GRANTED, and the Court's finding of his removability under INA §237(A)(2)(B)(i) is thereby VACATED.

IT IS FURTHER ORDERED that Respondent's motion to continue is DENIED.

1/15/2014

Date

V. Stuart Couch

V. STUART COUCH
United States Immigration Judge
Charlotte, North Carolina