U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Chief Clerk

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Name: Ruela, Juan Ignacio

A 077-485-879

Date of this Notice: 5/5/2014

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:
Greer, Anne J.
Guendelsberger, John
Pauley, Roger A.

File: A077 485 879 – Lumpkin, GA Date: MAY 05 2014

In re: JUAN IGNACIO RUELA a.k.a. Daniel L. Ruela a.k.a. Juan Frias

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Fred (Rocky) Rawcliffe, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony defined in section 101(a)(43)(R) of the Act

APPLICATION: Termination

The respondent appeals the Immigration Judge's January 17, 2014, decision finding him removable as charged and ordering his removal to Mexico. The proceedings will be terminated.

The respondent challenges the Immigration Judge's determination that his conviction for forgery in violation of the OFFICIAL CODE OF GEORGIA § 16-9-1(b) was an aggravated felony. The respondent contends that the original judgment, which reflected the imposition of a sentence of 4 years' confinement to be served entirely on probation with no jail time, was ambiguous. He asserts that the subsequent trial court order clarified that he was not sentenced to any period of confinement, and pursuant to *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), the court's clarification order is due full faith and credit. As such, the respondent argues that he does not stand convicted under the Act and is not removable for having sustained an aggravated felony conviction.

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. 8 C.F.R § 1003.1(d)(3)(ii).

An aggravated felony is defined in relevant part as "an offense relating to . . . forgery . . . for which the term of imprisonment is at least one year." Section 101(a)(43)(R) of the Act. As the Immigration Judge noted, the respondent initially was sentenced to 4 years' confinement but was permitted to serve the sentence on probation subject to compliance with the general and special conditions of his probation (I.J. at 3; Exh. 2 Judgment and Sentence). The trial judge's October 24, 2013, Order to Clarify Sentence stated that the respondent's negotiated plea "called for a sentence of four (4) years, entirely on probation, with no period of confinement whatsoever," with respect to all four forgery counts in the indictment to which the respondent pled guilty (Exh. 2 Indictment; Exh. 3 Order to Clarify Sentence). The court stated: "The defendant was and is

hereby sentenced to four years (4) years [sic], entirely on probation, with no period of confinement whatsoever, with all other terms and conditions of the sentence to remain the same on Counts, One, Two, Three, and Four." The order was dated nunc pro tunc to the original sentencing date of October 26, 2010 (Exh. 2 Order to Clarify Sentence).

The Immigration Judge determined that the clarifying order did not operate to eliminate the respondent's probationary sentence and made no mention of reducing or eliminating the originally enumerated 4-year period of confinement (I.J. at 3). He concluded that the clarification mirrored the effect of the language in the original judgment, which was to suspend the sentence in favor of probation so long as the respondent complied with the terms; otherwise probation could be revoked and the respondent could be confined for any portion of the original 4-year term (*id.*). Additionally, observing that § 16-9-2, the Georgia statutory provision governing punishment for the respondent's offense, mandates a prison term of at least 1 year, the Immigration Judge found that the respondent had not been sentenced to a period of straight probation without confinement (*id.* at 4). The Immigration Judge concluded that the respondent had been sentenced to 4 years' confinement with all 4 years to be served on probation (*id.* at 5).

We need not resolve whether or not the Immigration Judge's determination was proper, because with his appeal the respondent has submitted the trial judge's "Order to Correct Scrivener's Error." The order, dated February 26, 2014, recites the terms of probation imposed for each of the respondent's criminal convictions and states in relevant part that the "Court did not nor does it now impose any incarceration or confinement whatsoever upon the Defendant." We take administrative notice of the trial judge's order, which makes clear that the respondent was not sentenced to any period of confinement. 8 C.F.R. § 1003.1(d)(3)(iv). "When a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony.'" *United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000).

Since the respondent was not convicted of a forgery offense for which the term of imprisonment was at least 1 year, he was not convicted of an aggravated felony pursuant to section 101(a)(43)(R) of the Act. In the absence of such a conviction, the respondent is not removable as charged. Consequently, these proceedings will be terminated.

Accordingly, the following orders will be entered.

ORDER: The Immigration Judge's January 17, 2014, order is vacated.

FURTHER ORDER: The proceedings are terminated.

FOR THE BOARD

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

File: A077-485-879 January 17, 2014

In the Matter of

JUAN IGNACIO RUELA FRIAS	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(2)(A)(iii~~3~~) - aggravated felony forgery.

APPLICATION: None.

ON BEHALF OF RESPONDENT: FRED RAWCLIFFE

ON BEHALF OF DHS: REID MCKEE

ORAL DECISION OF THE IMMIGRATION JUDGE

Exhibits:

1, Notice to Appear.

2, record of respondent's 26 October 2010 conviction for forgery.

3, respondent's submission of documents clarifying respondent's sentence (17 pages).

4, respondent's brief, with tabs A and B.

Witnesses:

None.

Findings of Fact and Conclusions of Law

Respondent was admitted into the United States as a lawful permanent resident on November 29, 2001.

Exhibit 1 was served on respondent on November 15, 2013.

On December 5, 2013, respondent, through counsel, admitted all allegations in Exhibit 1, but denied the charge. Specifically, respondent denies that he is removable as charged because he was not convicted of a crime for which the terms of imprisonment of at least one year was imposed.

On October 26, 2010, respondent was convicted in accordance with his pleas of four counts of forgery in the first degree, which he committed on January 29, 2010, in violation of Section 16-9-1(b)~~D~~ of the Official Code of Georgia Annotated (O.C.G.A.). Respondent was "sentenced to confinement for a period of four years;~~,~~" however, respondent's sentence was suspended in favor of probation. INA Section 101(a)(48)(B~~b~~).

According to O.C.G.A. Section 16-9-1(b)~~B~~, "[a] person commits the offense of forgery in ~~a~~ the first degree when~~,~~ with the intent to defraud~~,~~ he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such ~~a~~ manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions or by authority of one who did not give such authority and utters or delivers such writing."

I find that respondent has been convicted of an aggravated felony as defined in Section 101(a)(43)(R~~r~~) of the Immigration and Nationality Act because he has committed an offense relating to forgery for which a sentence of one year or longer is imposed. See U.S. v. Martinez-Gonzalez, 663 F.3d 1305 (11th Cir. 2011). Consequently, I find that respondent's conviction~~,~~ categorically~~,~~ is an aggravated felony.

O.C.G.A. Section 16-9-2(a)~~A~~ provides that "[a] person who commits the offense of forgery in the first degree shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment for not less than one ~~to~~ nor more than 15 years." In this case, respondent was sentenced to confinement for a period of four years, but allowed to serve it on probation provided respondent complied with the general and special conditions of his probation. Georgia Courts may suspend or probate all or any part of the entire sentence. O.C.G.A. Section 17-10-1(c)~~C~~.

Pages 1 and 2 in Exhibit 3 and tab B in Exhibit 4 show that on October 23, 2013, *nunc pro tunc* to October 26, 2010, a Georgia Court clarified respondent's sentence to "four (4) years, entirely on probation, with no period of confinement whatsoever, with other conditions of probation." In other words, based upon the clarifications, respondent's entire four year sentence to imprisonment was suspended in favor of probation; but respondent could still have his sentence revoked if he violated the terms and conditions of his probation.

The clarification did not operate to excuse or eliminate respondent's probation and the Georgia Court did not state that it was reducing or eliminating respondent's period of confinement, only that such confinement was to be served entirely on probation ~~period~~.

The effect of the language found at pages 1 and 2 in Exhibit 3 and tab B in Exhibit 4 is identical to the effect of the language provided to respondent on October 26, 2010. That is; respondent's sentence was suspended in favor of probation as long as respondent complied with all of the terms and conditions imposed by the Court; ~~o~~Otherwise, respondent's probated sentence could be revoked and respondent could be made to serve the remaining portion of his four year sentence, or any portion thereof, in confinement.

Furthermore, the court could "proceed to sentence [respondent] to the maximum sentence provided by law~~,~~" which in this case is 15 years. See pages 6 and 7 in Exhibit 2 and pages 10 and 11 at tab A in Exhibit 4.

Given the requirements in O.C.G.A. Section 16-9-2(a)~~A~~ and given the conditions of respondent's probation, it is clear that respondent originally was and today remains under a sentence to confinement~~,~~ which is suspended in favor of probation. I find that respondent is not now, nor was he ever, sentenced to a period of "straight probation" without confinement. See United States v. Garza-Mendez, 735 F.3d 1284 (11th Cir. 2013).

Although respondent was sentenced under Georgia's First Offender Act, this does not mean that respondent lacks a "conviction" for purposes of the INA. Respondent entered a plea of guilty, he was found guilty, and the Judge imposed some form of punishment or restraint on respondent's liberty, which was probation with terms and conditions. See Ali v. U.S. Attorney General, 443 F.3d 804 at 809-810 (11th Cir. 2006).

INA Section 101(a)(48) provides that a sentence includes the period of confinement ordered by a Court regardless of any suspension of the imposition or execution of the sentence.

Immigration Judges must give full faith and credit to all State Court documents and I will accord such full faith and credit here~~.~~; ~~H~~however, there is no requirement for Immigration Judges to construe court documents to be contrary to state law in cases where such documents also may be construed to comply with state law. In respondent's case, it is clear that the Georgia Court has not directed respondent to serve any portion of his mandatory sentence to imprisonment provided respondent complies with all conditions of his probation.

Therefore, I find that respondent was sentenced to four years of confinement as contemplated by O.C.G.A. Section 16-9-2(a)~~A~~, but that all four years was suspended in favor of probation. Such finding is consistent both with what the Georgia Judge has said and what the Georgia law requires. I cannot find that the Georgia Judge ignored O.C.G.A. Section 16-9-2(a)~~A~~ and merely sentenced respondent to direct probation.

The term of imprisonment imposed on respondent includes those portions of his sentence which were probated under Georgia law. See United States v. Ayala-Gomez, 255 F.3d 1314 (11th Cir. 2001). Thus, respondent's sentence was four years. INA Section 101(a)(48)(B). Respondent did not receive a sentence of direct probation. The punishment respondent received included a term of imprisonment of at least one year. See In re Cito Hayden Fermine, 2006 WL 901347, February 21, 2006; and In re Julio Caesar Mendez Raymundo, 2011 WL 1792109, April 22, 2011 (both cases cited as persuasive rather than presidential authority).

In this case my findings are based upon a categorical analysis. I did not use the modified categorical approach.

Based upon the above analysis, I am sustaining all allegations in Exhibit 1 and I find by clear and convincing evidence that respondent is removable as charged in Exhibit 1. Mexico is designated as the country of removal.

For the above reasons, respondent is ineligible for cancellation of removal and adjustment of status for certain non-permanent residents. INA Section 240A(a)(3).

Because of his conviction, respondent also is ineligible for voluntary departure. INA Section 101(f)(8) and INA Section 240B(b)(1)(B) and INA §240B(b)(1)(C).

Respondent made no claim of fear of returning to Mexico.

Respondent made no requests for relief.

ORDER

IT IS HEREBY ORDERED respondent will be removed from the United States to Mexico.

A written order reflecting the above decision will be provided separately and made part of the record.

Please see the next page for electronic signature

DAN TRIMBLE
Immigration Judge

//s//

Immigration Judge DAN TRIMBLE

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