U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: VALENZUELA-FELIX, JAIME EN... **A 034-590-205**

Date of this notice: 10/15/2013

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:
Holmes, David B.

lucasd
Userteam: Docket

File: A034 590 205 – Haskell, TX[1] Date: OCT 15 2013

In re: JAIME ENRIQUE VALENZUELA-FELIX a.k.a. Jaime Fedix

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Vinesh Patel, Esquire

ON BEHALF OF DHS: Sean M. McCrory
Assistant Chief Counsel

APPLICATION: Termination of proceedings

ORDER: The Board has been advised that the Department of Homeland Security's appeal has been withdrawn. 8 C.F.R. § 1003.4. Since there is nothing now pending before the Board, the record is returned to the Immigration Court without further action.

FOR THE BOARD

[1] The respondent appeared from this location via video conference, with the Immigration Judge presiding over proceedings from Dallas, TX. *See* section 240(b)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(2)(A)(iii).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS
VIA TELEVIDEO TO HASKELL DETENTION CENTER

File: A034-590-205 March 5, 2013

In the Matter of

JAIME ENRIQUE VALENZUELA-FELIX	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), as amended - in that respondent is an alien who has been convicted of or who admits having committed or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended - in that the respondent is an alien who has been convicted of or admits having committed or admits committing acts which constitute the essential elements of a violation of any law or regulation of a state of the United States or foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substance Act, 21 U.S.C. 802).

APPLICATIONS: Motion to terminate.

ON BEHALF OF RESPONDENT: VANESH PATEL, Esquire
P.O. Box 190114
Dallas, Texas 75219

ON BEHALF OF DHS: JOHN MCCURRIE, Esquire
Assistant Chief Counsel
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ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male, native and citizen of Mexico. He applied for admission into the United States at or near San Ysidro, California on or about August 8, 2009 as a lawful permanent resident. Exhibit 1. At the time, the NCIC, the National Criminal Index, revealed that there was an outstanding warrant for his arrest from the United States Marshal's Service. He was then paroled into the United States on August 18, 2009 for prosecution. See Exhibit 1.

On July 8, 2010, the respondent was convicted in the United States District Court for the Central District of California for the offense of bulk cash smuggling in violation of 31 U.S.C. Section 5332. For that offense, the respondent was sentenced to 27 months confinement in the United States Bureau of Prisons. Exhibit 1.

On May 19, 2011, the Department of Homeland Security (hereinafter referred to as the Government) served the respondent with a Notice to Appear, charging him under Section 212(a)(2)(A)(i). On June 29, 2011, the respondent acknowledged proper receipt of the Notice to Appear, admitted allegations 1, 2, 3, 6 and 7, but denied the charge of removal.

On July 11, 2011, the Government submitted a Form I-261 which added an allegation (Allegation 8) against the respondent for a July 8, 1991 conviction for possession or sale of a controlled substance in violation of the California Health and Safety Code Section 11.351, and also added a charge of removability under Section 212(a)(2)(A)(i)(II) of the Act. Exhibit 6.

At a hearing on July 13, 2011, the Court issued an oral decision, holding that the Government had failed to meet its burden to show that on August 8, 2009 it had by clear and convincing evidence shown that respondent was included under Section 101(a)(13)(C)(v). Thus, the Court held that respondent was not properly in proceedings

and he was not an arriving alien. Furthermore, the Court found that the Government had not established the charge contained in Form I-261 by clear and convincing evidence because the Government failed to provide the conviction record relating to the respondent's conviction for possession for sale of a controlled substance. The Court, therefore, terminated the proceedings against the respondent.

The Government appealed the Court's oral decision rendered on July 13, 2011. On November 16, 2012, the Board issued a decision reversing the Court's order, finding that the Government "should be permitted to try to establish by clear and convincing evidence at the time of the removal hearing that the respondent committed an offense that is identified in 212(a)(2) of the Act for the purposes of potentially carrying its burden of establishing that the respondent was an applicant for admission under Section 101(a)(13)(C) and consequently was chargeable under admissibility grounds at Section 212(a)(2)(A)(i)." See Matter of Valenzuela-Felix, 26 I&N Dec. 53 (BIA 2012). The Board added that it expressed no opinion as to the ultimate outcome of this inquiry, but that if the Court finds the respondent's conviction for bulk cash smuggling is not a CIMT, then the Court should determine whether the respondent can properly be charged with removal based on his 1991 conviction for a controlled substance violation.

At a hearing on January 22, 2012, the parties stipulated that the Government now had the burden to show by clear and convincing evidence that the respondent was an arriving alien based on one or both of his convictions and thus was subject to removal under the charges contained in the Notice to Appear and the I-261. Regarding whether the respondent's conviction for bulk cash smuggling was a CIMT, the Government stated that it would rest on the brief submitted on July 11, 2011. The Court then made it clear to the parties that at the hearing on March 5, 2013, it would render a decision based on the evidence currently in the record, and will not accept further

evidence at the hearing. At the end of proceedings, the Court took the matter under advisement for the decision today.

LEGAL STANDARDS AND ANALYSIS:

WHETHER THE RESPODNENT'S CONVICTION FOR BULK CASH SMUGGLING IS A CRIME INVOLVING MORAL TURPITUDE

As an initial matter, it is necessary tor the Court to resolve the issue of whether the respondent's conviction for bulk cash smuggling was a crime involving moral turpitude, as this issue is critical in resolving whether the respondent was properly charged and thus subject to charges lodged against him as an arriving alien. As a general rule, a crime involves moral turpitude if it is inherently based on vile or depraved and contrary to accepted rules of morality and the duties owed between persons or to society in general. Matter of Sanudo, 23 I&N Dec. 968 (BIA 2006). Furthermore, to qualify as a crime involving moral turpitude, the perpetrator must have committed the reprehensible act with a minimal level of reckless scienter. Matter of Silva-Trevino, 21 I&N Dec. 687, 689 (A.G. 2008).

The Attorney General has provided a three-prong test to use to determine whether a conviction constitutes a crime involving moral turpitude. Matter of Silva-Trevino, 24 I&N Dec. at 689. First, the Immigration Judge shall look to the statute of conviction to determine under a category inquiry whether there is a realistic probability, not a theoretical possibility, that the state or Federal criminal statute similar to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude. See Matter of Silva-Trevino. If this category approach does not fully resolve the question, then the Court is permitted to engage in a modified category inquiry, examine the record of conviction, including documents such as the indictment, the

judgment and conviction, jury instructions, a signed guilty plea and the plea transcript. See Matter of Silva-Trevino at 690. If the record of conviction is inconclusive, then the Immigration Judge may consider any additional evidence deemed appropriate or necessary to resolve accurately the moral turpitude question. See Matter of Silva-Trevino.

CATEGORY APPROACH

Under the category approach, an Immigration Judge must determine if at the time of the alien's removal proceedings there were any cases that existed in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. Matter of Silva-Trevino, 24 I&N Dec. at 697. If the statute has not been applied, then the Immigration Judge can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude, but if it seems that the language of the statute could include both conduct that does involve moral turpitude and conduct that does not, and there is a case in which the relevant criminal statute has been applied to the latter conduct, then the Immigration Judge cannot find that all convictions under that pertinent statute are categorically crimes involving moral turpitude. Matter of Silva-Trevino.

The relevant statute at issue here is the crime of bulk cash smuggling into or out of the United States under Title 31 U.S.C. Section 5332. That section provides the following. In general, whoever with the intent to invade the currency reporting requirement under Section 5316 knowingly conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise or other container, transports or transfers or attempts to transport or transfer such currency or monetary instrument from a place outside the United States to a place within the United States, shall be guilty of a currency smuggling

offense and sentenced to punishment pursuant to subsection (b).

The Court finds that the statute at issue, 31 U.S.C. 5332, does not encompass conduct that would be considered turpitudinous. The Board of Immigration Appeals has considered this offense in three separate unpublished decisions. The Board held in each of those cases that convictions under Title 31 U.S.C. 5332 was not conduct that would be considered turpitudinous. In In Re Ariana Mendez, the Board found that the respondent's conviction under 31 U.S.C. 5332 was not categorically a crime involving moral turpitude because although the statute had a potential relationship with other offenses that may be crimes involving moral turpitude, that is not a sufficient basis to conclude that the offense as written is inevitably nefarious. 2010 W.L. 5635161 (2010). The Board noted that as held in the United States v. Bjakajin, 524 U.S. 321 (1998), the respondent's failure to declare the cash was not inherently fraudulent and caused no loss to the public. Rather, the Board noted that the respondent's crime was solely a reporting offense.

In another unpublished case, In Re Hernandez-Filho, the Board held that a conviction under 31 U.S.C. 5332 was not a crime involving moral turpitude because the statute of conviction does not require proof that the concealed currency or monetary instruments were the proceeds of criminal activity or that the perpetrators had an intent to defraud. 2010 W.L. 5635038 (2010). Rather, the Board held that failure to report the existence of the cash may be considered merely a regulatory offense similar to their conclusion in the Matter of L-V-C-, 22 I&N Dec. 594 (BIA 1990) (ruling that a currency structuring offense was not a crime involving moral turpitude).

Finally, in In Re Ariana Serabia, the Board again held that a violation of 31 U.S.C. 5332 is not inherently reprehensible because it is essentially a reporting offense and does not require proof that the concealed currency or monetary instruments were

the proceeds of criminal activity. See In Re Ariana Serabia, 2010 W.L. 225299 (2010).

Although the Court is not bound by unpublished decisions issued by the Board, the Court finds the reasoning employed in those decisions to be persuasive. As the Board noted in Hernandez-Filho, although when enacting 31 U.S.C. 5332 Congress may have intended to target drug dealers and other criminals engaged in cash-based businesses, the statute's potential relationship with other offenses that may be crimes involving moral turpitude is not a sufficient basis upon which to categorize this particular statute as one that encompasses turpitudinous conduct. Rather, the Court must look to the conduct prohibited by the statute at issue.

In that regard, the Court's review is in line with that of the Board, that is, that the conduct prohibited by 31 U.S.C. 5332 is essentially a reporting offense. Again, in that regard, the Court's view is in line with that of the Board, that is, that the conduct prohibited by 31 U.S.C. 5332 is essentially a reporting offense. In other words, the prohibited conduct relates to failing to report certain information and does not require any evidence of fraud of other inherently based vile or depraved conduct. Thus, the statute as written would not encompass conduct involving moral turpitude.

The question then becomes whether the Court may move beyond the category approach when the Court has found that the statutory language does not encompass conduct that would constitute a crime involving moral turpitude. For guidance on this issue, the Court has looked to both the Board and the Fifth Circuit case law and has determined that both courts appeared to limit the modified category approach to situations in which the moral turpitude inquiry is not resolved using the category approach, that is, when the statute encompasses both turpitudinous and non-turpitudinous conduct.

In the Matter of Silva-Trevino, the Attorney General directs the courts, when

analyzing whether a particular crime is a crime involving moral turpitude, to begin at the category stage using a realistic probability approach to determine whether there is a realistic probability that the statute at issue could be applied to conduct that would involve moral turpitude. Matter of Silva-Trevino, at 687 and 698. The Attorney General then discussed why a modified category approach may be necessary. The Attorney General held that the option of continuing to a modified category approach is necessary because the realistic probability approach cannot assure proper resolution of all moral turpitudinous inquiries. See Matter of Silva-Trevino. The Attorney General wrote that the realistic probability method employed in the category approach provides no answer where a statute encompasses both conduct that involves moral turpitude and conduct that does not. See Silva-Trevino, at 698.

As the Attorney General noted, a problem arises when a statute can be broken into two or more parts, one part involving conduct that is morally turpitudinous, and other parts that do lack such conduct. This suggests that the moral turpitude inquiry may be resolved at the category stage, meaning the Court can determine whether this statute is categorically is or is not one that involves moral turpitude, then the inquiry ends there. Under this reasoning, there will be no reason to employ the modified categorical approach, as the moral turpitude inquiry would be resolved at the category stage, meaning it would not involve a situation in which the category approach provides no answer where a statute encompasses both conduct that involves moral turpitude and conduct that does not. The Attorney General ruling in the Matter of Silva-Trevino, therefore, suggests that when a court is able to resolve a moral turpitude inquiry at the category stage, the Court need not continue on to the modified category stage, as the purpose of that stage is to resolve a moral turpitude inquiry that cannot be resolved at the category stage.

The Fifth Circuit case law also supports the proposition that the modified category approach is only appropriate when a statute, at a minimum, includes both turpitudinous and non-turpitudinous conduct. The Fifth Circuit has held that it is appropriate to continuously modify the categorical approach when the statute is divisible, and some parts describe crimes involving moral turpitude and some do not. Nino v. U.S., 690 F.3d 691 (5th Cir. 2010). Thus, it would appear that the Fifth Circuit also endorses employing the modified category approach only in limited situations when the moral turpitude inquiry cannot be resolved either way at the category stage.

Based on the Attorney General's decision and the Fifth Circuit precedent discussed above, the Court finds that it is not appropriate to employ the modified category approach or the third prong of Silva-Trevino when, as here, the Court has found that the statute itself does not encompass conduct that would constitute a crime involving moral turpitude. Accordingly, the Court finds that respondent's conviction under Title 31 U.S.C. 5332 is not a crime involving moral turpitude.

WHERE THE RESPONDENT WAS AN ARRIVING ALIEN WHEN HE ENTERED THE UNITED STATES ON AUGUST 8, 2009 DUE TO HIS CONVICTION FOR BULK CASH SMUGGLING

An arriving alien is defined in relevant part as an applicant for admission, coming or attempting to come into the United States at a port of entry. 8 C.F.R. Section 1001.1(q). However, when a lawful permanent resident arrives at a port of entry, they are generally not considered to be seeking admission to the United States and are therefore not arriving aliens under the Act. Section 101(a)(13)(C). There are, however, exceptions to this general rule. See Section 101(a)(2). Unless under such offense the alien has been granted relief under Section 212(h) or Section 240A(a) of the Act. See Section 101(a)(13)(C)(v).

Here the respondent was a lawful permanent resident when he arrived at the port of entry on August 8, 2009. Thus, if respondent were to file under the exception in Section 101(a)(13)(C)(v), he would be considered seeking admission to the United States and, therefore, been an arriving alien under 8 C.F.R. 1001.1(q).

As noted above, the Court has found that the respondent's crime for bulk cash smuggling did not qualify as a crime involving moral turpitude under Section 212(a)(2)(A)(i)(I). Thus, when the respondent arrived at the port of entry on August 8, 2009, he had not committed a crime involving moral turpitude; thus, he would not be subject to the exception delineated in Section 101(a)(13)(C)(v). As a result, the respondent was not required to seek admission to the United States when he arrived on August 8, 2009, and would therefore not be an arriving alien under 8 C.F.R. Section 1001.1(q).

CHARGES UNDER SECTION 212(a)(2)(A)(i)

As noted above, the Court has found that the respondent was not an arriving alien when he arrived at the port of entry on August 8, 2009, as he was a lawful permanent resident that was not required to seek admission under Section 101(a)(13)(C)(v) of the Act. Accordingly, the Court finds that the charge under Section 212(a)(2)(A)(i)(I) cannot be sustained, as a lawful permanent resident cannot be charged with a ground of inadmissibility when he was not required to seek admission. Thus, the Government has failed to establish by clear and convincing evidence that the respondent is an arriving alien subject to inadmissibility under Section 212(a)(2)(A)(i)(I) of the Act. See Matter of Rivens, 25 I&N Dec. 623 (BIA 2011) (holding that the Government bears the burden by clear and convincing evidence that a returning lawful permanent resident is seeking an admission).

Second, the Court finds the charge under Section 212(a)(2)(A)(i)(I), a charge that

covers crimes involving moral turpitude, cannot be sustained as the Court has determined that the respondent's conviction for bulk cash smuggling was not a crime involving moral turpitude. Thus, the Government has also failed to establish by clear and convincing evidence that the respondent is inadmissible under Section 212(a)(2)(A)(i)(I) of the Act.

CHARGE UNDER SECTION 212(a)(2)(A)(i)(II)

Although the Government has charged respondent under Section 212(a)(2)(A)(i)(II) based on alleged conviction for possession for sale of a controlled substance, the Government failed to submit any evidence required under Section 240(c)(3)(B) in order to establish the respondent's conviction. Exhibit 6. The Government has, therefore, failed to meet its burden to establish that the respondent was convicted for possession or sale of a controlled substance, and thus has failed to establish by clear and convincing evidence that the respondent is inadmissible under Section 212(a)(2)(A)(i)(II) of the Act. The Court, therefore, finds the charge under Section 212(a)(2)(A)(i)(II) cannot be sustained.

Pursuant to the Board's directive on remand, the Court has also considered whether respondent would be removable due to his alleged 1991 conviction for possession for sale of a controlled substance. However, as the Government failed to meet its burden to establish that conviction (and also failed to file an additional charge of removal against the respondent), the Court need not further consider any charge of removal against the respondent based on that conviction.

MOTION TO TERMINATE

After commencement of proceedings, any party may move the Court for dismissal and only the Court upon a motion may then terminate. Matter of G-N-C-, 22 &N Dec. 281 (BIA 1998). See also 8 C.F.R. Section 1239.2(c) and 239.2(c).

Here, the respondent has moved for the Court to terminate proceedings on the basis that the Government has failed to meet its burden to establish the charges under Section 212(a)(2)(A)(i)(I) and Section 212(a)(2)(A)(i)(II). The Court has indeed found that the Government has failed to meet its burden on either charge. Thus, the Court will grant the respondent's motion to terminate and terminate proceedings. Furthermore, given that the Court gave the Government ample opportunity to provide the conviction records related to the respondent's alleged conviction for a controlled substance, the Court finds that proceedings must be terminated with prejudice in order to ensure that the Government does not later charge the respondent based on that conviction.

Accordingly, the following order shall be entered:

ORDER

IT IS HEREBY ORDERED that the charge pursuant to Section 212(a)(2)(A)(i)(I) is not sustained.

IT IS FURTHER ORDERED that the charge under Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act is not sustained.

IT IS FURTHER ORDERED that respondent's motion to terminate proceedings is granted.

IT IS FURTHER ORDERED that removal proceedings against the respondent be terminated with prejudice.

Please see the next page for electronic signature

DEITRICH H. SIMS
Immigration Judge

//s//

Immigration Judge DEITRICH H. SIMS

simsd on August 6, 2013 at 9:14 PM GMT