



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Cleveland, OH 44199**

Name: DE BARTOLO, RENATO

A 018-330-617

Date of this notice: 12/11/2015

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:
Miller, Neil P.

Userteam: Docket

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Falls Church, Virginia 22041

File: A018 330 617 – Bedford, OH

Date:

DEC 11 2015

In re: RENATO DE BARTOLO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Margaret W. Wong, Esquire

APPLICATION: Reopening; termination

The final order of removal in these proceedings was entered by the Board on November 18, 2014, when we dismissed the respondent's appeal. The respondent filed an untimely motion to reopen his proceedings on October 8, 2015. *See* sections 240(c)(7)(A), (C) of the Immigration and Nationality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C); 8 C.F.R. § 1003.2(c)(2). The respondent does not dispute the untimeliness of his motion, but requests that the Board exercise its sua sponte authority to reopen and terminate his proceedings in the interests of justice. *See* 8 C.F.R. § 1003.2(a). The Department of Homeland Security ("DHS") has not responded to the motion. The motion will be granted.

The respondent asserts that on September 8, 2015, the Northern District Court of Indiana, South Bend Division, granted the respondent's petition filed pursuant to 28 U.S.C. § 2555 and the government's motion to dismiss the indictment against the respondent without prejudice in accordance with the United States Court of Appeals for the Seventh Circuit's decision in *DeBartolo v. U.S.*, 790 F.3d 775 (7th Cir. 2015). This conviction formed the basis for the respondent's charges of removability under sections 237(a)(2)(A)(iii), (B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), (B)(i). The respondent urges that the plea and resulting conviction were vacated by the circuit and state courts because he had not been apprised of the possible immigration consequences resulting from his guilty plea pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). He further argues that the DHS can no longer meet its burden of proof regarding the charges of removability based on the vacatur of his plea and conviction.

Considering the totality of circumstances presented in the respondent's motion, the proceedings are reopened and terminated on our own motion under the provisions of 8 C.F.R. § 1003.2(a). *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997). We find that the uncontested evidence presented shows that the underlying conviction which served as the basis for the respondent being subject to removal has been vacated due to a defect in the criminal proceeding. If a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006)(conviction vacated pursuant to Ohio law for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes). Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The removal proceedings are terminated and the record is returned to the Immigration Court without further action.



FOR THE BOARD