U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
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Mahon, Andrew Joseph
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132 East Chestnut Street
Lancaster, PA 17603

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: CASTRO-CAMACHO, DAVID

A 058-107-973

Date of this notice: 3/30/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam: Docket

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CASTRO-CAMACHO, DAVID
A058-107-973
YORK COUNTY PRISON
3400 CONCORD ROAD
YORK, PA 17402

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3400 Concord Road
York, PA 17402

Name: CASTRO-CAMACHO, DAVID **A 058-107-973**

Date of this notice: 3/30/2017

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

Userteam:

File: A058 107 973 – York, PA

Date: MAR 30 2017

In re: DAVID CASTRO-CAMACHO

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Andrew J. Mahon, Esquire

ON BEHALF OF DHS: Keith Hoppes
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Removability; remand

The respondent, a native and citizen of the Dominican Republic and a lawful permanent resident of the United States, has timely appealed the Immigration Judge's November 21, 2016, decision. During the pendency of the appeal, the respondent filed a motion to remand the record to the Immigration Judge. The Department of Homeland Security ("DHS") has filed a response to the motion and does not oppose remanding the case to the Immigration Judge. The motion to remand will be granted and the record will be returned to the Immigration Judge for further proceedings.

We review an Immigration Judge's findings of fact, including findings with regard to credibility and the likelihood of future events, to determine whether they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i); *see also Huang v. Att'y Gen. of U.S.*, 620 F.3d 372, 382-87 (3d Cir. 2010); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review de novo all questions of law, discretion, and judgment and any other issues in appeals from decisions of Immigration Judges. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was charged with removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), due to his April 9, 2015, conviction for possession of a controlled substance, to wit, synthetic marijuana, in violation of Title 35 of the Pennsylvania Statute, section 780-113(a)(16) (I.J. at 1-2). The Immigration Judge found the respondent removable as charged.

The respondent has filed a motion to remand based on the February 6, 2017, decision of the Lancaster County Court of Common Pleas to vacate and dismiss the respondent's conviction of possession of synthetic marijuana on the basis of ineffective assistance of counsel. The respondent included a copy of the court's decision with his motion. In its response to the

respondent's motion, the DHS states that it does not oppose the motion. Based on the foregoing, we will remand the record to the Immigration Judge for consideration of the new evidence in this case. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992) (holding that motions to remand are subject to the same substantive requirements as motions to reopen); 8 C.F.R. § 1003.2(c)(1) (a motion to reopen shall not be granted unless it appears that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing). The Immigration Judge should consider the new evidence and enter a new decision in this case.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this order and for the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A058-107-973 November 21, 2016

In the Matter of

DAVID CASTRO-CAMACHO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: 237(a)(2)(B)(i).

APPLICATIONS: Motion to Terminate.

ON BEHALF OF RESPONDENT: ANDREW MAHON, Esq

ON BEHALF OF DHS: KEITH HOPPES, Assistant Chief Counsel and Jeff Bubier, Senior Attorney

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a male, native and citizen of the Dominican Republic. He was admitted to the United States at New York, New York on February 10, 2009, as an immigrant. However, on April 9, 2015, the respondent was convicted in the magisterial district court, Lancaster County, Pennsylvania for the offense of possession of a controlled substance, to wit, synthetic marijuana in violation of Title 35 of the Pennsylvania Statute Section 780-113(a)(16). Pursuant to this conviction, the respondent was placed in removal proceedings and charged under Section

237(a)(2)(B)(i) for having been convicted of a controlled substance.

The respondent has had numerous master calendar hearings. However, at his prior hearings through counsel, he has admitted time, place, manner of admission but denied the conviction as alleged on the Notice to Appear. See Exhibit 1. And denied the charge of removal.

The following evidence was considered by the Court:

Exhibit 1 is the Notice to Appear.

Exhibit 2-A was a motion to accept late filed documents by the Department of Homeland Security.

Exhibit 2 are those documents at Tabs A through F.

Exhibit 2-B was the withdrawal of the admission to the charge by respondent's prior counsel.

Exhibit 2-C is a motion to withdraw submitted by respondent's prior counsel.

Exhibit 2-D was a grant of the request by prior counsel to withdraw. Attorney Troy Mattes and Andrew Mahon entered their appearance and are the attorney of record in these proceedings.

Exhibit 3 is DHS evidence, Tab G.

Exhibit 4 is the respondent's motion to terminate.

Exhibit 5 is DHS' opposition to the motion to terminate.

Exhibit 6 is a supplemental brief by the Department of Homeland Security and Exhibit 7 is respondent's reply brief submitted through counsel.

The respondent argues that he is not removable based on several arguments that were advanced. The first argument is that the Government is relying on an affidavit of probable cause to demonstrate that synthetic marijuana includes XLR-11.

Synthetic marijuana as previously defined under Pennsylvania law includes several substances, some of which are under the Federal controlled substances list and some are not. XLR-11 is punishable under the Federal law. However, the only document that reflects XLR is the affidavit of probable cause and respondent's counsel argues that that document is not a judicially noticeable document.

Furthermore, respondent's counsel argues that the Government's evidence at Exhibit 3, Tab G, the affidavit of probable cause is not signed by the district judge and also the page prior to the affidavit of probable cause indicates that the police criminal complaint consists of the preceding pages numbered 1 and 2. Upon consideration of all the evidence and the arguments from both parties, the Court is sustaining the charge of removal and denying the motion to terminate.

COURT'S ANALYSIS

Under INA Section 237(a)(2)(B)(i), any alien who at any time after admission has been convicted of a violation of or conspiracy or attempt to violate any law or regulation of a state, the United States or a country relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana is deportable. The Third Circuit has interpreted Section 237(a)(2)(B)(i) to require: 1) a conviction under a law relating to a controlled substance, the controlled substance be defined under the Controlled Substances Act. See Rojas v. Attorney General cited at 728 F.3d 203 (3rd Cir. 2013).

The existence of a federally controlled substance can be established by documents pursuant to the Supreme Court's decision in Taylor and Sheppard. This approach was affirmed by the U.S. Supreme Court in a case called Mellouli 575 U.S. ___ (2015)alully, where the Supreme Court held that an alien's conviction must involve a federally controlled substance in order to trigger the grounds of removability cited at 135

Supreme Court 1980 (U.S. Supreme Court 2015). In Mellouli~~aluly~~, the petitioner's record of conviction was silent as to the substance involved in the Kansas drug paraphernalia conviction. While the courts have found the charge to be very broad as to the charge, it uses language relating to, the Supreme Court held that the Government still has the burden to establish that it involves a drug that is punishable under the Federal Controlled Substances Act. See Matter of Espinoza, cited at 25 I&N Dec. 118 (BIA 2009) and see Baromi, Third Circuit decision cited at 687 F.3d 160, and Dennis v. Attorney General, cited at 633 F.3d 201 (3rd Cir. 2011).

In this case, the respondent was convicted on April 9, 2015, of possession of a controlled substance in violation of Pennsylvania Consolidated Statutes, Title 35, Section 780-113(a)(16). See Exhibit 3. A controlled substance violation renders the respondent removable under Section 237(a)(2)(B)(i). The respondent contends that the Department of Homeland Security has not shown that the respondent is removable under this charge as the agency has not shown that the conviction relates to a federally controlled substance. The respondent argues that pursuant to Taylor v. U.S., cited at 495 U.S. 575 (1990), that the affidavit of probable cause is not a judicially noticeable document.

In determining whether a state offense involves a federal controlled substance, the permissible documents to be examined include the charging documents, plea colloquy, plea agreements. See Sheppard v. United States, cited at 544 U.S. 13 (U.S. Supreme Court 2005). A criminal complaint may only be used to the extent that it functions as part of the charging document. See Rojas v. Attorney General, cited at 728 F.3d 2003 (3rd Cir. 2013). However, in Pennsylvania, a criminal complaint does, in fact, function as a charging document. See Garcia v. Attorney General, cited at 462 F.3d 287 (3rd Cir. 2006). DHS relies on the Garcia decision at Exhibit 6 and the Court

having reviewed the decision, finds that the case is controlling and the Garcia case states the following, "in Pennsylvania, a criminal complaint is not merely a police report. It is the charging document and in this case, bears the impetour of the district attorney. The filing of a criminal complaint is sufficient to initiate criminal proceedings in the Commonwealth, and Pennsylvania law does not require the subsequent filing of either an information or indictment of a plea of guilty or nolo contendere is entered."

Since the facts of this case are similar to the Garcia case in that the conviction is out of the magisterial court, the Court finds that the charging document, includes a criminal complaint and that that criminal complaint is part of the record of conviction. The Garcia case goes on to say, "since the record of conviction includes the charging document and the criminal complaint in Garcia's case is the relevant charging document, we may appropriately examine that the complaint if departure from the formal categorical approach is appropriate. Thus, the question in this present case is whether the affidavit of probable cause serves as part of the criminal complaint. In the case at hand, the affidavit of probable cause is on page 5 entitled police criminal complaint and while the respondent did, in fact, only sign page 2 of the complaint, this does not preclude the affidavit of probable cause as being part of the complaint in its entirety.

Pursuant to Section 234 P.A. Section 504(6)(a), which is the Pennsylvania court rules, also at Exhibit 10, it states that in a court case, the summary of the facts sufficient to advise the defendant of the nature of the offense charged, but neither the evidence nor the statute allegedly violated, need be cited in the complaint. However, a citation of the statute allegedly violated by itself shall not be sufficient for compliance with this subsection. The Court having reviewed that rule, finds that the respondent's argument that the complaint only include page 1 and 2, which really only reiterates what

the statute says, would be insufficient to constitute the criminal complaint in this case. And so the Court finds that it must also include the affidavit of probable cause. Otherwise, it would not be in compliance with Pennsylvania Rule 504(6)(A). Having found that the affidavit of probable cause should be part of the record of conviction in this case, the Court finds that the Government has met their burden by clear and convincing evidence that the respondent has been convicted of a controlled substance, possessing a controlled substance violation or a controlled substance that is punishable under the Federal controlled substance list, that being XLR-11.

Further, the respondent's argument that the affidavit of probable cause is not signed by the magisterial district court, district judge is correct. However, the page immediately preceding which is also part of the titled police criminal complaint, the same document that says the complaint consists of the preceding number of pages, numbered 1 through 2 is signed by the judge and there are other documents that Exhibit 3, Tab G that are signed by the judge. And so based upon the record as a whole, the Court finds that the affidavit of probable cause is evidence of the respondent's conviction when pursuant to the regulations at 8 C.F.R. Section 1003.41(a)(6) that states any document or record prepared by or at the direction of the Court in which the conviction was entered, that indicates the existence of a conviction can be relied upon by this Court as part of the record of conviction. Further, 8 C.F.R. Section 1003.41(d) says that any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof. And so the Court considering the affidavit of probable cause in conjunction with the other documents contained at Exhibit 3, Tab G, that do include a signature from the magisterial court, the Court finds to be sufficient evidence of the respondent's conviction in this case. And so therefore the Court does find that the respondent is removable by clear and convincing evidence and

the charge of removal is hereby sustained.

The case was rescheduled to today's date for the respondent to indicate any relief that is being sought. The respondent was seeking prosecutorial discretion. However, the Department of Homeland Security has elected not to favorably exercise prosecutorial discretion in this case. Because the respondent was admitted as a lawful permanent resident for the first time in 2009 and was convicted in 2015, the respondent does not have the requisite seven years of continuous residence after having been admitted in any status to establish eligibility for cancellation of removal for a lawful permanent resident. See INA Section 240A(a)(2).

ORDERS

Therefore cancellation is not an option for the respondent and since there is no other relief that the respondent is seeking in these proceedings, the Court unfortunately has no choice but to order the respondent removed from the United States to the Dominican Republic pursuant to the charge on the Notice to Appear.

Please see the next page for electronic

signatureKGQ
November 21, 2016

KUYOMARS Q. GOLPARVAR
Immigration Judge

//s//

Immigration Judge KUYOMARS Q. GOLPARVAR

golpark on January 24, 2017 at 12:26 PM GMT