U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Helena, MT 59601

Office of the Dep. Chief Counsel,
2800 Skyway Drive
Helena, MT 59602

Name: NOYOLA-MONTALVO, CANDIDO **A23-006-885**

Date of this notice: 12/05/2005

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

Sincerely,

F.F. Kr

Frank Krider
Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.
OSUNA, JUAN P.
PAULEY, ROGER

File: A23 006 885 - Helena, Montana Date:

In re: CANDIDO NOYOLA-MONTALVO DEC - 5 2005

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Deborah S. Smith, Esquire

ON BEHALF OF DHS: Ann M. Tanke
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

Lodged: Sec. 212(a)(2)(C), I&N Act [8 U.S.C. § 1182(a)(2)(C)] - Controlled substance trafficker

APPLICATION: Cancellation of removal; adjustment of status

The respondent appeals from an Immigration Judge's October 21, 2004, decision sustaining the charges of inadmissibility against him and denying his applications for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i). The Department of Homeland Security (the "DHS"), formerly the Immigration and Naturalization Service, opposes the appeal. The appeal will be sustained in part and the record will be remanded to the Immigration Judge for further proceedings.

The respondent, a native and citizen of Mexico, does not dispute that he is an alien present in the United States without having been admitted or paroled. Accordingly, he is removable under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). However, the Immigration Judge also concluded that the respondent is inadmissible, and ineligible for cancellation of removal and adjustment of status, because he is an alien who "the Attorney General knows or has reason to believe ... is or has been an illicit trafficker in any controlled substance," within the meaning of section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i). On appeal, the respondent maintains that he is not inadmissible under section 212(a)(2)(C)(i) and that he is eligible for both cancellation of removal and adjustment of status.

The Immigration Judge finding of inadmissibility under section 212(a)(2)(C)(i) of the Act was based exclusively on the respondent's arrest and diversion in 1986 on a charge of marijuana

cultivation in violation of CAL. HEALTH & SAFETY CODE § 11358. According to the police report prepared in connection with this arrest, the respondent was found to be growing 15 marijuana plants in his garden, as well as a number of seedlings. As the Immigration Judge appeared to acknowledge, there is nothing in the police report or the subsequent court papers prepared in connection with the offense that would suggest that the respondent's cultivation of marijuana was for any reason other than his own personal use. Nonetheless, the Immigration Judge "assum[ed] ... that the personal cultivation and raising of marijuana would be deemed an act of manufacturing and that as one who 'manufactured,' he comes within the ambient [sic] of the 'trafficker' standard." I.J. Dec. at 4. On the facts of this case, we do not agree.

An alien's drug-related conduct gives the Attorney General "reason to believe" that he is an "illicit trafficker" in a controlled substance only if that conduct is of a "business or merchant nature," reflecting a predilection on the alien's part to "trade" or "deal" in controlled substances for profit. *Cf. Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992) (holding, in the aggravated felony context, that "[e]ssential to the term ['trafficking'] ... is its business or merchant nature, the trading or dealing of goods"). While an alien need not be a continuous, long-term participant in a drug distribution enterprise in order to be an "illicit trafficker," *Matter of P-*, 5 I&N Dec. 190 (BIA 1953), he must at a minimum have engaged, or attempted to engage, in some form of drug-related commercial activity, however slight. Where an alien's drug-related conduct is not commercial by its nature, its status as evidence of "trafficking" depends on context. *Compare Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (holding that the Attorney General had reason to believe that an alien found at the border in possession of 162 pounds of marijuana was an "illicit trafficker," since the quantity of marijuana involved was not consistent with personal use), *with Matter of McDonald and Brewster*, 15 I&N Dec. 203 (BIA 1975) (holding that alien's attempt to smuggle a few marijuana cigarettes into the United States for personal use did not give the Attorney General reason to believe the alien was an "illicit trafficker"in marijuana).

While an alien involved in the cultivation or manufacture of large quantities of marijuana (i.e., quantities not consistent with personal use) could certainly be inadmissible under section 212(a)(2)(C)(i), the present respondent engaged in the cultivation of 15 marijuana plants and some seedlings. While we have no wish to minimize the seriousness of the respondent's conduct, the evidence simply does not reflect that his cultivation of these plants was inconsistent with personal use; on the contrary, the treatment of the respondent's offense by the State of California suggests that he was growing marijuana for his own consumption. Specifically, after being charged, the respondent was placed in a drug diversion program available only to individuals who have cultivated marijuana for personal use, and upon his successful completion of diversion his criminal record was expunged. Under the circumstances, we conclude that the respondent has met his burden of demonstrating by a preponderance of the evidence that he is not inadmissible to the United States under section 212(a)(2)(C)(i). We now turn to the respondent's arguments regarding his eligibility for relief from removal.

To be eligible for cancellation of removal under section 240A(b) of the Act, the respondent must demonstrate, inter alia, that his removal from the United States will result in exceptional and extremely unusual hardship to his United States citizen or lawful permanent resident spouse, parent or child. In this instance the respondent's qualifying relatives are his lawful permanent resident

parents and his United States citizen child. The Immigration Judge concluded that although the respondent's removal would undoubtedly result in some degree of emotional and, in the case of his child, financial hardship, the record did not reflect that these hardships would be so unusual or severe when compared with those experienced by other, similarly-situated, individuals that they may fairly be characterized as "exceptional and extremely unusual" in the sense intended by Congress. Keeping in mind that the respondent is not the custodial parent of his child and does not appear to maintain a particularly close relationship with his parents, we find no reversible error in this determination. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 21 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001). Accordingly, we will not disturb the Immigration Judge's determination that the respondent is ineligible for cancellation of removal under section 240A(b) of the Act.

In addition to cancellation of removal, the respondent wants to adjust his status under section 245(i) of the Act from that of an alien present in the United States without having been admitted or paroled to that of an alien lawfully admitted for permanent residence. The Immigration Judge determined that the respondent was not eligible for adjustment of status because he was inadmissible under section 212(a)(2)(C)(i) of the Act. As we have already noted, the fact that the respondent engaged in personal marijuana cultivation in 1986 does not make him an "illicit trafficker" in marijuana for purposes of section 212(a)(2)(C)(i), and therefore we will vacate the Immigration Judge's decision denying the respondent's adjustment of status application and remand the record for a determination as to whether the respondent is otherwise eligible for adjustment of status and whether he merits such relief in the exercise of discretion.

Accordingly, the following orders shall be issued.

ORDER: The appeal is sustained in part.

FURTHER ORDER: The Immigration Judge's decision is vacated in part and the record is remanded for further proceedings consistent with the foregoing decision.

FOR THE BOARD