U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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P.O. Box 8728
Boston, MA 02114

Name: ISABEL DIAZ, JOSE MANUEL

A 205-500-422

Date of this notice: 12/30/2013

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:
Grant, Edward R.

yungc
Userteam: Docket

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A205-500-422
PLYMOUTH CTY HOC
26 LONG POND RD
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P.O. Box 8728
Boston, MA 02114

Name: ISABEL DIAZ, JOSE MANUEL **A 205-500-422**

Date of this notice: 12/30/2013

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,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.

yungc
Userteam: Docket

File: A205 500 422 – Boston, MA Date: DEC 30 2013

In re: JOSE MANUEL ISABEL DIAZ a.k.a. Luis Maldonado

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Javier F. Pico, Esquire

APPLICATION: Motion to remand

The respondent has appealed from the Immigration Judge's August 12, 2013, decision denying his request for a continuance, finding him subject to removal as charged, and ordering his removal to the Dominican Republic. The appeal will be dismissed.

The record reflects that the respondent, a native and citizen of the Dominican Republic, entered the United States without being admitted or paroled after inspection (Exh. 1). The Department of Homeland Security ("DHS") submitted evidence indicating that the respondent is the subject of criminal proceedings in Essex County Court in Massachusetts on a charge relating to drug trafficking (Exh. 5). The DHS argued that the respondent is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as an alien whom an immigration officer has "reason to believe" is or has been an illicit trafficker in a controlled substance or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in a controlled substance and is therefore ineligible to adjust his status.

In his August 12, 2013, decision, the Immigration Judge concluded that the evidence of the respondent's arrest was sufficiently detailed to serve as evidence of the specifics of the underlying conduct of the respondent relating to the criminal charges (I.J. at 2; Exhs. 2, 5 & 5). Upon consideration of the criminal arrest and the information contained therein, the Immigration Judge determined that there was sufficient evidence making it "likely" that the respondent participated in the illicit trafficking of drugs and is inadmissible under section 212(a)(2)(C) of the Act as a suspected drug trafficker (I.J. at 2; Exh. 5). The Immigration Judge went on to note that the respondent's invocation of the Fifth Amendment in response to questions raised regarding his alleged criminal activities did not aid him in meeting his burden of proof in establishing that he is not inadmissible under section 212(a) of the Act for purposes of eligibility for adjustment of status (I.J. at 2). On appeal, the respondent asks that proceedings be remanded to await the outcome of the criminal proceedings pending against him and so that he may renew his request for pre-conclusion voluntary departure. *See* Respondent's Brief at 3-4.

Although there is no controlling case law defining a "reason to believe" as that phrase is used in section 212(a)(2)(C) of the Act, similar language in different statutes has generally been interpreted as a "probable cause" requirement. *See generally Ludecke v. United States Marshal*, 15

F.3d 496, 497 (5th Cir. 1994) (equating probable cause with a "reasonable ground" to believe the accused guilty); *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990) (noting that a "reasonable belief" that the alien is involved in terrorist activity may be formed if the evidence linking the alien to terrorist violence is sufficient to justify a "reasonable person" in the belief that the alien falls within the proscribed category); *Oen Yin-Choy v. Robinson*, 858 F.2d 1400, 1407 (9th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) (equating probable cause to a "reasonable ground to believe the accused guilty" in an extradition case); *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984) (same); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) (noting that in order to issue an order and warrant for commitment in international extradition cases, the "existence of probable cause or, in other words, the existence of a reasonable ground to believe the accused guilty of the crime charged" is essential). We find "probable cause" to be a reasonable interpretation of section 212(a)(2)(C)'s "reason to believe" requirement, and we adopt that interpretation here. *Matter of Casillas-Topete*, 25 I&N Dec. 317 (BIA 2010).

We find no reason to disturb the Immigration Judge's conclusions and, thus, find no reason to stay the respondent's proceedings pending the outcome of the criminal proceedings. As compared to a "clear and convincing" standard, the "reason to believe" standard is quite low, i.e., probable cause. The evidence of record indicates that the respondent was observed making "a street level drug transaction" involving cocaine. In removal proceedings the respondent took the Fifth Amendment thereby failing to provide any other plausible explanations for his participation in the incident. *Compare Matter of Guevara*, 20 I&N Dec. 238 (BIA 1991) (an alien's silence in response to questions relating to whether or not he was subject to deportation cannot serve as evidence of his deportability and cannot be given a negative inference) with *Matter of Carillo*, 17 I&N Dec. 30 (BIA 1979) (when alien has already conceded deportability his silence to questions in relation to meeting his burden of proof for relief from deportation can be given a negative inference in deciding whether alien met burden of proof).

Under these circumstances, we find that the Immigration Judge was justified in finding that the arresting police officer had a reason to believe that the respondent was an illicit drug-trafficker or at least a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. The objective facts of this case justify an immigration officer in having probable cause or a reason to believe that the respondent was involved in drug-trafficking. See *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977) (noting that an alien may be excluded if an immigration officer knows or has reason to believe the alien is or has been an illicit trafficker in drugs). The respondent has failed to provide any evidence disputing this finding and thus has failed to show that he is not inadmissible. Moreover, since the respondent did not concede removability and waive appeal of all issues, the Immigration Judge correctly concluded that he is not statutorily eligible to seek pre-conclusion voluntary departure. Section 240B(a) of the Act.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

File: A205-500-422 August 12, 2013

In the Matter of

JOSE MANUEL ISABEL DIAZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Immigration and Nationality Act (INA) Section 212(a)(6)(A)(i) - in that the respondent is present in the United States without being admitted or paroled;

INA Section 212(a)(2)(C) - in that the consular or Immigration officer knows or has reason to believe that the respondent is an alien who is or has been an illicit trafficker in any controlled substance, or who is or has been a knowing assistor, abettor, conspirator or colluder with others in the illicit trafficking in any such controlled substance.

APPLICATIONS: Continuance.

ON BEHALF OF RESPONDENT: JAVIER F. PICO

ON BEHALF OF DHS: HELEN E. MOORE

ORAL DECISION OF THE IMMIGRATION JUDGE

Removal proceedings against the respondent, Jose Manuel Isabel Diaz, were initiated on July 25, 2013, with the filing in Immigration Court of the Notice to Appear. The notice alleged that he was not a citizen or national of the United States, but was a

native and citizen of the Dominican Republic; that he arrived in the United States at an unknown place, time and date; that he was not then admitted or paroled after inspection by an Immigration officer; and that he has been an illicit trafficker of a controlled substance or was, or has been a knowing assister, aider, abettor, conspirator, or colluder with others in the illicit trafficking of a controlled substance, specifically cocaine. He was charged with removability pursuant to INA Sections 212(a)(6)(A)(i) and 212(a)(2)(C). See Exhibit 1.

On the issue of removability, the respondent submitted pleadings on August 1, 2013. In these pleadings the respondent, through counsel, admitted to the first four allegations in the Notice to Appear, denied the fifth allegation and conceded removability under INA Section 212(a)(6)(A)(i), but did not concede removability under INA Section 212(a)(2)(C). See Exhibit 3. The Court received into evidence Exhibit 2, an I-213, Record of Deportable/Inadmissible Alien, and in addition received into evidence Exhibit 4 and Exhibit 5, consisting of the respondent's Essex County face sheet and a police report describing the events that has led to the respondent's current charge of possession with intent to distribute cocaine. Based upon the written pleadings, as well as Exhibits 2, 4 and 5, this Court finds by clear, convincing and unequivocal evidence that the allegations set forth in the Notice to Appear are true, and the two charges of removability are sustained.

The respondent initially indicated that he would seek pre-conclusion voluntary departure. Pre-conclusion voluntary departure requires that the respondent concede removability. See 8 C.F.R. §1240.26(b)(1)(i)(C). The respondent does not concede removability and because he is pending a current charge does not desire to take the stand and testifying in regard to the events concerning his current criminal charge of possession with intent to distribute.

The respondent seeks no other form of relief other than a continuance to await the outcome of his criminal charge. The Court will not delay these proceedings any longer. The respondent is removable as charged. If he is acquitted of the drug trafficking charge, he may be eligible for voluntary departure at that time. However, at this time it is a speculative matter, and the Court will not await the disposition of his criminal charges. The Court, therefore, denies the motion to continue these proceedings, and there being no other relief sought will order the respondent's removal to the Dominican Republic.

ORDER

IT IS HEREBY ORDERED that the respondent be removed to the Dominican Republic.

Please see the next page for electronic signature

STEVEN F. DAY
Immigration Judge

//s//

Immigration Judge STEVEN F. DAY

days on September 30, 2013 at 10:52 AM GMT