



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

**Riley, Casey L.
Masferrer & Associates, P.C.
45 Bromfield Street
5th Floor
Boston, MA 02108**

**DHS/ICE Office of Chief Counsel - BOS
P.O. Box 8728
Boston, MA 02114**

Name: TAVAREZ, CARLOS A

A 043-908-493

Date of this notice: 10/8/2020

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:
Kelly, Edward F.

Userteam: Docket

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Falls Church, Virginia 22041

File: A043-908-493 – Boston, MA

Date:

OCT - 8 2020

In re: Carlos A. TAVAREZ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Casey L. Riley, Esquire

APPLICATION: Reconsideration

This matter was last before the Board on April 20, 2020, when we denied the respondent's untimely motion to reopen.¹ On May 20, 2020, the respondent filed the instant timely motion to reconsider. The Department of Homeland Security (DHS) has not responded to the motion. For the reasons set out below, the respondent's motion will be granted and these proceedings will be reopened and terminated.

With his prior motion to reopen, the respondent presented evidence that his 1999 conviction for larceny, breaking and entering in the nighttime with intent to commit a felony was vacated by the state court on the grounds that the respondent was not advised of the immigration consequences of his guilty plea. The respondent urges that the DHS can no longer meet its burden of proof regarding his only charges of removability based on the vacatur of his plea and conviction.


Considering the totality of circumstances presented, 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). Upon review, we find that the uncontested evidence presented shows that the underlying convictions which served as the sole basis for the respondent being subject to removal have 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). The record reflects that, following his plea withdrawal, the respondent's case was placed on file for a period of thirty days, after which the case was dismissed. It is therefore apparent that the respondent will not be re-tried for the same offenses and there is thus no conviction to serve as a basis for the respondent's removal. The following orders will therefore be entered.

ORDER: The motion to reconsider is granted, our April 20, 2020, decision is vacated, and the respondent's proceedings are reopened.

¹ The respondent has a petition for review of the Board's decision currently pending before the United States Court of Appeals for the First Circuit.

A043-908-493

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



FOR THE BOARD

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