U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: AVILES DIAZ, RUBEN

A 097-869-352

Date of this notice: 12/5/2013

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:
Guendelsberger, John
Mullane, Hugh G.
Malphrus, Garry D.

TranC
Userteam: Docket

File: A097 869 352 – Los Angeles, CA Date: DEC - 5 2013

In re: RUBEN AVILES-DIAZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Frances E. Arroyo, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] - Alien smuggler

APPLICATION: Termination of proceedings

The respondent, a native and citizen of Mexico, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated June 13, 2013. The Immigration Judge found the respondent removable based on his criminal conviction. On appeal, the respondent renews his challenge of the admissibility of the evidence of the conviction that was entered into the record.[1] The appeal will be dismissed.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The Notice to Appear alleges that, on February 17, 2012, the respondent was convicted of Aiding and Abetting Bringing Illegal Alien into the United States, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii) and 18 U.S.C. § 2, and sentenced to 24 months in prison. The respondent denied the conviction and denied the charge of removability (Tr. at 8; I.J. at 2). In support of this allegation, the DHS submitted: a Complaint, an Information, a Waiver of an Indictment, a Stipulation of Fact and Joint Motion for Release of Material Witness and Order Thereon, an Order Releasing Material Witness, and a Judgment in a Criminal Case (Tr. at 8-9; I.J. at 2-3; Exh. 2). The respondent objected to admission of these documents into evidence because they lacked a certification (Tr. at 9, 15; I.J. at 3). The DHS was granted a continuance to submit documents with appropriate certifications (Tr. at 15-17; I.J. at 2). Ultimately, these documents were admitted over the respondent's objection (Tr. at 19-22, 27-36; I.J. at 3-5). Based on these documents, the Immigration Judge found the respondent removable as charged for knowingly encouraging, inducing, assisting, abetting, or aiding any other alien to enter or try to enter the United States in violation of law (Tr. at 37-40; I.J. at 6; Exh. 1). The respondent requested no relief from removal, so the Immigration Judge ordered him removed (Tr. at 41; I.J. at 6).

[1] The Department of Homeland Security (DHS) did not submit a brief in response to the appeal.

The test for admission of evidence generally in immigration proceedings is "whether the evidence is probative and its admission is fundamentally fair." *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011) (*quoting Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995)). Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure are binding. *See e.g.*, *Singh v. Holder*, 638 F.3d 1196, 1209-10 (9th Cir. 2011); *Matter of D-R-*, 25 I&N Dec. at 458-59 & n.9; *Matter of Lopez*, 15 I&N Dec. 183, 184 (BIA 1975); *Matter of Gutnick*, 13 I&N Dec. 412, 416-17 (BIA 1969). The relevant question in terms of admission of evidence of criminal records is "whether the criminal records correctly reflect the facts." Matter of Gutnick, 13 I&N Dec. at 416. *See also Matter of J.R. Velazquez*, 25 I&N Dec. 680, 683 (BIA 2012).

The conviction records in the present case are the *type* authorized by statute and regulations. *See* 8 U.S.C. § 1229a(c)(3)(B)(ii); 8 C.F.R. § 1003.41(a)(2). However, the documents are not original documents or certified copies of original documents. They were obtained by a DHS officer via electronic means. With regard to the above-listed documents submitted to prove the conviction, the DHS officer certified: "The attached document was received electronically by internet download from the Public Access to Court Electronic Records ("PACER") site containing the records from the U.S. District Court, District of California." However, the above-listed documents submitted to prove the conviction did *not* contain a certification by a court official from the United States District Court for the Southern District of California that the document was an official record from its repository.

Although some form of authentication is required, the precise methods of authentication described in section 240(c)(3)(C) of the Act and 8 C.F.R. § 1003.41 are not mandatory or exclusive. They are safe harbors. *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006); *Matter of J.R. Velazquez*, *supra*, at 684. These provisions indicate when an electronically transmitted document *must* be admitted. *See Sinotes-Cruz v. Gonzales*, *supra*, at 1196. These provisions establish the maximum standard for authentication of electronically transmitted records of conviction, but they do not establish a minimum standard. *See Sinotes-Cruz v. Gonzales*, *supra*, at 1196. The government is required to provide some authentication of conviction records introduced in immigration proceedings. *See Chew v. Boyd*, 309 F.2d 857, 866-67 (9th Cir.1962) (holding unauthenticated record inadmissible). But, so long as an alien's due process right to a fair hearing is protected, "any [authentication] procedure that comports with common law rules of evidence constitutes an acceptable level of proof." *Iran v. INS*, 656 F.2d 469, 472 n.8 (9th Cir. 1981). "The guiding principle is that proper authentication requires some sort of proof that the document is what it purports to be." *Sinotes-Cruz v. Gonzales*, supra, at 1196; *Iran v. INS*, *supra*, at 473. *See also Matter of J.R. Velazquez*, *supra*, at 684.

In the present case, we conclude that the certification by the DHS officer that the documents were obtained from PACER was sufficient to authenticate the conviction records. Therefore, they were admissible as evidence to prove the respondent's criminal conviction. There has been no showing that PACER, a District Court database, is not a reliable source for conviction records. Consequently, we find clear and convincing evidence of removability. *See* 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a); *Woodby v. INS*, 385 U.S. 276, 286 (1966). *Cf.* 8 C.F.R. §§ 1003.15, 1240.10.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: A097-869-352 June 13, 2013

In the Matter of

RUBEN AVILES DIAZ	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 212(a)(6)(E)(i) of the Immigration and Nationality Act (Act), as amended, in that the respondent is an alien who at any time knowingly encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law.

APPLICATIONS: None.

ON BEHALF OF RESPONDENT: FRANCES ARROYO, Esquire
2 Northlake Avenue, 9th Floor
Pasadena, California 91101

ON BEHALF OF DHS: STEVEN MARCUS, Assistant Chief Counsel
300 North Los Angeles Street, Room 8108
Los Angeles, California 90012

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a male, native and citizen of Mexico. The Department of Homeland Security issued a Notice to Appear dated May 7, 2013, alleging that the respondent was granted lawful permanent resident status in the United States on October 10, 2006. Homeland Security further alleged that the respondent applied for

admission to the United States at the Otay Mesa Port of Entry on August 10, 2011, as a returning lawful permanent resident of the United States. Homeland Security further alleged that on or about February 17, 2012, respondent was convicted in the United States District Court, Southern District of California, of the offenses of bringing in illegal aliens, aiding and abetting, in violation of Title 8 United States Code Section 1324(a)(2)(B)(iii), bringing in illegal aliens, Title 18 United States Code Section 2, aiding and abetting. Homeland Security alleged that for this offense, the respondent was sentenced to 24 months imprisonment, 36 months supervised release. Respondent was charged with removability under Section 212(a)(6)(E)(i) of the Act. See Exhibit 1 in the record of proceedings.

On June 6, 2013, the respondent, through counsel, admitted the first three factual allegations set forth in the Notice to Appear. These allegations relate to the respondent's alienage and his status as a lawful permanent resident.

The respondent denied the other allegations and the charge. He denied that he was an applicant for admission into the United States. He also denied the alleged federal court conviction for alien smuggling.

The Department of Homeland Security begins with the burden of proof for a returning lawful permanent resident. The Government submitted federal court records on two occasions. On June 6, 2013, Homeland Security submitted photocopies of documents that may have been downloaded from the Internet to a U.S. Immigration officer. The Immigration Judge agreed with the respondent that there were problems with the certification in this submission, and did not admit them into the record. See Exhibit 2 for identification.

On June 13, 2013, the Court received another submission from Homeland Security. This submission begins with an original signature from Quang Quach. Officer

Quach identified himself as a Deportation Officer with Immigration and Customs Enforcement. He is certified in the certification that the documents that were attached were received electronically by Internet download from the Public Access to Court Electronics Records (PACER). Officer Quach explained in his certification that PACER is a federal repository site containing records from the United States District Bankruptcy and Appellate courts. Officer Quach stated that he received this download from PACER on or about June 11, 2013. Attached to this certification is a copy of a complaint, probably cause statement, information waiver of an indictment, stipulation of fact, and joint motion for release of a material witness, order releasing a material witness, a judgment in a criminal case, all from the United States District Court, Southern District of California.

The respondent objected to inclusion of these documents into the record because they did not comply with the requirements set forth in Section 240(c)(3)(C) of the Act.

The admissibility of documents that have been received by electronic means was explored by the Board of Immigration Appeals in Matter of Velasquez, 25 I&N Dec. 680 (BIA 2012). In that decision, which was published and precedential, the Board of Immigration Appeals interpreted the requirements set forth not only in Section 240(c)(3)(C) of the Act, but also the regulatory requirement found at 8 C.F.R. Section 1003.41. The Court would note that Officer Quach essentially recited the requirements set forth in 8 C.F.R. Section 1003.41(c), and the Court agrees with the respondent, that not all the requirements have been met for that subsection of the regulation. The Court does have a certification in writing by a Service official that the documents were received electronically from the Court's record repository. (See 8 C.F.R. Section 1003.41(c)(2)). However, the Court agrees with the respondent that there is no

certification by a court official from the court in which the conviction was entered as an official record from this repository.

Such a deficiency was the subject of Matter of Velasquez, and the Board of Immigration Appeals noted that documents can be admitted under 8 C.F.R. Section 1003.41(d). If all the requirements in subsection (c) were met, then under Matter of Velasquez, the Immigration Judge must under this "safe harbor" admit the documents. However, under Matter of Velasquez, the Immigration Judge may admit documents that are authenticated in other ways if the documents are found to be reliable. In establishing this standard, the Board of Immigration Appeals referred to a Ninth Circuit case, Sinotes-Cruz v. Gonzales, 468 F.3d 1190, 1196 (9th Cir. 2006).

The respondent objects to inclusion of the conviction records because better conviction records could have been submitted. The Government, according to the respondent, could have expended more resources, and done more to meet its burden of proof. And it is not fair that the Government is not required to do more and expend more resources to meet its burden of proof. For example, the Government could have asked that a Deportation officer visit the United States District Court in San Diego, and ask that the court there retrieve the court file, and photocopy off the documents. They could have asked that the court clerk make an official seal on each page of those documents. The Court agrees that that would be a better and more reliable form of evidence.

However, this form of evidence is not required by the Department of Homeland Security, and the Department decides how much resource to expend when it meets its burden of proof. The Immigration Judge then must decide whether the evidence is not the best evidence, but sufficient evidence under Matter of Velasquez to meet its burden of proof.

In the instant matter, the Court finds that the conviction records have been authenticated in other ways. Officer Quach has provided an original statement from himself . He has cited his position within the Department of Homeland Security. He signed a statement saying that the attached documents were downloaded from PACER. He explained what PACER was, and he stated the date when the PACER documents were downloaded. The Court also finds that these documents are reliable. The Court has reviewed the pages which follow Officer Quach's certification. There is no evidence that they have been in some way altered or corrected by anyone outside of the District Court. There is no evidence that any of the documents therein are incomplete. All of the pages of the documents have been submitted. And the documents not include the judgment, but both the complaint and information, as well as the statement of probable cause.

Therefore, over the respondent's objection, and pursuant to Matter of Velasquez, the Immigration Judge admitted the second submission June 13, 2013. See Exhibit 3 in the record of proceedings. Based on Exhibit 3, the Immigration Judge sustained allegation 5.

The Department of Homeland Security submitted a Form I-213, record of deportable or inadmissible alien. This record was created for Ruben Aviles Diaz. The A number on the form is the same A number that appears on the Notice to Appear, and it ties the federal court conviction to the respondent. The respondent did not oppose its inclusion into the record, and it was also admitted. See Exhibit 4 in the record of proceedings. Therefore, based on Exhibits 3 and 4, the Court finds that the respondent was convicted on or about February 17, 2012 for the offenses described in allegation 5.

The parties also disagreed as to whether the respondent was an applicant for admission into the United States. See allegation 4 in the record of proceedings. Not

all returning lawful permanent residents are classifiable as applicants for admission. See Section 101(a)(13)(C) of the Act. However, certain illegal acts exempt lawful permanent residents from treatment under Section 101(a)(13)(C) of the Act. In Matter of Guzman Martinez, 25 I&N Dec. 845 (BIA 2012), the Board of Immigration Appeals considered the case of a lawful permanent resident who was found trying to cross back into the United States while engaging in the illegal activity of attempting to smuggle aliens into the United States. The Board found that this activity prevented the alien from enjoying treatment under Section 101(a)(13)(C) of the Act. According to Exhibit 4, respondent was stopped at the border. The conviction record, probable cause statement also establishes this. And the Court agrees that the respondent is an arriving alien, and was applying for admission into the United States as a returning lawful permanent resident. Therefore, based on Exhibits 3, 4, and Matter of Guzman Martinez, the Court sustained allegation 4.

The Department of Homeland Security met its burden of proving allegations 4 and 5. The parties agreed as to allegations 1, 2 and 3. The respondent denied the charge. However, the Department of Homeland Security met its burden of proving with allegations 3 and 4 that the respondent at any time knowingly has encouraged, induced, assisted, abetted or aided any other alien to enter, or to try to enter the United States in violation of law. Therefore, the Immigration Judge sustained the charge June 13, 2013.

The respondent designated Mexico as the country of removal, and Mexico was directed. Respondent made no applications for relief after having been given an opportunity to do so. Therefore, the Immigration Judge has no option but to order the respondent removed from the United States, and deported to Mexico on the charge contained in the Notice to Appear.

ORDERS

IT IS HEREBY ORDERED that the respondent be removed from the United States, and deported to Mexico under the charge contained in the Notice to Appear.

Please see the next page for electronic signature

DAVID C. ANDERSON
Immigration Judge

//s//

Immigration Judge DAVID C. ANDERSON

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