U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: FLORES ALCALA, FRANCISCO **A 200-762-691**

Date of this notice: 5/9/2013

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
Hoffman, Sharon
Miller, Neil P.

TranC
Userteam: Docket

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File: A200 762 691 – Dallas, TX Date: MAY - 9 2013

In re: FRANCISCO FLORES ALCALA a.k.a. Francisco Flores a.k.a. Francisco Alcala Flores

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Monica Lira, Esquire

APPLICATION: Continuance

The respondent, a native and citizen of Mexico, appeals the decision of the Immigration Judge, dated May 30, 2012, denying his request for a continuance and ordering his removal from the United States. The Department of Homeland Security ("DHS") has not filed a response to the respondent's appeal. The record will be remanded.

The respondent is subject to removal from the United States as a result of not timely departing this country in accordance with the terms of his admission as a nonimmigrant visitor in 1998 (I.J. at 1-2; Exhs. 1, 1A). *See* section 237(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(B). The respondent does not allege that, at the present time, he is eligible for any form of relief from removal. Nonetheless, he asserts that the Immigration Judge should have continued these removal proceedings to await the adjudication of an immigrant visa petition which was allegedly filed on his behalf by his United States citizen spouse. *See Matter of Hashmi*, 24 I&N Dec. 785 (BIA 2009) (recognizing that a continuance may be warranted where an alien has demonstrated that he is the beneficiary of a pending immigrant visa petition and established a likelihood of success on an application for adjustment of status). It appears that, upon approval of the allegedly filed visa petition, the respondent would seek adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The Immigration Judge denied the respondent's request for a continuance upon concluding that his conviction for possession of testosterone foreclosed his eligibility for adjustment of status.[1]

Upon review of the record, we conclude that the order vacating the respondent's aforementioned conviction should be recognized under the immigration laws. The respondent's "Defendant's Motion for New Trial and Motion in Arrest of Judgment," which was granted by the county criminal court judge, raises sufficient constitutional concerns (i.e., deprivation of the

[1] In order to establish eligibility for adjustment of status under section 245(a) of the Act, an alien must demonstrate, among other things, that he is admissible to the United States. A conviction for possession of testosterone, a schedule III controlled substance, renders an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and cannot be waived under section 212(h) of the Act (I.J. at 5). As such, an alien who has been convicted of possession of testosterone is unable to demonstrate the requisite "apparent ultimate likelihood of success on the adjustment application" needed to warrant a continuance of removal proceedings to await the adjudication of an immigrant visa petition filed on his behalf. *See Matter of Hashmi*, *supra*, at 790.

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opportunity to be represented by the attorney of his choosing and a failure on the part of his public defender to advise him of the immigration consequences of entering a plea of guilty or nolo contendere), such that we are satisfied that the record supports a conclusion that the respondent's conviction for possession of testosterone has been vacated on the basis of a procedural or substantive defect (as opposed to reasons solely related to rehabilitation or immigration hardships) (Exh. 4).[2] *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *see also Padilla v. Kentucky*, 559 U.S. 356 (2010).

Considering the above circumstances, we will remand the record to the Immigration Judge to reevaluate the respondent's request for a continuance under the framework set forth in *Matter of Hashmi* and for further proceedings as he deems appropriate. At the present time, we express no opinion regarding the ultimate outcome of these removal proceedings. However, upon remand, it will be the burden of the respondent to present evidence to demonstrate that "good cause" exists for a continuance. *See* 8 C.F.R. §§ 1003.29, 1240.6; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (recognizing that the statements of counsel are not evidence); *see also Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (recognizing that a continuance should not be granted where it is being sought "as a dilatory tactic to forestall the conclusion of removal proceedings"). Accordingly, the following order is entered.[3]

ORDER: The Immigration Judge's decision denying the respondent's request for a continuance is vacated and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD

[2] We acknowledge that the United States Court of Appeals for the Fifth Circuit has concluded, regardless of the reasons for the vacatur, a vacated conviction remains effective for immigration purposes. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). However, the United States Government, through the Department of Justice's Office of Immigration Litigation, has advised the Fifth Circuit that it would not seek to uphold removal orders premised upon an application of *Renteria-Gonzalez*.[2] *Gaona-Romero v. Gonzales*, 497 F.3d 694 (5th Cir. 2007). As such, this Board evaluates the effect of a vacatur under the rubric set forth in *Matter of Pickering*. We observe that, in certain circumstances, a federal court may defer to an agency's interpretation of a statute which is within the agency's jurisdiction to administer even if the agency's interpretation is inconsistent with the jurisprudence of that court. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

[3] We note that on June 15, 2012, the Secretary of the DHS announced that certain young people, who are low law enforcement priorities, will be eligible for immigration benefits under a Deferred Action for Childhood Arrivals ("DACA") program. It is unclear whether the respondent would qualify for DACA benefits. However, if he is interested in requesting DACA benefits, information may be obtained on-line (www.uscis.gov or www.ice.gov) or by phone at the United States Citizenship and Immigration Services hotline (1-800-375-5283) or at the Immigration and Customs Enforcement hotline (1-888-351-4024).

Cite as: Francisco Flores Alcala, A200 762 691 (BIA May 9, 2013)

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DALLAS, TEXAS

File: A200-762-691 May 30, 2012

In the Matter of

FRANCISCO FLORES ALCALA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: A violation of Section 237(a)(1)(B).

APPLICATIONS: None stated.

ON BEHALF OF RESPONDENT: MONICA LIRA

ON BEHALF OF DHS: PEGGY PRICE

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 22-year-old male native and citizen of Mexico who was issued a Notice to Appear on December 21 of 2010. See Exhibit 1. The respondent appeared at a master calendar with his attorney of record on March 28 of 2012. At that time, the respondent through his counsel admitted to Allegations 1 and 2, denied Allegations 3 and 4, and denied removability under Section 212(a)(6)(A)(i) of the Act. The

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respondent provided documents verifying what he contended to be a lawful entry into the United States. After those documents were produced to the Government, the Government requested a continuance in order to amend the charges and file a 261 to place the respondent in 237 proceedings, as opposed to 212 proceedings. The Court granted the Government's request.

On or about April 2 of 2012, the Government then filed an I-261, which was served on respondent's counsel. At the hearing on May 30 of 2012, counsel for the respondent acknowledged proper receipt and service of the I-261, which was marked and admitted as Exhibit 1-A.

The respondent then through his attorney admitted to the new Allegation 3 and 4 and conceded his removability from the United States as alleged under Section 237(a)(1)(B) of the Act. The Government withdrew the prior charge under 212(a)(6)(A)(i). The respondent designated Mexico as the country of removal. Based on the admissions and concessions entered by the respondent through his attorney of record, the Court finds that the issue of removability has been conclusively established. See Section 240(c)(1)(A) of the Act.

Counsel for the respondent was then asked to articulate whatever relief the respondent would have available. The respondent's attorney indicated that the respondent had subsequently been married after being placed into proceedings but that that spouse had filed an I-130 and they were requesting

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a continuance to allow the I-130 to be adjudicated. The Government of the United States objected under Matter of Hashmi and indicated that it did not appear that the respondent would be eligible to adjust because he had a disqualifying drug conviction for which a waiver was not available. The Government also again pointed out that the respondent had been married after being placed into proceedings, and therefore the marriage would be presumptively invalid.

The Government submitted a copy of the I-213, which was marked and admitted without objection as Exhibit 2. The I-213 (see Exhibit 2) indicates that the respondent was placed into proceedings after being convicted of a possession of a controlled substance. The Government also moved to introduce without objection as Exhibit 3 a copy of the affidavit and information and police report that formed the basis of the respondent's drug charge. The Government also moved to admit without objection as Exhibit 4 a copy of a document filed by the respondent in the County Criminal Court of Dallas, Texas, case number M11-70336-M, indicating that the respondent had subsequently tried to vacate his conviction and produced a copy of the motion so doing.

A review of Exhibit 4 would indicate that that pleading acknowledges the respondent's conviction, when the respondent in his motion for new trial on page 1 of Exhibit 4, paragraph 1 says the defendant was sentenced on May 5 of 2011.

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The motion also indicates on paragraph 4 of page 2 that the respondent was represented by an attorney and that on May 5 of 2011, that he entered his plea of guilty to possession of a controlled substance and was sentenced to 24 days to serve in the Dallas County Jail.

That motion then filed by the defendant goes on to say that as a result of his plea, the defendant is now being held by the Department of Homeland Security and was not aware of significant sanctions pertaining to his plea. The motion then goes on in paragraph 4 to say that the Court has the authority to grant a new trial in the interest of justice and says, "For more than 120 years, our trial judges have had the discretion to grant new trials in the interest of justice."

The respondent then produced a copy of a document which appears in the record as Exhibit 5. That document shows that on November 11 of 2011, that the drug case was dismissed pursuant to the terms of a memo agreement. However, what is lacking from the respondent is a copy of what the memo agreement is, what it constitutes, and what legal effect it has.

However, what is clear from the motion filed by the respondent (see Exhibit 4) is that he acknowledges in his pleadings filed in Texas State Court that he pled guilty on May 5 of 2011 to the drug charge, that he was represented by an attorney, that he was sentenced to serve 24 days in jail, and that he now seeks to have his conviction vacated in the interest

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of justice because of Immigration consequences, according to paragraph G of page 2 of Exhibit 4.

It also appears, based on the information contained in Exhibit 3, that the respondent was stopped by the police on December 18 of 2010 at 5 o'clock in the morning and that during the course of that police-citizen encounter, a police officer discovered a 12 milliliter glass vial of testosterone steroid in the right front pant pocket of the respondent. So it appears that the drug of question is a schedule 3 controlled substance steroid for which there would not be a 212 waiver available.

So the Government's position is that the respondent is statutorily ineligible for adjustment of status, and therefore objects to any further continuance in this case.

It is the respondent's contention that the original judgment was vacated and that he then entered into some type of pretrial program with the district attorney and therefore he is still eligible to adjust and the Court should wait to have the I-130 adjudicated.

This matter is squarely governed by the United States Circuit Court of Appeals for the 5th Circuit's precedent decision in Renteria v. the U.S., 322 F.3d 804 (5th Cir. 2002). The United States Circuit Court of Appeals for the 5th Circuit in Renteria told us that it does not matter why a respondent's conviction was vacated, it remains a conviction for Immigration purposes.

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Upon reviewing the motion for new trial filed by the respondent, it would appear that even if we disregarded the 5th Circuit's decision in Renteria (which the Court is certainly not free to do), that even applying the Board's analysis in Pickering, that the conviction would have been vacated for Immigration purposes based on the information contained in paragraph G and paragraph 4 of page 2 of Exhibit 4.

However, the United States Circuit Court of Appeals for the 5th Circuit has clearly indicated in its precedent decision that they do not follow the Board's decision in Matter of Pickering and that the respondent's conviction would still constitute a conviction for Immigration purposes under Section 101(a)(48)(A) of the Act.

Under Section 101(a)(48)(A), the respondent's own pleadings (see Exhibit 4) acknowledge that the respondent went into court represented by an attorney, pled guilty, and received a sentence of 24 days to serve in the Dallas County Jail with credit for time served. Therefore, the respondent entered a plea of guilty, and a form of punishment was imposed.

Therefore, in accordance with the 5th Circuit's precedent decision in Renteria, the respondent's conviction constitutes a conviction under Section 101(a)(48) of the Immigration and Nationality Act, and therefore the respondent is statutorily ineligible for adjustment of status.

The respondent's attorney was asked to identify any

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other form of relief that the respondent had available and she indicated she was simply asking for a continuance. The Board has clearly told us that a continuance is not a form of relief.

Therefore, the respondent's attorney having failed to identify any relief available for this respondent, it is hereby ordered that he be removed from the United States to the nation of Mexico.

The respondent will be advised of his appeal rights separately on the record.

MICHAEL P. BAIRD
Immigration Judge

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CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE MICHAEL P. BAIRD, in the matter of:

FRANCISCO FLORES ALCALA

A200-762-691

DALLAS, TEXAS

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

GRACE SHIPPS (Transcriber)

DEPOSITION SERVICES, Inc.

JULY 23, 2012

(Completion Date)

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