U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - IMP
1115 N. Imperial Ave.
El Centro, CA 92243

Name: NUNEZ PARRA, MARIO

A 092-283-469

Date of this notice: 11/16/2012

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:
Neal, David L
Greer, Anne J.
Kendall-Clark, Molly

schwarzA
Userteam: Docket

File: A092 283 469 - Imperial, CA

Date: NOV 16 2012

In re: MARIO NUNEZ PARRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Francisco Javier Aldana, Esquire

ON BEHALF OF DHS: John D. Holliday
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Termination

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, appeals from the Immigration Judge's May 20, 2011, decision. In that decision, the Immigration Judge found the respondent inadmissible as charged. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The appeal will be sustained and the proceedings will be terminated.

On appeal, the respondent argues that the Immigration Judge erred in determining that he conceded to his inadmissibility during the underlying proceedings. Moreover, the respondent argues that the Immigration Judge failed to consider his mental competency.

We disagree with the Immigration Judge's determination that the respondent is inadmissible as charged. The Department of Homeland Security ("DHS") bears the burden of proving by clear and convincing evidence that the respondent, who is a returning lawful permanent resident, is to be regarded as seeking an admission. *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011). Here, the Immigration Judge based his finding of inadmissibility solely on the respondent's admissions during the underlying proceedings that he has used marijuana on several occasions in the United States and that he has carried marijuana on his person when coming to the United States from Mexico at some point in the past (I.J. at 2-3; Tr. at 25-27). These admissions were prompted by questions from the Immigration Judge, who had not notified the respondent that the government had the burden of proving his inadmissibility.

Unlike the Immigration Judge, we find these statements by an unrepresented alien insufficient to establish that the respondent admitted to a crime under *Matter of K-*, 7 I&N Dec. 594 (BIA 1957),

such that the DHS has shown by clear and convincing evidence that the respondent is inadmissible as charged. We therefore find that termination of proceedings is warranted. Because we find that termination of proceedings is warranted for the aforementioned reasons, we need not address the mental competency issues raised by the respondent on appeal.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained and the removal proceedings against the respondent are terminated.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Imperial, California

File A 092 283 469 May 20, 2011

In the Matter of

MARIO NUNEZ PARRA,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Section 212(a)(2)(A)(i)(II) (admits the essential elements of a controlled substance offense) Immigration and Nationality Act (INA) fraud.

APPLICATION: Termination.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:
Pro Se	John Holliday, Esquire 1115 North Imperial Avenue El Centro, California 92243

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 42-year-old man who is a native and citizen of Mexico and who has been a lawful permanent resident of the United States since December 1990. The Immigration authorities began removal proceedings filing a Notice to Appear against him on March 17, 2011. The Notice to Appear alleges that he has admitted the essential elements of a controlled substance offense and is therefore removable as charged. That is, for admitting to committing the essential elements of a controlled substance offense, Exhibit 1. The Notice to Appear was properly served.

On May 20, 2011, the matter came on for hearing. The

respondent was not represented. I explained to him the rights, allegations, and charge against him. He said he understood the rights, allegations and the charge. He chose to represent himself. I called on him then to admit or to deny the allegations and thereby to enter a pleading in the matter. Respondent admitted the allegations. Further, he testified that he had been possessed of marijuana within the United States on past occasions when he purchased the marijuana on the streets of Calexico, took it with him to his field labors, and used the marijuana. He made these admissions after having an explanation of the law concerning marijuana explained to him in plain language. I explained to him that the law of marijuana under the laws of the United States and of California are that it is unlawful to be possessed of marijuana when one knows it is marijuana and knows that one has it and has no prescription. Respondent admitted that such were his circumstances. Then, he testified as to those matters.

Based on the respondent's admissions and testimony, I find the allegations are true. He is not a citizen or national of the U.S. though he is a legal resident. He has admitted the essential elements of a controlled substance offense, namely unlawful possession of marijuana, a violation of both Federal and California state law. Therefore, he is removable as charged. He admits to more than one use. Consequently, a waiver under Section 212(h) would not be available to him. Ultimately, he is

ineligible for any relief. He has lived his legal residence life as a commuter. He lives in Mexico. He works in the United States. His family is in Mexico. They are undocumented for the U.S. It has been his practice simply to commute daily across the border from Mexico into the United States. Therefore, he is ineligible for cancellation of removal as a permanent resident because he has not established and cannot establish that he has been continuously a resident in the United States for seven years after any lawful admission. Thus, he is statutorily barred from cancellation of removal.

I have considered the respondent's case to determine if other relief may be available to him. However, he is an arriving alien. Voluntary departure would be unavailable it seems. Even if he were otherwise eligible, as an arriving alien for voluntary departure, he lacks the necessary one year of continuous residence to receive that form of relief. See Section 240B(b), INA.

Having considered all the evidence of record, whereas discussed above or not, I make the following order:

ORDER

IT IS THEREFORE ORDERED that the respondent be removed from the United States to Mexico on the basis of the allegations and the charge in the Notice to Appear.

JACK STATON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JACK W. STATON in the matter of:

MARIO NUNEZ PARRA

A 092 283 469

Imperial, California

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Margaret E. Johnson (Transcriber)

Deposition Services, Inc.
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Germantown, Maryland 20874
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August 16, 2011
(Completion Date)