U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: BELTRAN [redacted], C[redacted] **A 041-828-094**

Date of this notice: 7/8/2014

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:
Pauley, Roger

Userteam: Docket

File: A041 828 094 – Los Angeles, CA Date: JUL - 8 2014

In re: C[redacted] BELTRAN [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jesse J. Banuelos, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Section 212(c) waiver

The respondent appeals from an Immigration Judge's October 5, 2012, decision ordering her removed from the United States. The record will be remanded.

The respondent, a native and citizen of Mexico, has two California convictions that are pertinent here: (1) in 1988, for possessing phencyclidine for sale, *see* Cal. Health & Safety Code § 11378.5; and (2) in 2000, for theft, *see* Cal. Penal Code § 484(A). In a decision dated June 3, 2011, a three-member panel of this Board held in part that the foregoing convictions render the respondent removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude ("CIMT") not arising from a single scheme of criminal misconduct.

The Immigration Judge, properly deeming herself bound by the Board's finding of the respondent's removability under section 237(a)(2)(A)(ii) of the Act, concluded that the respondent's removability under that section could not be waived under former section 212(c) of the Act, 8 U.S.C. § 1182(c), because the charge was based in part upon her 2000 conviction, which was entered after April 1, 1997, the date when former section 212(c) was repealed.

On appeal, the respondent now argues that the offense underlying her 2000 theft conviction is not a CIMT after all, but that argument is foreclosed by controlling precedent of the

United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this matter arises. *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009) (citing *Flores Juarez v. Mukasey*, 530 F.3d 1020, 1022 (9th Cir. 2008) and *United States v. Esparza-Ponce*, 193 F.3d 1133, 1136 (9th Cir. 1999)). Thus, we reaffirm our prior judgment that the respondent is removable under section 237(a)(2)(A)(ii) of the Act.

The respondent's removability under section 237(a)(2)(A)(ii) of the Act is not dispositive of her eligibility for a section 212(c) waiver, however. During the pendency of this appeal, we decided *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014), which held in pertinent part that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable by virtue of a conviction entered before April 24, 1996, is eligible to apply for section 212(c) relief unless: (1) she is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act, 8 U.S.C. §§ 1182(a)(3)(A), (B), (C), or (E), or (10)(C) (2012); or (2) she has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.

All four removal charges in this matter depend in whole or in part upon the respondent's 1988 conviction for possession of phencyclidine for sale. That conviction was entered before the April 1996 effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 1277, which made section 212(c) relief unavailable to most aliens deportable under sections 237(a)(2)(A)(ii), 237(a)(2)(A)(iii), and 237(a)(2)(B)(i). The respondent has been a lawful permanent resident of the United States since 1987, moreover, and thus she has accrued more than 7 years of lawful unrelinquished domicile. Further, there is no indication that she is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act. And while the offense underlying the respondent's 1988 conviction was an aggravated felony, it does not disqualify her from applying for section 212(c) relief because the conviction was entered before November 29, 1990, and did not result in the imposition of a term of imprisonment of at least 5 years. Accordingly, as we are satisfied that the respondent's removability is subject to waiver under former section 212(c) of the Act,[1] we will remand the record so the Immigration Judge may evaluate the discretionary merits of her application for such a waiver. *See Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

ORDER: The record is remanded for further proceedings consistent with the foregoing decision.

FOR THE BOARD

[1] If the respondent's 1988 conviction is waived, she would not be subject to removal on the section 237(a)(2)(A)(ii) charge. The respondent's section 237(a)(2)(A)(ii) charge has two essential pillars (i.e., the 1988 and 2000 conviction), and thus the elimination of *either one* of them by the grant of a section 212(c) waiver would necessarily topple the entire charge. The respondent's eligibility for a section 212(c) waiver is therefore not defeated in this instance by the fact that the section 237(a)(2)(A)(ii) charge is based in part on a conviction entered after that section's repeal.

U.S. Department of Jus[illegible]

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Name: BELTRAN [redacted], C[redacted] **A041-828-094**

Date of this notice: 6/3/2011

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:
Cole, Patricia A.
Filppu, Lauri S.
Pauley, Roger

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File: A041 828 094 - Los Angeles, CA Date: JUN -3 2011

In re: C[redacted] BELTRAN[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jesse J. Banuelos, Esquire

ON BEHALF OF DHS: Norman E. Parkhurst
Assistant Chief Counsel

CHARGES:

Notice: Sec. 237(a)(2)(A)(i), I&N Act [8 U.S.C. § 1227(a)(2)(A)(i)] - Convicted of crime involving moral turpitude

Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from the Immigration Judge's October 28, 2009, decision terminating proceedings against the respondent, a native and citizen of Mexico. The respondent has submitted a brief in opposition. The appeal will be sustained, the removal proceedings will be reinstated, and the record will be remanded.

The issue on appeal is whether the DHS met its burden of proving by clear and convincing evidence that the respondent was convicted on November 28, 1988, of violating section 11378.5 of the California Health and Safety Code (CHSC), which prohibits the possession for sale of phencyclidine and its analogs/precursors. We conclude that it has, and therefore we reverse the Immigration Judge's decision to the contrary.

The DHS submitted multiple documents to establish the fact of the respondent's conviction under CHSC § 11378.5, including a criminal information (Exh. 6), a minute order (Exh. 5), and two documents issued by the California Department of Justice, one entitled "Disposition of Arrest and Court Action" (Exh. 4), and the other "Criminal History Transcript" (Exh. 8). As the

Immigration Judge acknowledged (I.J. at 6), the minute order (Exh. 5) shows that on November 28, 1988, the respondent entered a guilty plea to a violation of CHSC § 11378.5. The Immigration Judge also found that the "Disposition of Arrest and Court Action" (Exh. 4) reflects a "date of sentence of March 31, 1989," for this offense (I.J. at 8). The Immigration Judge nevertheless terminated the removal proceedings, concluding that the "Disposition of Arrest and Court Action" could not be considered because it was "not a judicially noticeable document" under "the modified categorical approach" (I.J. at 6, 8). As a result, the Immigration Judge found that the DHS's evidence did not prove that the California court had entered a "formal judgment of guilt" or ordered any "punishment, penalty, or restraint on the alien's liberty to be imposed," as required for a "conviction" by section 101(a)(48)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(48)(A)(ii) (I.J. at 6). Alternatively, the Immigration Judge found that the "Disposition of Arrest and Court Action" was unreliable because it identified the respondent's date of "conviction" as November 28, 1988, when in fact that was merely the date upon which his guilty plea was entered, sentence having been imposed several months later, in March 1989 (I.J. at 8).

Upon our *de novo* review, *see* 8 C.F.R. § 1003.1(d)(3)(ii) (2010), we conclude that the "Disposition of Arrest and Court Action" (Exh. 4) submitted by the DHS is admissible as a matter of law to prove *the fact* of the respondent's conviction and sentence under CHSC § 11378.5. Specifically, that document is "an abstract of a record of conviction prepared by . . . a state official associated with the state's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence." Section 240(c)(3)(B)(v) of the Act, 8 U.S.C. § 1229a(c)(3)(B)(v); 8 C.F.R. §§ 1003.41(a)(5), 1003.41(d) (allowing for the admission of any other evidence that reasonably indicates the existence of a conviction); *see also United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc). The Immigration Judge refused to consider the document because it is not among the "judicially noticeable" records which the Ninth Circuit allows to be considered under the "modified categorical approach" (I.J. at 6, 8). This case does not implicate the modified categorical approach, however, because the DHS proffered the "Disposition of Arrest and Court Action" merely to prove the *existence* of the respondent's conviction, not to identify the nature of his convicted conduct under a divisible statute. *Cf. United States v. Felix*, 561 F.3d 1036, 1045 (9th Cir. 2009) (holding that the limitations of the modified categorical approach do not apply to an inquiry regarding *the fact* of a conviction, and upholding sentencing judge's reliance on a computer printout to establish the existence of a defendant's prior conviction for purposes of calculating his criminal history). In short, the "Disposition of Arrest and Court Action" meets the statutory and regulatory requirements for proof of convictions in removal proceedings, and confirms that the respondent was sentenced to probation in March 1989 as a result of his November 28, 1988, guilty plea to violating CHSC § 11378.5. The minute order and "Disposition of Arrest and Court Action," taken together, thus establish by clear and convincing evidence that the respondent was "convicted" under section 101(a)(48)(A) of the Act of possessing phencyclidine (or one of its enumerated analogs or precursors) for sale.[1]

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[1] As the Immigration Judge determined, the "Disposition of Arrest and Court Action" identifies the respondent's date of conviction as November 28, 1988, and shows that sentence was imposed on March 31, 1989 (I.J. at 8). The Immigration Judge found that, based on these two dates, there was

(continued...)

Having established that the respondent was convicted under CHSC § 11378.5, the remaining question is whether that conviction supports the charges of deportability, a question of law that we review *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii). We hold that the respondent's conviction under CHSC § 11378.5 qualifies categorically as both an offense "relating to" a controlled substance under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), and an aggravated felony under section 237(a)(2)(A)(iii) of the Act.

Section 237(a)(2)(B)(i) of the Act defines the term "controlled substance" by reference to section 102 of the federal Controlled Substances Act ("CSA"), and thus the DHS must prove that the respondent was convicted of a violation of State law relating to a *federally* controlled substance. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007). The California statute under which the respondent was convicted regulated the possession for sale of phencyclidine and its analogs/precursors, all of which were then regulated by the CSA. *Compare* CHSC §§ 11054, 11055 (West 1988) with 21 C.F.R. §§ 1308.11, 1308.12 (1987). Thus, the section 237(a)(2)(B)(i) charge is sustained. The section 237(a)(2)(A)(iii) aggravated felony charge is likewise sustained because the California offense of possession for sale of phencyclidine has a "trafficking element" which satisfies the "illicit trafficking" prong of the "aggravated felony" definition set forth at section 101(a)(43)(B) of the Act. *See Rendon v. Mukasey*, 520 F.3d 967, 976 (9th Cir. 2008) (holding that possession with intent to sell a controlled substance involves a "trafficking element" and is an aggravated felony); *People v. Daniels*, 537 P.2d 1232, 1235 (Cal. 1975) (holding that in California a "sale" of drugs denotes an exchange of drugs for cash, goods, services, favors, or some other non-cash benefit).

The evidence further establishes that the respondent is removable under section 237(a)(2)(A)(i) of the Act as an alien convicted of a crime involving moral turpitude within five years after the date of admission for which a sentence of one year or longer may be imposed. The offense of possession for sale of phencyclidine or its analogs/precursors is a crime involving moral turpitude. *See Barragan-Lopez v. Mukasey*, 508 F.3d 899, 903-04 (9th Cir. 2007) (observing that "drug trafficking offenses, including possession of unlawful substances for sale, generally involve moral turpitude"); *Matter of Khourn*, 21 I&N Dec. 1041, 1046-47 (BIA 1997) (observing that "both Federal and State courts concur that participation in illicit drug trafficking is a crime involving moral turpitude").

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[1] (...continued)
a discrepancy as to the actual date of "conviction" which prevented the DHS from proving its factual allegation. Yet we fail to see the discrepancy; the fact that California may have deemed the respondent "convicted" as of the date of his plea (rather than the date when his sentence was imposed) is a distinction without a material difference. Even assuming there may be confusion with respect to the actual date of conviction, whether November 28, 1988, or March 31, 1989, the document nonetheless establishes the existence of the conviction for immigration purposes. *See generally Matter of Truong*, 22 I&N Dec. 1090 (BIA 1999) (unclear conviction record with respect to the date of offense was not too vague to for purposes of establishing removability). Furthermore, there is no serious dispute that the allegations in the Notice to Appear were sufficiently precise to inform the respondent of the charges against him and to allow for a proper defense. *Cf. Matter of Raqueno*, 17 I&N Dec. 10, 12-13 (BIA 1979) (regarding Order to Show Cause in deportation proceedings).

In addition, a violation of CHSC § 11378.5 is punishable by imprisonment for a period or three, four, or five years, and the respondent committed the offense well within 5 years after the date of her 1987 "admission."

Finally, and contrary to the respondent's assertion on appeal, we agree with the Immigration Judge that the respondent's 2000 conviction for theft of property under section 484(a) of the California Penal Code, constitutes a crime involving moral turpitude (I.J. at 9-10; Exh. 2). *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1160 (9th Cir. 2009) (holding that acts of petty theft constitute crimes involving moral turpitude and specifically noting that "a conviction for grand theft or petty theft under Cal. Penal Code § 484 requires, in common with other crimes of moral turpitude, 'the specific intent to deprive the victim of his property permanently.'" (quoting *People v. Albert A.*, 47 Cal.App.4th 1004 (1996))). Thus, the respondent's theft conviction, when viewed in conjunction with her unrelated conviction under CHSC § 11378.5, establishes that she is removable under section 237(a)(2)(A)(ii) of the Act, as an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

As the DHS has met its burden of establishing the respondent's removability as charged, the Immigration Judge's decision terminating the proceedings is vacated, the proceedings are reinstated, and the record is remanded to the Immigration Court to give the respondent an opportunity to apply for any available forms of relief from removal.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision dated October 28, 2009, is vacated, and the removal proceedings are reinstated.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD