File: (b) (6) Date: FEB 27 2012

In re: (b) (6) (b) (6)

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reconsideration; reopening

On December 16, 2011, the respondent filed a motion to reconsider the Board's November 7, 2011, decision, wherein we dismissed the respondent's appeal of the Immigration Judge's June 21, 2011, decision, finding him removable as charged. The Department of Homeland Security ("DHS") has not filed a brief in opposition to the motion. For the reasons set out below, the motion will be denied.

As an initial matter, the motion to reconsider was filed in an untimely manner. *See* 8 C.F.R. § 1003.2(b)(2) (stating that a motion to reconsider a decision of the Board must be filed within 30 days after the date of that decision). However, given the circumstances of this case, including the respondent's pro se status and his attempt to timely file the motion with the Board on December 2, 2011,[1] we will consider the untimely motion to reconsider on our own motion under the provisions of 8 C.F.R. § 1003.2(a).

We find that the contentions raised in the motion do not warrant reconsideration of our previous decision. A party seeking reconsideration requests that the original decision be reexamined in light of alleged legal or factual errors, a change of law, or an argument or aspect of the case that was overlooked. *See Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991); 8 C.F.R. § 1003.2(b). Here, the respondent has not specified errors of fact or law in our prior decision. The respondent also raises similar arguments in the instant motion to reconsider as were raised in his appellate brief (*compare* Motion to Reconsider *with* Appeal Brief). We considered those arguments in our prior decision and found them unpersuasive. *See Matter of O-S-G-*, *supra*, at 58 (stating that "a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal . . . ."). Further, to the extent the respondent raises additional issues regarding the Immigration Judge's decision or pre-hearing events, those issues should have been raised on appeal. *See O-S-G-*, *supra*, at 58 (stating that "[a] motion to reconsider based on a legal argument that could have been raised earlier in the proceedings will be denied" and "arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.") (citation omitted).

[1] The Board rejected the respondent's motion on December 2, 2011, because he did not include the required filing fee or a fee waiver request form.

(b) (6)

Although unclear, to the extent the respondent's motion is also a motion to reopen and terminate, he has not demonstrated that evidence pre-dating June 2011 was unavailable and could not have been presented at his June 2011 hearing (*see* Motion to Reconsider, Tabs A-E).[2] *See* 8 C.F.R. § 1003.2(c)(1). Finally, the respondent's motion to vacate his underlying criminal conviction, which was allegedly filed with the Superior Court o(b) (6) County, on(b) (6) (Motion to Reconsider, Tab F), does not operate to negate the validity of his conviction until his conviction is in fact overturned or materially amended in a criminal court. *See Matter of Onyido*, 22 I&N Dec. 552, 555 (BIA 1999); *Ortega de Robles v. I.N.S.*, 58 F.3d 1355, 1358 (9th Cir. 1995) (stating that "[c]riminal convictions cannot be collaterally attacked in deportation proceedings.") (citations omitted). Accordingly, the following order is entered.

ORDER: The motion is denied.

FOR THE BOARD

[2] In fact, several of these documents were submitted during his former hearing (*compare* Motion to Reopen, Tabs A-C *with* Exhibits 2A-2D).

File: (b) (6)

Date: NOV 07 2011

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

CHARGE:

Notice: 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 respondent, a native and citizen of Mexico, appeals from the Immigration Judge's June 21, 2011, decision. In that decision the Immigration Judge found the respondent removable as charged. The appeal will be dismissed.

We review findings of fact, including the Immigration Judge's determination of credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The record shows that, on (b) (6), in the (b) (6) Superior Court, County of (b) (6) the respondent, who had originally been charged in count one, with the offense of sale of a controlled substance, to wit, methamphetamine, in violation of section (b) (6) of the (b) (6) entered a plea of nolo contendere to the lesser included offense of possession of a controlled substance, in violation of section (b) (6) of the (b) (6) (Gp. Exh. 2). Based on this conviction, the Department of Homeland Security (the DHS) charged the respondent with removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a controlled substance violation, a charge which the Immigration Judge sustained.

Convictions under section (b) (6) of the (b) (6) do not categorically qualify as removable offenses under section 237(a)(2)(B)(i). The United States Court of the Appeals for the (b) (6), the jurisdiction in which the matter arises, has held that the "[s]imple fact that [an] alien was convicted under state law of possession of a controlled substance did not, by itself, establish that alien's conviction was for possession of a substance that was contained in the federal schedules of the Controlled Substances Act (CSA), as required for that conviction to serve as predicate offense for alien's removal as an alien convicted of violating a law relating to a controlled substance, where state law regulated the possession and sale of

numerous substances that were not similarly regulated by the CSA.." *See* (b) (6) (b) (6) *see also Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009) (requiring proof that the record of conviction show not only that the alien's conviction involved a substance that is listed under (b) (6) law, but also one that is contained in the federal schedules). Thus, the DHS must prove by clear and convincing evidence that the substance underlying the respondent's conviction is one that is contained in the federal schedules of the CSA.

The respondent argues that the record of his 2010 conviction is silent as to which controlled substance was involved. The respondent also argues that he entered his plea pursuant to *People v. West*, 477 P.2d 409 (Cal. 1970), admitting a violation of section (b) (6) but without specifying which predicate offense he intended to commit.

The respondent's record of conviction includes the criminal information, which includes, in count one, the charge that the respondent was being accused of, on or about (b) (6) the sale of a controlled substance, a violation of section (b) (6) of the (b) (6) (b) (6) and states that the controlled substance was methamphetamine. The record also contains the "Clerks Docket and Minutes" which shows that the above charge was amended and the respondent pleaded nolo contendere to an offense under (b) (6) of the (b) (6) (b) (6) In the transcript of the plea colloquy, it was indicated that the respondent pled no contest to an offense under (b) (6) of the (b) (6) as a lesser included offense of count one. The respondent acknowledged that, if he was not a citizen of the United States, the consequences of this conviction could lead to deportation.

In *People v. Thomas*, 373 P.2d 97, 100 (Cal. 1962), the California Supreme Court discussed the parameters for determining a lesser included offense. The court stated that the test of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense. If, in the commission of acts made unlawful by one statute, the offender must always violate another, the one offense (i.e., the latter) is necessarily included in the other. Thus, before a lesser offense can be said to constitute a necessary part of a greater offense, all the legal ingredients of the *corpus delicti* of the lesser offense must be included in the elements of the greater offense. The court indicated that the foregoing test of a necessarily included offense was approved by the court; a lesser offense is necessarily included if it is within the offense specifically charged in the accusatory pleading, as distinguished from the statutory definition of the crime.

With respect to that respondent's latter argument, that he entered his plea pursuant to *People v. West*, *supra*, the respondent does not point to anything in the record of conviction suggesting that he was entering a *West* plea. Rather, the record contains a plea colloquy that indicated that he was pleading to a lesser included offense. We conclude, consistent with *People v. Thomas*, *supra*, that when he entered his plea of no contest to the offense of possessing a controlled substance, under section (b) (6) of th (b) (6) , he was pleading to a lesser included offense of the charge set out in count one of the criminal information, that is, sale of a controlled substance, to wit, methamphetamine, a violation of section (b) (6) the (b) (6) . As such, the record adequately establishes that the respondent was admitting that the controlled substance involved was methamphetamine, a controlled substance listed within the CSA's federal schedules. *See Mielewczyk v. Holder*, *supra* (concluding that the alien was removable because the charging document and the plea agreement in his case

demonstrated that his crime involved a drug found in the CSA's federal schedules); *see also United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (adjudicator may rely upon "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, . . . any explicit factual finding by the trial judge to which the defendant assented," or other comparably reliable judicial record including minute orders, when applying the modified categorical approach.)

The respondent also argues that, as he previously was in proceedings for a similar 2003 conviction, the current proceedings were precluded by the principles of *res judicata* and collateral estoppel. However, the respondent does not assert, nor is there any showing, that the respondent has been previously charged with being removable by reason of the 2010 conviction. The Board concludes that, as the current proceedings charge the respondent with removal based upon a 2010 conviction, a conviction entered well after his previous removal proceedings were terminated, the doctrine of *res judicata* (or claim preclusion) does not apply. *Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 900 (9th Cir. 2002) ("To trigger the doctrine of *res judicata*, the earlier suit must have (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies."). While he also seeks to invoke the doctrine of collateral estoppel, he has not met his burden to demonstrate that the issue sought to be precluded was actually and necessarily decided by the Immigration Judge in the prior proceedings; similarity between issues is not sufficient and collateral estoppel is applied only when the issues are identical.

Based on the foregoing, the respondent is removable under section 237(a)(2)(B)(i) of the Act, as an alien convicted of a controlled substance violation. Thus, we need not address the remaining arguments presented on appeal; the appeal will be dismissed.

The following order shall be issued.

ORDER: The appeal is dismissed.

FOR THE BOARD

IMMIGRATION COURT

In the Matter of

(b) (6)

Respondent

Case No.: (b) (6)

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on June 21 2011
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[✓] The respondent was ordered removed from the United States to Mexico or in the alternative to .

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( )granted ( )denied( )withdrawn.

[ ] Withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] A Waiver under Section _____ was ( )granted ( )denied ( )withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b) (2) was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ____ was ( )granted ( )denied ( )withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: 6 21 11

LORRAINE J. MUNOZ
Immigration Judge

Appeal: Waived/Reserved Appeal Due By: July 22 2011

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: (b) (6) Date: JUL 25 2007

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert B. Jobe, Esquire

ON BEHALF OF DHS: Linda I. Orji
Assistant Chief Counsel

ORDER:

PER CURIAM. Pursuant to the decision by the United States Court of Appeals for the (b) (6) (b) (6) in (b) (6) the Immigration Judge's March 11, 2004, decision denying the respondent's motion to terminate these proceedings and ordering him removed, is reversed. The Board's July 22, 2004, decision affirming the Immigration Judge's order and the August 26, 2004, decision denying the respondent's motion for reconsideration, are vacated. The proceedings are hereby terminated.

FOR THE BOARD

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