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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LOUISIANA

In the Matter of:

Respondent

File No.: A

**JOINT MOTION TO REOPEN TO
DISMISS PROCEEDINGS BASED ON VACATED CONVICTION**

I. INTRODUCTION

Pursuant to § 240(c)(7)(A) of the Immigration and Nationality Act (INA) and 8 C.F.R. § 1003.23(b)(4)(iv) (allowing for joint motions to be filed at any time), Respondent [REDACTED] (Mr. [REDACTED]), through counsel, and the Department of Homeland Security, Immigration and Customs Enforcement, jointly move this Court to reopen Mr. [REDACTED]'s removal proceedings, rescind the removal order issued on [REDACTED], 2007, and dismiss removal proceedings without prejudice.

With this motion, Respondent submits evidence that, on [REDACTED], 2014, the state criminal court vacated the [REDACTED], 2007 Massachusetts state conviction for drug distribution alleged in the Notice to Appear. *See* Exhibit (Ex.) A3 (order granting motion to vacate) and Ex. A4 (Defendant's Motion to Withdraw Guilty Plea in Lawrence District Court). This conviction formed the *sole* basis of Mr. [REDACTED]'s removal order. The vacatur of this conviction nullifies the basis for the order of removal, and, therefore, the Court should reopen and dismiss removal proceedings without prejudice.

II. BACKGROUND FACTS

Mr. [REDACTED] is a [REDACTED]-year-old native and citizen of [REDACTED] born on [REDACTED] 1987. He was admitted to the United States as a lawful permanent resident on [REDACTED] 2003, when he was 15 years-old, as a beneficiary of a visa petition filed by his mother, [REDACTED]. Mr. [REDACTED]'s mother is a lawful permanent resident and his [REDACTED] are U.S. citizens.

On [REDACTED] 2007, when he was 19 years-old, Mr. [REDACTED] pled guilty to distribution of a class B substance, pursuant to MASS. GEN. LAWS ch. 94C, §32A(a). Ex. A2 (Criminal Docket in Case No. 0618 CR 003859). He received three years of probation. *Id.* Following his

conviction, Immigration and Customs Enforcement took Mr. [REDACTED] into custody. He was served with a Notice to Appear alleging he was removable pursuant to INA § 237(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined in INA § 101(a)(43)(B) (trafficking in a controlled substance) on the basis of that conviction. Ex. A1 (Notice to Appear). In [REDACTED] 2007, during a group hearing, Immigration Judge James Nugent in Oakdale, Louisiana ordered Mr. [REDACTED] removed. Ex. A6 (removal order). Mr. [REDACTED] was removed to [REDACTED] thereafter.

On July 19, 2013, Mr. [REDACTED], through counsel, moved to withdraw his prior guilty plea to drug distribution based on recently revealed misconduct conduct by Annie Dookhan, one of the state chemists who signed the drug certificate in that case. Exs. A4 and A5. On June 12, 2013, the Lawrence District Court vacated Mr. [REDACTED]'s conviction on the basis of egregious government misconduct. Ex. A3 (handwritten order finding Mr. [REDACTED]'s guilty plea was not voluntary).

III. STANDARD FOR REOPENING

A motion to reopen pursuant to INA § 240(c)(7) and 8 C.F.R. § 1003.23(b)(1), (3) requests reopening of proceedings so that the respondent may present new evidence. *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991). A motion to reopen must provide “new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material.” 8 C.F.R. § 1003.23(b)(3).

Pursuant to 8 C.F.R. § 1003.23(b)(1)(i), Respondent states that the validity of his removal order is the subject of a criminal proceeding under 8 U.S.C. § 1326.

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IV. ARGUMENT

MR. [REDACTED] IS NO LONGER REMOVABLE, THEREFORE THIS COURT SHOULD REOPEN AND TERMINATE PROCEEDINGS.

A conviction that has been vacated on the merits is no longer a conviction as defined in INA § 101(a)(48) for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003); *cf. Discipio v. Ashcroft*, 417 F.3d 448, 450 (5th Cir. 2005) (“According to Respondent, the Board’s opinion in *In re Pickering* constitutes a permissible construction of the statute because it comprehensively addresses the effect of a vacated conviction.”). An individual seeking to reopen proceedings bears the burden of proving that the conviction was not vacated solely for immigration purposes. *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 274 (BIA 2007).

In August 2012, the Commonwealth of Massachusetts acknowledged that Annie Dookhan, a chemist at the Hinton state crime lab, falsified results of alleged drug samples. A criminal investigation of Ms. Dookhan – who was subsequently charged with multiple counts of perjury, tampering with evidence, and obstructing justice – called into question the reliability of evidence used in 34,000 criminal prosecutions. *See* Exs. B1-B10. Ms. Dookhan was the primary chemist on Mr. [REDACTED]’s case and supplied the information on which the conviction was obtained. Ex. A5 (Exhibits to Defendant’s Motion to Withdraw Guilty Pleas and Admission to Sufficient Facts).

In July 2013, Mr. [REDACTED] filed a Motion to Withdraw Guilty Pleas, asserting that his plea and admission were not knowing, intelligent, and voluntary and, thus, violated the Fourteenth Amendment to the U.S. Constitution and Article 14 of the Massachusetts Declaration of Rights. Ex. A4. It is on these grounds that the Lawrence District Court allowed Mr. [REDACTED]’s motion and found that his guilty plea was not voluntary, thereby, vacating the conviction on April 30,

2014. Ex. A3. Mr. [REDACTED] has thus demonstrated that the vacatur of his conviction was based on a substantive or procedural defect in the underlying criminal proceedings.

Immigration courts and the Board of Immigration Appeals routinely reopen proceedings where a conviction that formed the basis for a removal order has been vacated due to substantive or procedural defects. *See, e.g., Cruz v. AG*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) (listing cases); *see also* [REDACTED], 2012 Immig. Rptr. LEXIS 6015 (BIA, Sept. 28, 2012); [REDACTED], 2012 Immig. Rptr. LEXIS 27 (BIA, Jan. 18, 2012); [REDACTED] (BIA Sept. 27, 2011).

This Court should reopen and dismiss Mr. [REDACTED]'s proceedings without prejudice in light of the vacatur of the sole conviction that formed the sole basis of the removal order.

V. CONCLUSION

For the foregoing reasons, Mr. [REDACTED] and the Department of Homeland Security respectfully ask the Court to reopen the proceedings, rescind the removal order, and dismiss the proceedings without prejudice.

Respectfully submitted,

[REDACTED]
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