

Falls Church, Virginia 22041

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File: A18 079 714 - Oakdale

Date:

In re: TINDARO CORSO

DEC 29 1999

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Thomas Moseley, Esquire  
Law Offices of Thomas E. Moseley  
One Gateway Center--Suite 2600  
Newark, New Jersey 07102

CHARGE:

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

APPLICATION: Reopening

This case was first before this Board on May 10, 1999, when we denied the respondent's appeal from the decision of an Immigration Judge dated December 22, 1998, finding him removable as charged and finding him ineligible for any form of relief. On August 6, 1999, the respondent filed a motion to reopen removal proceedings to apply for relief pursuant to section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), and to state that he had commenced proceedings to reduce the sentence imposed in his case. This Board denied the motion on August 31, 1999. The respondent has now filed a motion to reconsider the denial of the motion to reopen and/or for reopening sua sponte based on a decision by the United States District Court for the Southern District of New York granting the respondent's application for coram nobis, vacating his sentence and resentencing him to 10 months imprisonment. The Immigration and Naturalization Service has filed an opposition to the motion.

A motion to reconsider must state the reasons for the motion by specifying the errors of fact or law in the prior Board decision. 8 C.F.R. § 3.2(b). The respondent does not identify errors in our prior decision, but seeks to reopen proceedings based upon new facts that he wishes to present to the court. 8 C.F.R. § 3.2(c). The present motion is therefore a motion to reopen. Unless agreed to by both parties and filed jointly, a party may file only one motion to reopen deportation proceedings. 8 C.F.R. §§ 3.2(c)(2) and (3). This motion is the second motion to reopen and is therefore barred by 8 C.F.R. § 3.2(c). As noted by the respondent in his motion, however, this Board retains limited discretionary powers under the regulations to reopen or reconsider cases sua sponte in unique

situations where it would serve the interest of justice. Matter of X-G-W., Interim Decision 3352 (BIA 1998); 8 C.F.R. 3.2(a). Because the issues presented by the respondent effect the finding of deportability and the respondent has not filed dilatory motions but has promptly filed as soon as

events occurred, we will accept the respondent's motion and set aside the previous decision.

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respondent was found deportable as an aggravated felon under section 237(a)(2)(A)(iii), 227(a)(2)(A)(iii). He was convicted of conspiracy to commit robbery under section 951. The Immigration Judge found that this was a crime of violence for which the term of imprisonment is at least one year. Section 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

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Order from the United States District Court, Southern District of New York, submitted by the respondent, indicates that the court found good cause to grant the writ of coram nobis<sup>1</sup> and vacated the judgment as to the term of imprisonment imposed from a year and a day to 10 months. The court stated that it found unique family circumstances warranting a downward departure of the sentence to 10 months. The amended judgment states that there was a correction of the sentence for clerical mistake, citing to the Fed. R. Crim. P. 36. The reduction in sentence takes the respondent out of the purview of the definition of aggravated felony.

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In Matter of Martin, 18 I&N Dec. 226 (BIA 1982), this Board held that where a sentence has been found to have been illegal and is void and of no force and effect, and the trial court reconsiders the sentence and sentences the defendant anew, the new, reduced sentence stands as the only valid and lawful sentence imposed upon the defendant. Id. We find that this case is similar to Matter of Martin. The court voided the previous sentence based upon an error of fact. The court is to have reconsidered the sentence and imposed a new term of imprisonment. The new sentence stands as the only valid and lawful sentence imposed upon the defendant.

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The Service argues that the district court lacked jurisdiction to issue the writ where the court issued the writ as a mechanism to avoid the immigration consequences of a criminal conviction, United States v. Tablie, 166 F.3d 505 (2d Cir. 1999)(per curiam). The Service argues that if the district court had jurisdiction to issue the writ, the respondent did not fulfill the requirements for

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The question of whether a court has jurisdiction to change its orders is a proper and necessary issue for consideration in removal proceedings. Matter of Sirhana, 13 I&N Dec. 592, 595 (BIA 1997). In vacating proceedings where a grant of writ of coram nobis vacated alien's conviction in the State of California). The Supreme Court has held that federal courts have jurisdiction over writs of coram nobis. United States v. Morgan, 346 U.S. 502 (1954). See also U.S. v. LaPlante, 959 F.2d 1000 (2d Cir. 1995) (coram nobis available to redress an adverse consequence resulting from an illegally imposed criminal conviction or sentence); United States v. Castro, 26 F.3d 557 (5th Cir. 1994) (writ of coram nobis granted based upon ineffective assistance of counsel at sentencing where defense

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<sup>1</sup> A writ of coram nobis is a procedure which permits the trial court to correct its own judgment if it has been based upon an error of fact not apparent in the common law record. State of Alabama, 335 U.S. 252, 259 (1948).

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counsel had failed to request judicial recommendation against deportation); Matter of Sirhana, supra at 597. United States v. Tablie, supra, is inapposite as the issue was whether the All Writs Act, 18 U.S.C. 28 U.S.C. § 1651 (1994), conferred an independent source of jurisdiction in a case where the defendant could not obtain relief from a writ of audita querala. The record does not indicate that the district court's order was appealed, and we will not look behind the district court order. Further, the court order does not mention that it considered the immigration consequences in issuing the writ, and despite counsels' representations about the court's reasoning, we will not look beyond the face of the documents presented where, as here, they provide the facts considered by the district court.

As the sentence does not constitute a term of imprisonment of a year or more under section 101(a)(43)(F) of the Act, the respondent's deportability under section 237(a)(2)(A)(iii) of the Act cannot be upheld. Accordingly, the motion will be granted, the proceedings will be terminated.

ORDER: The motion is granted and the proceedings are terminated.

  
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FOR THE BOARD