NO. 15-3733

United States Court of Appeals

FOR THE THIRD CIRCUIT

OMAR ALEJANDRO FRIAS-CAMILO,
Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

PETITIONER'S OPENING BRIEF AND APPENDIX VOLUME I OF II, p. 1A - 25A

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No. 15-3733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OMAR ALEJANDRO FRIAS-CAMILO,

A 056-557-093 (DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITIONER'S OPENING BRIEF

INTRODUCTION

Petitioner, Omar Alejandro Frias-Camilo (hereinafter referred to as "Petitioner"), is a native and citizen of the Dominican Republic. Petitioner first

entered the United States as a lawful permanent resident in 2006, while a minor. On September 20, 2012, Petitioner was driving his vehicle in Lehigh County, Pennsylvania. A local police officer tailed Petitioner's vehicle and, moments later, conducted a traffic stop. After a search of Petitioner's vehicle, he was arrested and charged with violating two Pennsylvania criminal statutes: (1) possession of an offensive weapon, specifically, brass knuckles; and (2) conspiracy to possess a controlled dangerous substance, to wit, cocaine.

On November 18, 2014, Petitioner appeared before the Court of Common Plea of Lehigh County, Pennsylvania. There, Petitioner entered a nolo contendere plea to the conspiracy to possess an offensive weapon offense and was sentenced on this offense alone to costs of prosecution, including a $176 Pennsylvania State Police laboratory fee, a $500 fine or the alternative 30 hours of community work service and 24-month period of probation. As to the conspiracy to possess a controlled dangerous substance, Petitioner was simply found guilty, without penalty—no penalty at all. No probation. No restitution. No fine. No costs of prosecution. No lab fees. No imprisonment. No work release. No community service. No parole. No license suspension. Nothing.

In July of 2014, the Department of Homeland Security (the "Department") commenced removal proceedings against Petitioner, issued an arrest warrant, took him into custody and has since continued to detain Petitioner. Petitioner appeared

before the Immigration Court at York, Pennsylvania (the "Immigration Court" or the "IC" or the "IJ"), where he contested the grounds of removability. Petitioner moved to terminate his proceedings. The Immigration Court denied his motion. Petitioner sought reconsideration of his motion to terminate proceedings. The Immigration Court denied reconsideration, pretermitted Petitioner's request for cancellation of removal for certain Lawful Permanent Residents, denied Petitioner's claim for asylum protection, and ordered him removed to the Dominican Republic. The Board of Immigration Appeals (the "Board") affirmed.

Petitioner now seeks this Court's review and in support thereof, submits this Brief.

STATEMENT OF JURISDICTION

Petitioner seeks review of an unpublished decision of the Board issued on October 23, 2015. See Petitioner's Appendix at 10a – 14a.[1] The Board had jurisdiction over Petitioner's appeal from the Immigration Court's determination pursuant Sections 1003.1 and 1240.15, Title 8 of the Code of Federal Regulations (the "CFR"). This Court has jurisdiction over the Board's final order of removal

[1] References to Petitioner's Appendix will be noted on with the respective page numbers, such as "1a – 20a."

under Section 1252(a)(1), Title 8 of the United States Code (the "USC"). See 8 U.S.C. § 1252(a)(1); see also 8 C.F.R. §§ 1003.1, 1240.15.

Petitioner timely petitioned this Court for review on November 10, 2015, within thirty days of the Board's October 23, 2015 decision. See 1a; see also 8 U.S.C. § 1252(b)(1). Venue is proper in this Court as Petitioner's proceedings before the Immigration Court were completed in York, Pennsylvania. See 15a; see also 8 U.S.C. § 1252(b)(2).

Petitioner concedes that the grounds that underlie his final order of removal are criminal offenses. Given this, this Court's review is statutorily limited to "constitutional claims or questions of law . . . ." 8 U.S.C. § 1252(a)(2)(D); see Catwell v. Attorney General, 623 F.3d 199, 205 (3d Cir. 2010). Here, Petitioner's review limited to a question of law; this Court, therefore, is clearly within its jurisdiction in reviewing this Petition. See Catwell, 623 F.3d at 205 (noting limited jurisdiction to review removal orders based on aggravated felony convictions); see also Bautista v. Attorney General, 744 F.3d 54 (3d Cir. 2014) (same).

STATEMENT OF THE ISSUE

1. Whether the Immigration Court and the Board erred in finding Petitioner was "convicted" as defined in the Immigration and Nationality Act, for a removable offense.

STATEMENT OF THE CASE

Petitioner seeks review of the Decision of the Board entered on October 23, 2015, dismissing his appeal. See In re: Omar Alejandro Frias-Camilo, No. A056 557 093 (BIA Oct. 23, 2015). Further, Petitioner seeks review of the May 6, 2015 Oral Decision of the Immigration Court at York, Pennsylvania, which incorporated the Immigration Court's December 11, 2014 denial of Petitioner's Motion to Terminate Proceedings and February 10, 2015 refusal to reconsider Petitioner's Motion to Terminate Proceedings. See Matter of Omar Alejandro Frias-Camilo, No. A056 557 093 (York, PA Imm. Ct. May 6, 2015).

FACTUAL AND PROCEDURAL HISTORY

Petitioner is a native and citizen and native of the Dominican Republic. See Form I-862, Notice to Appear (the "NTA"), 26a. He entered the United States as a Lawful Permanent Resident on July 20, 2006. Id. On September 20, 2012, Petitioner was arrested in Lehigh County, Pennsylvania and charged with violating Sections 903(a), Title 18 and 780-113(a)(16), Title 35 of the Pennsylvania Code, Conspiracy to Possession a Controlled Dangerous Substance, to wit Cocaine. See Record of Proceedings (hereinafter referred to as "ROP") at pp. 291-294 (Information, Commonwealth of Pennsylvania v. Omar Frias-Camilo, CP-39-CR-5738 (Lehigh Cty., PA 2012) (the "Information")); see also 18 Pa.C.S. § 903(a); 35 Pa.C.S. § 780-113(a)(16). Petitioner was also charged with violating Section 908(a), Title 18 of

the Pennsylvania Code, Possession of an Offensive Weapon, specifically, brass knuckles. See ROP, p. 294 (Information); see also 18 Pa.C.S. § 908(a).

On July 23, 2013, Petitioner entered a plea of guilty to the conspiracy to possession a controlled dangerous substance and nolo contendere to the offensive weapon offense. See 13a; see also 18 Pa.C.S. § 903(a); 35 Pa.C.S. § 780-113(a)(16); 18 Pa.C.S. § 908(a). Petitioner was initially erroneously sentenced to 12-months' probation on each of the two offenses, together with costs, lab fees and fines for each. See NTA, 26a.

On August 9, 2013, the Department commenced removal proceedings against Petitioner and issued the NTA. Petitioner was charged as removable under Section 1227(a)(1)(B)(i), Title 8 of the United States Code (the "U.S.C."), which states, in relevant part, that

> [a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(1)(B)(i). On October 27, 2014, Petitioner appeared before the Immigration Court at York, Pennsylvania and, through Counsel, denied the Department's allegation, arguing that he was never convicted of a violation or a

conspiracy to violate any law or regulation related to a controlled substance. The Court adjourned the matter to permit Counsel additional time to review the record. In the course of this review, error was recognized, in that, "[t]he sentence imposed on both the count of criminal conspiracy to possess and prohibited offensive weapon were both completed on one sentencing sheet." See 40a (Notes of Testimony before Lehigh County Court of Common Pleas, Commonwealth of Pennsylvania v. Omar Frias-Camilo, CP-39-CR-5738 (Lehigh Cty., PA 2012) dated Nov. 18, 2014)). On November 18, 2014, Petitioner appeared before the Lehigh County Court of Common Pleas (the "State Criminal Court") where the procedural and due-process related errors were corrected. See id.; see also Matter of Oscar Cota-Vargas, 23 I&N Dec. 849 (BIA 2005) (holding that any changed, amendments, corrections or the like made by a sentencing judge are to be given full faith and credit by the Immigration Court).

The State Criminal Court amended the record of the underlying criminal proceedings, to accurately reflect its original intentions. As to Sections 903(a), Title 18 and 780-113(a)(16), Title 35 of the Pennsylvania Code, Conspiracy to Possession a Controlled Dangerous Substance, to wit, Cocaine, the State Criminal Court simply made a determination of guilt without further penalty, pursuant to Section 9723, Title 42 of the Pennsylvania Code. See 39a (Amended Order, Commonwealth of Pennsylvania v. Omar Frias-Camilo, CP-39-CR-5738 (Lehigh Cty., PA 2012) dated Nov. 18, 2014) ("Amended Order")). Petitioner received no actual sentence,

punishment, restraint or the like. No probation. No parole. No fines. No costs. No lab fees. No parole. No work release. No incarceration. No alternative disposition. No deferred disposition. No community service. No privilege was taken away. No requirement was imposed. Nothing. Petitioner was received absolutely no real sentence or punishment—nothing. See 39a, Amended Order.

On November 21, 2014, Petitioner filed a Motion to Terminate Proceedings with the Immigration Court, arguing that Petitioner was not convicted for an offense related to a controlled substance. See 35a - 37a (Decision of the Immigration Court on Petitioner's Motion to Terminate dated Dec. 11, 2014). The Immigration Court denied Petitioner's Motion to Terminate, holding that Petitioner was indeed "convicted" under Immigration & Nationality Act (the "INA" or the "Act"). Id.; see also 8 U.S.C. § 1101(a)(48)(A). Petitioner requested reconsideration of the Motion to Terminate on January 15, 2015; the Immigration Court denied Petitioner's Motion to Reconsider on February 10, 2015. See 30a – 34a (Decision of the Immigration Court on Petitioner's Motion to Reconsider Termination dated Feb. 10, 2015).

Petitioner fell a few months shy of the seven-years of continuous physical presence necessary to qualify for Cancellation of Removal for Certain Lawful Permanent Residents. See 8 U.S.C. § 1229b(A). Petitioner subsequently sought protection under the doctrines of Asylum, Withholding of Removal, and the United Nations Convention Against Torture. See 8 U.S.C. §§ 1158; 1231(b)(3); see also

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); Pub. L. 105-277 (1998). Following a hearing on the merits, Petitioner was denied protection under the doctrines of Asylum, Withholding of Removal, and the United Nations Convention Against Torture. See id.; see also 14a – 16a. The Immigration Court ordered Petitioner removed to the Dominican Republic on May 6, 2015. See 14a – 16a (Order of the Immigration Court).

Petitioner timely appealed to the Board. 10a. On October 23, 2015, the Board denied and dismissed Petitioner's appeal. See 10a – 14a. Petitioner timely petitioned this Court for review on November 10, 2015. See 1a – 9a. On November 10, 2015, Petitioner moved this Court for a stay of removal, pending adjudication of the instant Petition; the Department opposed the grant of a stay. This Court entered an Order granting Petitioner's motion for a stay of removal on November 10, 2015.

The stay remains in place, Petitioner remains detained and deportable and now submits this Brief in support of his Petition for Review.

SUMMARY OF ARGUMENT

The Board and the Immigration Court clearly erred in finding that Petitioner was "convicted" for Immigration purposes in the State Criminal Court for violating Sections 903(a), Title 18 and 780-113(a)(16), Title 35 of the Pennsylvania Code,

Conspiracy to Possession a Controlled Dangerous Substance, to wit, Cocaine. Petitioner's State Criminal Court disposition falls outside of the definition and scope of a "conviction," as defined in the Immigration and Nationality Act. See 8 U.S.C. § 1101(a)(48)(A). This is an error of law and clearly necessitate this Court's review of the Petition.

ARGUMENT

I. SCOPE, STANDARD OF REVIEW AND BURDEN OF PROOF

The Court's review is limited to the final agency decision. See Xie v. Ashcroft, 359 F.3d 239, 242 (3d Cir. 2004). The Court, thus, reviews the Board's decision, and only those portions of the Immigration Court's decision that the Board has specifically adopted. See Camara v. Att'y Gen., 580 F.3d 196, 201 (3d Cir. 2009); see also Sandie v. Att'y Gen., 562 F.3d 246, 250 (3d Cir. 2009) (holding that, when an immigration court's "discussion and determinations are affirmed and partially reiterated in the [Board's] decision, [the Court] review[s] them along with the [Board's] decision.").

Findings of fact must be supported by substantial evidence. See Camara, 580 F.3d at 201 (holding that the Court will "affirm any findings of fact supported by substantial evidence and [that it is] bound by the administrative findings of fact unless a reasonable adjudicator would be compelled to arrive at a contrary

conclusion."). Legal conclusions, however, are reviewed de novo, subject to the principles of deference set forth in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Toussaint v. Att'y Gen., 455 F.3d 409, 413 (3d Cir. 2006); Bautista v. Attorney Gen. of U.S., 744 F.3d 54, 58 (3d Cir. 2014). Nonprecedential agency decisions are not entitled to Chevron deference, though they may be entitled to the lesser deference, under which respect is granted to agency action according to its power to persuade. See Skidmore v. Swift & Co., 323 U.S. 134 (1944); see also Chevron, 467 U.S. at 844; De Leon-Ochoa v. Attorney Gen. of U.S., 622 F.3d 341, 348-50 (3d Cir. 2010); Mahn v. Attorney Gen. of U.S., 767 F.3d 170, 173 (3d Cir. 2014).

II. THE BOARD AND THE IMMIGRATION COURT CLEARLY ERRED AND UNREASONABLY DETERMINED THAT PETITIONER WAS "CONVICTED" FOR IMMIGRATION PURPOSES OF CONSPIRACY TO POSSESS A CONTROLLED DANGEROUS SUBSTANCE AND, THEREFORE, THIS COURT MUST GRANT REVIEW OF THIS PETITION.

The Board and the Immigration Court clearly erred in finding that Petitioner was "convicted" for Immigration purposes in the State Criminal Court for violating Sections 903(a), Title 18 and 780-113(a)(16), Title 35 of the Pennsylvania Code, Conspiracy to Possession a Controlled Dangerous Substance, to wit, Cocaine. The Board and the Immigration Court were unreasonable—as a matter of law—in their

determinations and, therefore, the Board and Immigration Court should not be afforded any deference.

Petitioner was not "convicted" of a violation or a conspiracy to violate any law or regulation related to a controlled substance. See 8 U.S.C. §§ 1101(a)(48)(A), 1227(a)(1)(B)(i). The Act defines a conviction as

> [A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Id.; see also Pinho v. Gonzales, 432 F.3d 193, 197-98 (3d Cir. 2005). Read "plainly," the Act initially deems a conviction a "conviction" for immigration purposes when a "formal judgment of guilt" has been entered by a court. 8 U.S.C. § 1101(a)(48)(A). Alternatively, and rather confusingly, the Act deems a conviction a "conviction" for immigration purposes, "if adjudication of guilt has been withheld," when "a judge or jury has found the alien guilty," or when "the alien has entered a plea of guilty or nolo contendere," or when the alien "has admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." Id.

Here, both the Board and the Immigration Court deemed Petitioner convicted under the first, "formal judgment of guilt," prong. Id. As to a "formal judgement of guilt," this Court has clearly established and long held that it is analogous to Rule 32(k)(i) of the Federal Rules of Criminal Procedure, which states that a judgment of conviction must "set forth the [1] plea, [2] verdict or findings, [3] the adjudication, and [4] the sentence." Perez v. Elwood, 294 F.3d 552, 562 (3d Cir. 2002); see also Fed. R. Crim. P. 32(k)(1) [brackets added].[2] A "formal judgment of guilt" requires a plea, a verdict or finding, an adjudication and a sentence. Id. In the instant matter, there is no "formal judgment of guilt." Petitioner was not "convicted" under immigration law. See 8 U.S.C. §§ 1101(a)(48)(A), 1227(a)(1)(B)(i). The Court must, therefore, grant review of this Petition.

a. The Board's Decision was Contrary to Both this Court's Precedent and Its Own Precedent, in that the Third Circuit and Board Require a "Formal Judgment of Guilt" to Contain a Penalty or Restraint on Liberty.

This Court and the Board require a "formal judgment of guilt" to contain a penalty or restraint on liberty. In Petitioner's matter, both the Immigration Court and the Board erred in determining that a "sentence" for immigration purposes does not require any form of punishment or restraint on liberty.

[2] At the time of this Court's decision in Perez, the identical rule was found at Fed. R. Crim. P. 32(d)(1).

In a 2010 decision, the Third Circuit discussed whether a New Jersey "disorderly persons offense" constituted a "conviction" under the Act. Hussain v. Attorney General, 413 Fed. Appx. 431, 433 (3d Cir. 2010) (unpublished). There, this Court held that the "INA defines a 'conviction' as 'a formal judgment of guilt of the alien entered by a court . . . [where] the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.'" Id. (quoting 8 U.S.C. § 1101(a)(48)(A)) (ellipsis and brackets in original).

The Board itself has, time and again, stressed the importance of a "conviction for immigration purposes" requiring the imposition of some form of penalty or restraint on liberty and not merely a determination of guilt. In Marroquin-Garcia, for example, the Attorney General determined that the "definition of 'conviction' [under the Act] clearly provides that a defendant who has been found guilty by a judge or jury, or has pleaded guilty, has been 'convicted' for purposes of the INA if the judge has . . . imposed penalties or restraints upon the defendant's liberty." In re Marroquin-Garcia, 23 I&N Dec. 705 (BIA 1997; A.G. 2005) (emphasis added).

In Dale Anderson Telesford, the Board considered a respondent's argument that a plea of guilty to delivery of a controlled substance was not a conviction for immigration purposes because his sentenced probation was a "voluntary" part of a deferred adjudication and he had only received a civil, rather than a criminal penalty. In re Dale Anderson Telesford, 2014 WL 3697754, 1 (BIA 2014) (unpublished

opinion). Given this, the respondent contended, "no penalty or restraint on liberty was ultimately imposed on him." Id. The Board disagreed. It held that the voluntariness of the probation was irrelevant and noted that the respondent in that matter was also required to pay fees for his probation enrollment, court-appointed attorney, a law initiative surcharge, and a DARE contribution. Id. at 2. The Board concluded that, given

> the evidence presented, we agree with the Immigration Judge that the state court imposed penalties or restraints on the respondent in this case. . . . and that probation constitutes a restraint on liberty irrespective of whether the defendant 'chooses' to subject himself to it as a condition of receiving a deferred adjudication. For these reasons, we conclude that the respondent was 'convicted' for immigration purposes.

Id. It is clear that these conclusions rely on the presumption that not merely a sentence, but a penalty or restraint on liberty, must be imposed in order to establish a conviction for immigration purposes. Here, there lacks a penalty or restraint on liberty. There is nothing. Petitioner was clearly not "convicted" for purposes of immigration law. Given this, this Court must grant review of this Petition.

b. The Board's Decision was Contrary to Federal Statute, which Requires that a Sentence Contain a Penalty or Restraint on Liberty.

The Board's Decision was contrary to federal statute, which requires that a sentence contain a penalty or restraint on liberty, whatever that penalty or restraint may be.

As already noted, this Court has held that a "formal judgment of guilt" requires (1) a plea; (2) verdict or finding; (3) the adjudication; and (4) the sentence. Perez, 294 F.3d at 562. In so holding, this Court has found that a "formal judgment of guilt" must be defined in accordance with Federal Rules of Criminal Procedure. See Perez, 294 F.3d at 562; Fed. R. Crim. P. 32(k)(1).[3] Given that this Court clearly incorporated the "sentence" requirement within the context of the Federal Rules of Criminal Procedure, the federal definition of "sentence" is controlling as to whether a sentence has been issued in a particular case. Here, Section 3551(b), Title 18 of the United States Code states what follows:

> Individuals. — An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—
>
> **(1)** a term of probation . . .;
> **(2)** a fine . . .; or
> **(3)** a term of imprisonment . . .

[3] At the time of this Court's decision in Perez, the identical rule was found at Fed. R. Crim. P. 32(d)(1).

> A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by [S]ection[s] 3554, 3555, or 3556[, Title 18,] may be imposed in addition to the sentence required by this subsection.

18 U.S.C. § 3551(b). The only types of sentences permitted under federal statute – and thus the only sentences envisioned by Congress—are probation, fine, and/or imprisonment, together with forfeiture, restitution and the like. Id. Here, Petitioner's sentence of "guilty without further penalty" does not meet the federal definition of a "sentence," and thus cannot establish a "formal judgment of guilt." As a result, the Board's reliance upon the Pennsylvania state sentencing guidelines when determining whether a "sentence" occurred for immigration purposes was clearly misplaced.

In light of the myriad, widely-variant state sentencing structures, the federal definition of "sentence" provides the clearest and most uniform guidance within the immigration court system. For instance, New Jersey, another state within this Court's jurisdiction, has a substantially different set of permissible sentences for criminal convictions from those available in Pennsylvania, including release to perform community service and release into a halfway house or residential facility. See N.J. Stat. § 2C:43-2. Moreover, while the New Jersey statute does not offer "guilty without further penalty," it does permit its courts to issue a "suspended sentence," which allows the court to delay issuance of a sentence, so long as the

defendant meets certain conditions. Id.; N.J. Stat. § 2C:45-1. When comparing the Pennsylvania and New Jersey statutes, it is extremely difficult to formulate a steady rule within the immigration context as to what constitutes a "sentence." Pennsylvania categorizes "guilty without further penalty" as a sentence, but puts no restrictions on the defendant as a result of a finding of guilt. New Jersey, on the other hand, offers a "suspended sentence," which, by definition withholds any sentencing on the conviction – but then issues conditions under which the defendant must live for a specified period of time, thus restricting one's liberty and resulting in what amounts to a probation. It makes little to sense that the latter, which imposes a restriction on liberty, could be considered a non-sentence while the former, imposing no restrictions, is a sentence for immigration purposes. Should this Court impose state-by-state guidelines to the federal sentencing structure, the immigration courts would need to sift through complex and contradicting state sentencing structures, rather than apply the concise federal guidelines discussed herein. Moreover, it would permit aliens convicted in one state to have access to sentencing options not available in others, leading to clear inequities and utter confusion within the immigration court system.

The decisions of the Immigration Court and the Board were contrary to federal statute and this Court's precedent that directs one to said sentencing statute. In doing so, both the Immigration Court and the Board erroneously found Petitioner to have

a "conviction" for immigration purposes. Petitioner was not "convicted" under immigration law. The Court must grant review of this Petition.

c. Pennsylvania's Standard Criminal Sentencing Form Does Not Include "Guilty Without Further Penalty" as a Sentencing Option.

Pennsylvania's standard criminal sentencing form lacks "guilty without further penalty" as a sentencing option. 38a. This clearly indicates that "guilty without further penalty" is not intended to be a "sentence," in the literal sense of the word.

The Pennsylvania standard criminal sentencing form lists several "sentences," including costs, fines, restitution, imprisonment, work release, suspension of driving privileges, lab assessment fees, probation, immediate parole and more. Id. Nowhere is there a mention of "no penalty" or "guilt without further penalty," or something equivalent, as an option. Id. Indeed, each and every option listed imposed some financial penalty or restraint on liberty, something that "guilty without further penalty, quite simply, lacks. Petitioner was not "sentenced," in the literal sense of the word, as demonstrated the Pennsylvania's own criminal sentencing form.

Petitioner was not "convicted" for purposes of immigration proceedings. The Court must, therefore, grant review of this Petition.

d. The Amended Order Relating to Petitioner's Underlying Criminal Matter Failed to Meet the Standards for a "Formal Judgment of Guilt" as It is Devoid of the Plea and Any Discussion as to Adjudication.

The amended order relating to Petitioner's underlying criminal matter does not meet the standards necessary to establish a "formal judgement of guilt" as it lacks a plea and any discussion as to the question of adjudication. See 37a (Amended Order of State Criminal Court dated Nov. 18, 2014 (the "Amended Order")).

As already noted, this Court has held that a "formal judgment of guilt" requires (1) a plea; (2) verdict or finding; (3) the adjudication; and (4) the sentence. Perez, 294 F.3d at 562.As Judge Arthur notes, the Third Circuit requires that a "formal judgment of guilt" "set forth the [1] plea, [2] verdict or findings, [3] the adjudication, and [4] the sentence." Perez, 294 F.3d at 562 (brackets added). Here, the Amended Order does not satisfy the first or third requirements. See 37a.

First, there is no mention, either in the original order or the amended order, of Petitioner's plea in the case. See id. Put simply, the Amended Order does not mention whether Petitioner pleaded guilty or not guilty, and thus does not comply with this Court's first—plea—requirement. See id.; see also Perez, 294 F.3d at 562.

Second, there is no discussion of the "adjudication" of the case. Black's Law Dictionary defines "adjudication" as the "legal process of resolving a dispute; the

process of judicially deciding a case." Black's Law Dictionary, 16 (2nd ed. 2001) (pocket edition). The Amended Order lacks any portion of the facts of the case or how the case was resolved. 37a. The Amended Order states that "the sentence is that you . . . ," but does not delineate any sentence whatsoever; the Amended Order merely states that Petitioner was found guilty "pursuant to 42 PA C.S.A 9723" and that costs were "waived." Id. There is nothing more.

Petitioner was not "convicted" for purposes of immigration proceedings. The Court must, therefore, grant review of this Petition.

CONCLUSION

For the reasons set forth herein, Petitioner, Omar Alejandro Frias-Camilo, respectfully requests that this Court grant of Review of his Petition.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

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CERTIFICATION OF WORD COUNT

I, Raymond G. Lahoud, Esquire, being an attorney duly sworn to practice before this Court and, acting as Counsel for Petitioner, Omar Alejandro Frias-Camilo, hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 4,514 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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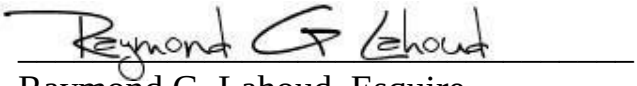
Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016



Raymond G. Lahoud, Esquire

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEFS

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Omar Alejandro Frias-Camilo, hereby certify that the Electronic Brief and Electronic Appendixes are identical to the Hard Copies submitted to the Court and served upon opposing Counsel.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

STATEMENT OF RELATED CASES

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Omar Alejandro Frias-Camilo, hereby certify that I am unaware of any other case that will directly affect or be directly affected by this Court's decision in the present Petition.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on this Petition was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in August of 2011 and is presently a member in good standing of the Bar of said Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

Raymond G. Lahoud, Esquire

CERTIFICATION OF VIRUS CHECK

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Omar Alejandro Frias-Camilo, hereby certify that a virus check was performed on the Electronic Brief and Electronic Appendixes using Symantec Endpoint Protection 12.1.5 and that no viruses were found.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

CERTIFICATION OF SERVICE

I, Raymond G. Lahoud, Esquire, being an attorney duly licensed to practice before this Court and, acting as Counsel for Petitioner, Omar Alejandro Frias-Camilo, hereby certify that I have served the within Brief and Appendix by depositing a true copy of the same, enclosed in a postpaid properly addressed FedEx wrapper and caused it to be mailed upon the following on this 8th day of February, 2016:

Aimee J. Carmichael, Esquire
Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

I further attest that, on this 8th day of February, 2016, I caused the within to be filed with this Court, through its Electronic Case Management System, to which the above-named is registered.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: February 8, 2016

Raymond G. Lahoud

Raymond G. Lahoud, Esquire

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NO. 15-3733

United States Court of Appeals

FOR THE THIRD CIRCUIT

OMAR ALEJANDRO FRIAS-CAMILO,
Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals

PETITIONER'S
APPENDIX VOLUME I OF II, p. 1A - 25A

RAYMOND G. LAHOUD, ESQUIRE
BAURKOT & BAURKOT
Attorneys for Petitioner, Omar Alejandro Frias-Camilo,
227 South Seventh Street
Post Office Box 801
Easton, Pennsylvania 18044
P: 484-544-0022
E: rgl@bmblawyers.com

TABLE OF CONTENTS

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No. 15-3733

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OMAR ALEJANDRO FRIAS-CAMILO,

A 056-557-093 (DETAINED),

Petitioner,

v.

LORETTA E. LYNCH,
THE ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

PETITION FOR REVIEW

Petitioner, Omar Alejandro Frias-Camilo (hereinafter referred to as the "Petitioner"), by and through his Counsel, Raymond G. Lahoud, Esquire of Baurkot & Baurkot, respectfully petitions for review the final agency order of the Board of Immigration Appeals (the "Board" or the "BIA") dismissing his Appeal dated October 23, 2015.

Petitioner seeks review of the Board's denial, together with the orders of the Immigration Court at York, Pennsylvania (the "Immigration Court"), from where this Petition arises, including, but not limited to any factual and legal conclusions upon which either the Board or the Immigration Court relied.

This Petition is filed within thirty (30) days of the Board's denial of Petitioner's appeal. See 8 U.S.C. Sec. 1252(b)(1). Further, to date, no court has upheld the validity of the removal order for now which review is sought.

Petitioner submits that there are no other matters pending in this Court or any Court that relates to this Petition.

Petitioner has attached to this Petition the final decision of the Board.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 10, 2015

Raymond G. Lahoud, Esquire
227 South Seventh Street
Post Office Box 801
Easton, PA 18044-0801
P: (484) 544-0022
F: (201) 604-6791
E: rgl@bmblawyers.com

Attorneys for Petitioner

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on this Petition was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in August of 2011 and is presently a member in good standing of the Bar of said Court.

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 10, 2015

Raymond G. Lahoud, Esquire
227 South Seventh Street
Post Office Box 801
Easton, PA 18044-0801
P: (484) 544-0022
F: (201) 604-6791
E: rgl@bmblawyers.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Petitioner's Petition for Review and a true and correct copy of the Decision of the Board of Immigration Appeals have been served upon the following in the manner and on the date set forth below:

Office of Immigration Litigation
Post Office Box 878
Washington, DC 20044

Attorneys for Respondent
Via US Post

Honorable Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Respondent
Via US Post

Respectfully Submitted:

BAURKOT & BAURKOT

Dated: November 10, 2015

Raymond G. Laheud, Esquire
227 South Seventh Street
Post Office Box 801
Easton, PA 18044-0801
P: (484) 544-0022
F: (201) 604-6791
E: rgl@bmblawyers.com

Attorneys for Petitioner

EXHIBIT A
FINAL DECISION OF THE BOARD OF IMMIGRATION APPEALS
DATED OCTOBER 23, 2015

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

FRIAS-CAMILO, OMAR ALEJANDRO
A056-557-093
DHS/ICE YORK
3400 CONCORD RD
YORK, PA 17402

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: FRIAS-CAMILO, OMAR ALEJAN... **A 056-557-093**

Date of this notice: 10/23/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Malphrus, Garry D.

Userteam:

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A056 557 093 – York, PA

Date: OCT 23 2015

In re: OMAR ALEJANDRO FRIAS-CAMILO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

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: Asylum; withholding of removal; Convention Against Torture

The respondent is a native and citizen of the Dominican Republic, and a lawful permanent resident of the United States. The respondent appeals from the decision of the Immigration Judge dated May 6, 2015, which denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").[1] *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(a), 1208.16(b)-1208.18. The appeal will be dismissed.[2]

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's applications were filed after May 11, 2005, and are subject to the amendments made by the REAL ID Act of 2005 (Exh. 13). *Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006).

Insofar as the respondent argues on appeal that he is not removable as charged under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. §1227(a)(2)(B)(i), as an alien convicted of a violation of any law relating to a controlled substance, other than a single offense involving possession for one's

[1] The Immigration Judge incorporated into his decision, his decision dated December 11, 2014, which denied the respondent's motion to terminate (I.J. at 2; Exh. 8). On February 10, 2015, the Immigration Judge denied the respondent's motion to reconsider (Exh. 11).

[2] The respondent's request for a waiver of the filing fees associated with the appeal is granted. *See* 8 C.F.R. §§ 1003.3(a)(1), 1003.8.

own use of 30 grams or less of marijuana, because the respondent was not "convicted" for immigration purposes, he has not presented convincing arguments to disturb the Immigration Judge's findings and determination in this regard (Form EOIR-26 at Attachment, Respondent's Br. at 5-10; Exhs. 8, 11). The record reflects that on July 23, 2013, the respondent was convicted for the offense of criminal conspiracy to possess a controlled substance, to wit: cocaine, in violation of 18 Pa. Cons. Stat. Ann. § 903(a) and 35 Pa. Cons. Stat. Ann. § 780-113(a)(16), for the offense of possession of an offensive weapon, in violation of 18 Pa. Cons. Stat. § 908(a), and was sentenced to 12 months of probation. *See* Exhs. 1, 4C; 10E, 12B, 12C. On November 18, 2014, the respondent's sentence for his conviction of criminal conspiracy to possess a controlled substance in violation of 18 Pa. Cons. Stat. Ann. § 903(a) and 35 Pa. Cons. Stat. Ann. § 780-113(a)(16), was amended to "guilty without further penalty" pursuant to 42 Pa. Cons. Stat. Ann. § 9723. *See* Exhs. 10E, 12C.

Considering the respondent's arguments on appeal, we note that section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) is written in the disjunctive, not in the conjunctive. Section 101(a)(48)(A) of the Act defines "conviction" as "a formal judgment of guilt of the alien entered by a court." However, where a formal judgment was not entered and "adjudication of guilt has been withheld," a "conviction" may be proven by showing that "(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *See* sections 101(a)(48)(A)(i)-(ii) of the Act; *Acosta v. Ashcroft*, 341 F.3d 218, 222 (3d Cir. 2003). We also note that by the plain terms of the statute, where a formal judgment of guilt has been offered into evidence, a "conviction" has been shown without regard to the "punishment, penalty, or restraint on liberty" as contemplated in the remainder of the statutory definition. *See also Retuta v. Holder*, 591 F.3d 1181, 1186 (9th Cir. 2010) (stating that the showing of "some punishment, penalty, or restraint on liberty" was one of "two things" that need to be shown "when a formal judgment of guilt has been withheld.") (persuasive authority).

The pertinent part of section 101(a)(48)(A) of the Act applicable to the respondent's controlled substance conviction is whether there has been "a formal judgment of guilt of the alien entered by a court." The United States Court of Appeals for the Third Circuit has referenced the Federal Rule of Criminal Procedure 32(d)(1) (now defined under Federal Rule of Criminal Procedure 32(k)(1)), to define "conviction" for immigration purposes, as "a formal judgment of guilt of the alien entered by a court" where such a judgment must "set forth the plea, verdict or finding, the adjudication, and the sentence." *See Perez v. Elwood*, 294 F.3d 552, 562 (3d Cir. 2002). Insofar as the respondent reiterates on appeal the same or similar arguments raised before the Immigration Judge, which upon our review of the record, were properly addressed by the Immigration Judge in his December 11, 2014, and February 10, 2015, decisions, we affirm the Immigration Judge's findings and determination (Respondent's Br. at 5-10; Exhs. 8, 11). Based on the combination of the "Amended Order" for case number "CR-5738-2012" (reflecting that pursuant to 42 Pa. Cons. Stat. Ann. § 9723, the state court found the respondent guilty for Count 5: Criminal conspiracy for possession of a controlled substance in violation of 18 Pa. Cons. Stat. Ann. § 903(a) and 35 Pa. Cons. Stat. Ann. § 780-113(a)(16) as amended), the "Criminal Action" document for case number "CP-39-CR-5738/12" (reflecting the respondent's plea of guilty to Count 5 and plea of nolo

contendere to Count 7 only), and "Notes of Testimony" for case number "5738-2012" (reflecting that the respondent's plea of guilty for Count 5 was accepted by the state court), the Immigration Judge properly determined that the respondent's conviction for the offense of criminal conspiracy to possess a controlled substance, to wit: cocaine, in violation of 18 Pa. Cons. Stat. Ann. § 903(a) and 35 Pa. Cons. Stat. Ann. § 780-113(a)(16), was established by a formal judgment of guilt (Exhs. 4C, 8, 10B, 10E at 18, 10C at 10, 11, 12B, 12C at 10). Accordingly, we affirm the Immigration Judge's determination that the respondent's conviction for a controlled substance violation renders him removable under section 237(a)(2)(B)(i) of the Act (Exhs. 8, 11).

The respondent is also statutorily ineligible for cancellation of removal under section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2), as he has not demonstrated his physical presence in the United States for a continuous period of 7 years after having been admitted in any status. The record reflects that the respondent was admitted as a lawful permanent resident in July 2006, and committed his offense for criminal conspiracy to possess a controlled substance in September 2012 (Exhs. 1, 4C, 12B). Because this offense falls under section 237(a) of the Act, it terminated the respondent's continuous presence on the date of commission. *See* section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1); *see generally Matter of Nelson*, 25 I&N Dec. 410, 412 (BIA 2011) Insofar as the respondent challenges the validity of his conviction, it is well-established that the Board and Immigration Judges cannot go behind the record of conviction to determine an alien's guilt or innocence (Respondent's Br. at 12-26). *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

In regards to the respondent's application for asylum, withholding of removal, and protection under the CAT, we adopt and affirm the Immigration Judge's decision (I.J. at 4-7). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The statement provided by the respondent in the Notice of Appeal (NOA), Form EOIR-26, does not specify in detail the factual and legal grounds for appeal, as required by the regulations, and thus, is insufficient to meaningfully apprise the Board of the reasons underlying his appeal. *See* 8 C.F.R. § 1003.3(b); *Matter of Lodge*, 19 I&N Dec. 500, 501 (BIA 1987). Based on the foregoing reasons, the respondent's appeal will be dismissed. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Lahoud, Raymond
Baurkot & Baurkot
227 South Seventh Street
P.O. Box 801
Easton, PA 18044

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: FRIAS-CAMILO, OMAR ALEJAN... **A 056-557-093**

Date of this notice: 10/23/2015

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:
Malphrus, Garry D.

taylort
Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

FRIAS-CAMILO, OMAR ALEJANDRO
A056-557-093
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Panel Members:
Malphrus, Garry D.

taylort
Userteam: Docket

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A056 557 093 – York, PA Date: OCT 23 2015

In re: OMAR ALEJANDRO FRIAS-CAMILO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raymond Lahoud, Esquire

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

CHARGE:

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The respondent is a native and citizen of the Dominican Republic, and a lawful permanent resident of the United States. The respondent appeals from the decision of the Immigration Judge dated May 6, 2015, which denied his applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").[1] *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(a), 1208.16(b)-1208.18. The appeal will be dismissed.[2]

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contendere to Count 7 only), and "Notes of Testimony" for case number "5738-2012" (reflecting that the respondent's plea of guilty for Count 5 was accepted by the state court), the Immigration Judge properly determined that the respondent's conviction for the offense of criminal conspiracy to possess a controlled substance, to wit: cocaine, in violation of 18 Pa. Cons. Stat. Ann. § 903(a) and 35 Pa. Cons. Stat. Ann. § 780-113(a)(16), was established by a formal judgment of guilt (Exhs. 4C, 8, 10B, 10E at 18, 10C at 10, 11, 12B, 12C at 10). Accordingly, we affirm the Immigration Judge's determination that the respondent's conviction for a controlled substance violation renders him removable under section 237(a)(2)(B)(i) of the Act (Exhs. 8, 11).

The respondent is also statutorily ineligible for cancellation of removal under section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2), as he has not demonstrated his physical presence in the United States for a continuous period of 7 years after having been admitted in any status. The record reflects that the respondent was admitted as a lawful permanent resident in July 2006, and committed his offense for criminal conspiracy to possess a controlled substance in September 2012 (Exhs. 1, 4C, 12B). Because this offense falls under section 237(a) of the Act, it terminated the respondent's continuous presence on the date of commission. *See* section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1); *see generally Matter of Nelson*, 25 I&N Dec. 410, 412 (BIA 2011) Insofar as the respondent challenges the validity of his conviction, it is well-established that the Board and Immigration Judges cannot go behind the record of conviction to determine an alien's guilt or innocence (Respondent's Br. at 12-26). *See Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

In regards to the respondent's application for asylum, withholding of removal, and protection under the CAT, we adopt and affirm the Immigration Judge's decision (I.J. at 4-7). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). The statement provided by the respondent in the Notice of Appeal (NOA), Form EOIR-26, does not specify in detail the factual and legal grounds for appeal, as required by the regulations, and thus, is insufficient to meaningfully apprise the Board of the reasons underlying his appeal. *See* 8 C.F.R. § 1003.3(b); *Matter of Lodge*, 19 I&N Dec. 500, 501 (BIA 1987). Based on the foregoing reasons, the respondent's appeal will be dismissed. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

Baurkot & Baurkot
Lahoud, Raymond
227 South Seventh Street
Post Office Box 801
Easton, PA 18044

IN THE MATTER OF FILE A 056-557-093 DATE: May 6, 2015
FRIAS-CAMILO, OMAR ALEJANDRO

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

_X_ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

_X_ OTHER: _____Order of the Immigration Judge_____

_____BLS_____
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL, C/O YORK PRISON
3400 CONCORD ROAD
YORK, PA, 17402

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

In the Matter of

FRIAS-CAMILO, OMAR ALEJANDRO
Respondent

Case No.: A056-557-093

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 5-6-15
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.

[X] The respondent was ordered removed from the United States to DOMINICAN REPUBLIC or in the alternative to .
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to DOMINICAN REPUBLIC 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 DOMINICAN REPUBLIC.

Respondent's application for:
[X] Asylum was ( )granted (X)denied ( )withdrawn.
[X] Withholding of removal was ( )granted (X)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.
[X] Respondent's application of (X) withholding of removal (X) deferral of removal under Article III of the Convention Against Torture was ( ) granted (X) 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: May 6, 2015

DAVID W. CROSLAND
Immigration Judge

Appeal: Waived/Reserved by Respondent Appeal Due By: 6-5-15

RE: FRIAS-CAMILO, OMAR ALEJANDRO

File: A056-557-093

CERTIFICATE OF SERVICE

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

File: A056-557-093 May 6, 2015

In the Matter of

OMAR ALEJANDRO FRIAS-CAMILO	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Violation of Section 237(a)(2)(B)(i) of the Immigration and Nationality Act

APPLICATIONS: Asylum, withholding of removal, and relief under the Convention Against Torture

ON BEHALF OF RESPONDENT: RAYMOND LAHOUD

ON BEHALF OF DHS: JEFFREY BUBIER

ORAL DECISION OF THE IMMIGRATION JUDGE

BACKGROUND

The respondent is a 25-year-old male citizen and national of the Dominican Republic who was placed in removal proceedings when a Notice to Appear dated August 9, 2013 was filed with Immigration Court alleging that the respondent violated Section 237(a)(2)(C)(i) of the Immigration and Nationality Act. The respondent appeared at a master calendar and admitted Allegations 1 through 3. It appears he

denied Allegation number 4. A motion to terminate proceedings was filed by the respondent, answered by the Government, and the Court entered an order denying the motion to terminate subsequently. The Court incorporates by reference that decision into this decision and finds that the Government has shown by clear and convincing evidence that the respondent is removable as charged.

This matter came on for hearing today, and the Court has considered the testimony of respondent and the Exhibits, which total in number 16, in reaching a decision in this case.

STATEMENT OF LAW
ASYLUM

The respondent bears the evidentiary burden of proof and persuasion in connection with the application for asylum. See 8 C.F.R. Section 1208.13(a); See Matter of S-M-J-, 21 I&N Dec. 722, 724 (BIA 1997). See Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985). See Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987). To be eligible for asylum, the respondent must credibly demonstrate either that he has suffered past persecution and therefore is presumed to suffer future persecution, or that he has a reasonable possibility of suffering future persecution based on one of the five enumerated grounds, that is race, religion, nationality, membership in a particular social group, or political opinion. See INA Section 101(a)(42)(A) and INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). Additionally, respondent must establish he is unable to avail himself of protection in his own country because his fear of persecution is countrywide. See INS Section 101(a)(42)(A). See Matter of Acosta, page 245; see Matter of C-A-L-, 21 I&N Dec. 754-757 (BIA 1997); Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). Finally, respondent must demonstrate that he is eligible for asylum as a matter of discretion. See INA Section 208(b)(1) and INS v. Cardoza-Fonseca, 480 U.S. 421, 423

(1987).

In addition, the respondent must demonstrate he has filed his application for asylum within a period of one year after having come into the United States or show exceptional circumstances for having failed to do so.

REAL ID ACT

The REAL ID Act of 2005 provides guidance in making credibility determinations. See REAL ID Act, Section 101(h)(2). It applies to asylum applications made on or after May 11, 2005. Under the REAL ID Act the Court determines credibility based on the totality of the circumstances. See 8 U.S.C.A. Section 1229(a)(c)(C) of the Immigration and Nationality Act.

WITHHOLDING OF REMOVAL

An I-589 application also constitutes an application for withholding of removal. See Section 241(b)(3)(A) of the Immigration and Nationality Act. Unlike an application for asylum, the respondent has a much higher burden of proof, in that he either must prove that he has suffered past persecution and therefore is presumed to suffer future persecution, or that it is more likely than not that he would suffer future persecution based upon his race, religion, nationality, membership in a particular social group, or political opinion. Thus it follows that if the application for asylum fails, then the application for withholding of removal will also fail.

PROTECTION UNDER THE CONVENTION AGAINST TORTURE

An I-589 application also constitutes an application for relief under the Convention Against Torture. Unlike an application for asylum or an application for withholding of removal, respondent need not show a nexus to any of the five enumerated grounds. Rather, the respondent must show it more likely than not that he would be subjected to severe punishment amounting to torture either at the hands of the

government or at the hands of those whom the government cannot or will not control.

PARTICULAR SOCIAL GROUP

The Board of Immigration Appeals has been instructive to the lower courts in assessing who is and who is not a member of a particular social group. First, the individuals in the group must share a common, immutable characteristic the members of the group either cannot change or should not be required to change. Two, the group must have social visibility, which means the group should generally be recognizable by others in the community. Three, the group must be defined with particularity, which means the group must have concrete, identifiable boundaries allowing an observer to distinguish members of that group form non-members.

TESTIMONY

The testimony of the respondent is that he is 25. He is engaged. He has two children; they were born in the United States. His testimony is his mother is in the United States and she is a United States citizen, and his father lives in the Dominican Republic. Respondent's testimony is he has three brothers, all of whom are lawful permanent residents.

His testimony is that he had a 9th grade education when he was in the Dominican Republic. He did not work; however, he works in a warehouse making $12 an hour here in the United States. Respondent's testimony is he filed income tax returns in 2012.

Respondent's testimony was he came to the United States in 2006, became a lawful permanent resident apparently, returned in 2012, was there for about eight days when he returned. The respondent's testimony is he suffered no arrests by the government of the Dominican Republic. When the respondent was asked why he fears returning to the Dominican Republic, he states that he fears his father, who has

been physically and emotionally and verbally abusive to him since he was 9 years old. When the respondent was asked since he is 25 and a grown man why he could not live elsewhere, or why he would have fear of his father, who is 63, he states and says that his father might hit him with a stick, and that he hit him with a stick before, and the last time he was there he was verbally abusive to him. He states that his father is 6' tall and respondent states that he is 5'6".

ANALYSIS AND FINDINGS OF THE COURT

The respondent contends that he is a member of a social group having grown up in an abusive relationship with his father, and therefore there is a nexus to one of the five enumerated grounds. In considering the application, the Court looks to the three-prong test that the Board has laid down in determining who is and who is not a member of a particular social group. Thirdly, the respondent is a member of a family. However, in this situation it is a family that the respondent contends is abusive in that his father has been abusive to him and would be abusive to him in the future. The Court does not find that this meets the definition of having social visibility that can be recognized by others in the community, nor is it defined with sufficient particularity with concrete, identifiable boundaries that allow an observer to distinguish members of that group from non-members. Essentially, the Court finds that there is no basis for the grant of an application based on the testimony. Indeed in looking at the respondent's application, his application makes no mention of his father but rather speaks to his concern that he would be on a downward spiral if he is returned to the Dominican Republic Although the Court is sympathetic to the respondent; he appears to have testified credibly as to his abusive relationship with his father; the Court simply does not find that his testimony reflects a sufficient nexus of any kind for the respondent to be granted relief under asylum. Therefore, the Court will deny the application for asylum.

The application for withholding of removal having a much higher burden of proof, and the application for asylum having failed, it follows that the application for withholding of removal will also fail. Therefore, the Court will deny the application for withholding of removal.

Next, the Court looked to relief under the Convention Against Torture. Here, the respondent contends that the police do not do anything to protect someone such as himself in the Dominican Republic, but there is no basis for the respondent's claim that he could not obtain the protection of the police, now being a grown man and not a child. Again, looking at his application, on page 6 it says in Question 4, are you afraid of being subjected to torture in your home country or any other country to which you may be returned? Answer, I am afraid of falling downwards in a spiral, given my only mental emotional sanity will be sensed as an inability to survive, which will only make me a target for gangs, prison, and a life of enduring depression that lets me spiral towards those. No mention of his father. On page 5 it says, do you fear harm or mistreatment if you return to your home country? Answer, yes. I know that I will simply fall by the way side given how I am mentally and the life I will be forced into if I am deported. I am afraid of gangs or prison there, of life there as a kid who was deported from the United States. It is not because I was deported. It is because I will become a victim of a society and treatment of those who have no work, no family, no sense of sanity, and with every day I will only think about what placed me into this position and what I lost forever, sending me into deep depression. I do not know where that will lead.

Accordingly, the Court will deny the application for relief under the Convention Against Torture in that the respondent has not shown it more likely than not that he would be subjected to severe punishment amounting to torture were he to be

returned to his home county.

ORDERS

IT IS HEREBY ORDERED that the application for asylum is denied.

IT IS HEREBY ORDERED that the application for withholding of removal is denied.

IT IS HEREBY ORDERED that the application for relief under the Convention Against Torture is denied.

IT IS HEREBY ORDERED that the respondent be removed from the United States to the Dominican Republic.

DAVID W.CROSLAND
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE DAVID W.CROSLAND, in the matter of:

OMAR ALEJANDRO FRIAS-CAMILO

A056-557-093

BALTIMORE, MARYLAND

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

Maraji Gwynallen

MARAJI GWYNALLEN (Transcriber)

DEPOSITION SERVICES, Inc.-2

June 18, 2015

(Completion Date)

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