

Falls Church, Virginia 22041

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File: A77 142 159 - Seattle

Date:

APR 26 2006

In re: HOGUER MONTANO-DIAZ

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Mark K. Kinzler, Esquire

During the pendency of this appeal, on April 7, 2006, the respondent filed a motion to terminate these removal proceedings based on the fact that on March 13, 2006, his underlying criminal conviction was vacated on constitutional grounds of inadequate assistance of counsel for failing to advise him of the immigration consequences of pleading guilty to Delivery of Controlled Substance Methamphetamine - Sch. II Substantial Quantities. The Department of Homeland Security (DHS) has not opposed the motion.

We find that the evidence presented establishes that the underlying conviction which served as the basis for the respondent's removability has been vacated due to a defect in the criminal proceeding. *See Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9<sup>th</sup> Cir. 1990); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2001). If a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. Accordingly, we grant the motion to terminate these proceedings, as there is no conviction which can serve as the basis for removing the respondent from the United States, and the respondent has not been charged with any other immigration violation.

ORDER: The motion to terminate is granted.

FURTHER ORDER: The removal proceedings are terminated.

  
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FOR THE BOARD