

BACKGROUND

He appeared, admitted and conceded the allegations at bar and requested relief pursuant to NACARA as the father of 5 qualifying US citizen children. The respondent also noted his criminal record, a sole conviction on March 02, 2000 of sex with a minor. Whereupon the Court set the matter for an individual hearing on relief on August 13, 2008. Further the court that any motions to pretermitt be filed 30 days prior to hearing
p 6 TRANSCRIPT

On or about 10/19/2007 the Government filed an additional charge of deportability pursuant to Section 212(a)(2)(A)(i)(1) of the Act alleging a crime of moral turpitude, though expunged.

~~The individual hearing began Aug 13 2008~~

A petition for NACARA petition was timely filed which included an extensive annex of the Order and findings granting custody of the child based on actions of the conviction to spare the respondent herein, on or about Sept 13, 2002

The individual hearing was began timely on Aug 13, 2008. District Counsel made an oral motion to pretermite TRANSCRIPT P 11 the court "I-I" sustained and this appeal ensued.

SYNOPSIS of Appeal

On Aug 18 2008 the court issued findings of fact and opinion based on the pretermination of Aug 13, 2008

The court concluded that the conviction of sex with a minor, despite the conviction's subsequent expungement was sufficient to terminate Respondent's NACARA hearing because any showing of "good moral character" would be futile. TRANSCRIPT p 23 Additionally the court held that because removability is not in issue the burden of proof to demonstrate good moral character is on your client. TRANSCRIPT p 18, 19.

The court found that Respondent's felony conviction was expunged and reduced to a misdemeanor OPINION p 7, despite the government's own amended charge stating expungement and a letter presented in court from previous counsel who handled the expungement. Additionally California Penal Code sec 17(b)1 states that a felony becomes a misdemeanor if punishment is directed in the county jail instead of the state prison.

SUBSTANTIATED
to
PROC.
NOT
REVERSIBLE

That is relevant because Respondent's conviction would ^{have} become a misdemeanor

at the moment of sentencing. Respondent sentence was PROBATION / Fail see CONVICTION. Thus his petition for expungement was just that, expungement, not reclassification of the crime.

The Respondent will not take issue with the Court's findings regarding Sexual Abuse and/or Aggravated Felony because like Moral Turpitude all three convictions provide a separate and independent basis, if a bona fide conviction, to preclude relief.

Conversely, the judicial resolution of whether Respondent's expungement within the context of the facts at bar, was rehabilitative or substantive will resolve the issue herein.

Therefore the following issues are presented for review:

- I Whether a motion to pretermitt requires the government maintain her burden of proving that a vacated conviction remains valid for immigration purposes?
- II Whether the court's refusal to consider or accept ~~contemporary~~ evidence as to the nature & circumstances of the expunged conviction was an abuse

of discretion and created a legally insufficient basis for pretermitted proceedings.

Because both issues have the same nexus of fact the issues will be argued together in the same narrative rather than broken out separately.

The general rule regarding the burden discussed in Issue I is provided in Pickering v. Gonzalez 465 F.3d 263, 269, we agree with the determination of the BIA.

①

INSERT

An the case at bar the government was silent as to any facts, law, or evidence that would make it clear that Respondent's expungement was rehabilitative or directed for an "immigration benefit" see TRANSCRIPT

Besides the fact that the government brought the amended charge which stated the conviction was expunged see Government's 261 there was no mention of California Penal Procedure, California Penal Code with respect to rehabilitative statutes, whether a hearing was required or recorded nor any affidavit that may have been submitted or proposed

In a case far more attenuated
Pickering v. Gonzalez 465 F.3d the court
reversed, BIA stating, the INS did not
^{the}
prove by clear and convincing evidence
that Pickering's conviction remained

(2) INSERT

As
~~for~~ the instant case we have no
evidence that the of any motive
directed towards an immigration benefit
nor any evidence that the statute
is solely rehabilitative, or ^{any} rehabilitative
in the context of the facts at
bar.

The only indication of California Law
brought forward was by the
court and that was incorrect TRANSCRIPT 16
The court states that the expungement
is pursuant to Penal Code 17 and that
is an expungement of based on completion
of probation, ... TRANSCRIPT 16

(3) INSERT RELEVANT SEC. ←
Ca Penal Code sec 17 is a description
of the relation between felonies, misdemeanors
and infractions in California CA Penal Code sec 17

As pointed out previously a felony
sentenced as a misdemeanor becomes
a misdemeanor. Ca Penal Code 17(b)
This is not rehabilitative rather, the substantive
relations between felonies & misdemeanors in CA.

Even if, the government had evidence brought forth ~~under~~ clear & convincing evidence that the alien's conviction was vacated solely related to rehabilitation or to avoid adverse immigration hardships, the Respondent should have been permitted to rebut.

Before the court and district counsel were a plethora of documents indicating a basis for expungement. ~~These were the~~ The Superior Court of California, after extensive investigation removed custody of the child of the alleged ~~sexual~~ illegal ritual activity to the Respondent on September 13, 2002. NACARA PETITION p184

Rather than allow any testimony or discussion to elucidate the documents NACARA pgs 190-203 the court pretermitted proceedings. TRANSCRIPT p17

CONCLUSION

~~The Immigration~~

The law requires that an expungement or vacation be treated as a conviction pursuant to immigration law if the expungement was solely rehabilitative in nature or to avoid immigration consequences.

→ Secondly the government is responsible to prove by clear & convincing evidence that a vacated conviction remains valid for immigration purposes.

In the case at bar Respondent respectfully states that government did not meet their burden, and therefore the conviction should have stood as charged - a crime of moral turpitude quashed.

Secondly, & consideration of all evidence in order to rebut and clarify is the quid pro quo of our adversarial system.

Wherefore, premises considered, your Respondent respectfully asks request that the instant matter be remanded conforming w/ this Court's decision.