

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Gustavo E. Borjas
(OI File No. H-13-42964-9),

Petitioner,

v.

The Inspector General.

Docket No. C-14-1080

Decision No. CR3334

Date: August 19, 2014

DECISION

I sustain the determination of the Inspector General (I.G.) to exclude Petitioner, Gustavo E. Borjas, from participating in Medicare, all State health care programs (State Medicaid programs) and all other federally funded health care programs for a minimum of five years.

I. Background

Petitioner requested a hearing to challenge the I.G.'s determination to exclude him and the case was assigned to me. I directed the parties to file briefs and proposed exhibits. The I.G. filed a brief, a reply brief, and four proposed exhibits, which are identified as I.G. Ex. 1 – I.G. Ex 4. Petitioner filed a brief. Neither party requested that I convene an in-person hearing.

I receive I.G. Ex. 1 – I.G. Ex. 4 into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue here is whether the I.G. is mandated to exclude Petitioner for a period of at least five years.

B. Findings of Fact and Conclusions of Law

The I.G. excluded Petitioner under the authority of section 1128(a)(4) of the Social Security Act (Act). This section mandates the exclusion of any individual who is convicted of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The evidence provides overwhelming support for the I.G.'s determination.

On September 12, 2013, Petitioner pled nolo contendere to a felony under Florida State law, namely, the crime of Solicitation to Purchase Cocaine. F.S. §§ 893.03(2)(a)(4), 777.04; I.G. Ex. 2 at 3. On its face Petitioner's plea establishes that he was convicted of a felony within the meaning of section 1128(a)(4), thereby mandating that the I.G. exclude him.

Petitioner argues that he was not "convicted" of a crime because adjudication of guilt was withheld under Florida law. He asserts that, under Florida law, an individual is not "convicted" of a crime if adjudication of guilt is withheld in that individual's case and he or she successfully completes a term of probation. Petitioner's Brief § I.

Whether or not that is so is irrelevant. Petitioner plainly was "convicted" within the meaning of section 1128 of the Act. An individual is convicted of a crime for section 1128 purposes if that individual enters a plea of nolo contendere to an offense and that plea has been accepted by a federal, State, or local court. Act § 1128(i)(3). Additionally, an individual is convicted if that individual enters into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld. Act § 1128(i)(4). Both of these sections apply to the nolo contendere plea entered by Petitioner and accepted by the Florida court.

Petitioner argues that, even if he was convicted of a crime, he was not convicted of a felony that is related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. He contends that the essential element of his crime, soliciting the purchase of cocaine, a controlled substance, is neither manufacture, distribution, prescription, or dispensing of cocaine. Petitioner's Brief § II.

