U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MEDINA-VELEZ, FELIPE

A 200-875-826

Date of this notice: 9/28/2018

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:
Cole, Patricia A.

Userteam: Docket

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

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A200-875-826 – El Paso, TX

Date: SEP 28 2018

In re: Felipe MEDINA-VELEZ a.k.a. Felipe de Jesus Medina-Velez
aka. Felipe de Jesus Medina Velez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jessica K. Miles, Esquire

ON BEHALF OF DHS: Adrian Paredes V.
Assistant Chief Counsel

APPLICATION: Termination

This case was last before the Board on January 19, 2018, when we remanded the record for further fact finding and analysis. The Department of Homeland Security (DHS) now appeals from the Immigration Judge's April 17, 2018, decision terminating removal proceedings against the respondent. The respondent opposes the appeal. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).nn

In his first decision, dated July 28, 2017, the Immigration Judge terminated the respondent's removal proceedings, finding that the DHS did not establish the respondent's alienage by clear and convincing evidence. We remanded the record for the Immigration Judge to provide further analysis of evidence not discussed in detail in his initial decision. On remand, the Immigration Judge issued a new decision, analyzing that evidence and finding the totality of the evidence insufficient to establish the respondent's alienage.

As we noted in our prior decision, the DHS alleged that the respondent is a native and citizen of Mexico. The respondent denied every factual allegation against him, as well as the charges of removability. The Immigration Judge found that the DHS did not sufficiently establish the respondent's alienage and terminated the removal proceedings.

Under the relevant regulation, when removability is not determined through a respondent's pleadings, "the [I]mmigration [J]udge shall request the assignment of [a] Service counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading." 8 C.F.R. § 1240.10(d). The DHS bears the burden of proving alienage. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a

finding of that fact. It is true that the burden of proving alienage rests upon the Government."), *overruled on other grounds by INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

"[T]he burden of proof . . . is upon the [DHS] to establish the alienage of the respondent, and ultimately his deportability, by evidence that is clear, unequivocal, and convincing." *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990, 1991). However, "evidence of foreign birth gives rise to a rebuttable presumption of alienage, and the burden shifts to the respondent to prove citizenship." *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001).

We do not disturb the Immigration Judge's decision to terminate removal proceedings. His findings of fact are not clearly erroneous. We summarized the evidentiary record in our prior decision, and that record has not materially changed in the interim.

In finding that the DHS did not carry its burden of proof, the Immigration Judge noted evidence of conflicting birthdates amongst the documentary evidence (IJ at 2-3). Additionally, the Immigration Judge analyzed a U.S. Visit printout on remand, but found insufficient evidence as to how the information in that printout was acquired. Moreover, the U.S. Visit printout contained a photograph of a man who resembled the respondent, but the Immigration Judge found that that photo and the printout did not clearly and convincingly establish the respondent's alienage (IJ at 2-3). We discern no reason to disturb this analysis.

The DHS argues that the difference in birthdates is an obvious scrivener's error (DHS's Br. at 4-8). The conflicting birthdates might be the result of an erroneous entry into a database. One database might display dates using a "day/month/year" format, instead of a "month/day/year" format. It does not follow that the Immigration Judge's fact finding is clearly erroneous. The Immigration Judge noted an absence of evidence regarding the nature of the U.S. Visit printout, which would include how the database displays dates. As we noted in our prior decision, the Immigration Judge's finding of conflicting birth dates is not clearly erroneous.

The DHS next argues that the Immigration Judge should have drawn an adverse inference from the respondent's silence (DHS's Br. at 8-11). Drawing such an inference is discretionary. *See Matter of Guevara*, 20 I&N Dec. at 241 ("We note at the outset that under certain circumstances, an adverse inference *may* indeed be drawn from a respondent's silence in deportation proceedings.") (emphasis added). Moreover, the conflicting evidence undercuts a claim that the evidence in question actually relates to the respondent himself. *See Matter of D-R-*, 25 I&N Dec. 445, 455 (BIA 2011) (setting forth that an Immigration Judge is not required to accept a party's plausible version of events when the record reflects other reasonable interpretations), *petition granted and remanded on other grounds sub nom. Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015) (mem.). We do not disturb the Immigration Judge's decision to terminate removal proceedings.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice

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Name: MEDINA-VELEZ, FELIPE

A 200-875-826

Date of this notice: 1/19/2018

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:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: A200 875 826 – El Paso, TX Date: JAN 19 2018

In re: Felipe MEDINA-VELEZ a.k.a. Felipe de Jesus Medina-Velez
aka. Felipe de Jesus Medina Velez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jessica K. Miles, Esquire

ON BEHALF OF DHS: Adrian Paredes
Assistant Chief Counsel

APPLICATION: Termination

The Department of Homeland Security (DHS) appeals from the Immigration Judge's July 28, 2017, decision terminating removal proceedings against the respondent. The respondent opposes the appeal. The record will be remanded for further proceedings.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The DHS has alleged that the respondent is a native and citizen of Mexico (IJ at 1; Exh. 1). The respondent denied every factual allegation against him, as well as the charges of removability (IJ at 1; Tr. at 73). The Immigration Judge found that the DHS did not sufficiently establish the respondent's alienage and terminated the removal proceedings (IJ at 4).

Under the relevant regulation, when removability is not determined through a respondent's pleadings, "the [I]mmigration [J]udge shall request the assignment of [a] Service counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading." 8 C.F.R. § 1240.10(d). The DHS bears the burden of proving alienage. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the Government."), *overruled on other grounds by INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

"[T]he burden of proof . . . is upon the [DHS] to establish the alienage of the respondent, and ultimately his deportability, by evidence that is clear, unequivocal, and convincing." *Matter of Guevara*, 20 I&N Dec. 238, 242 (BIA 1990, 1991). However, "evidence of foreign birth gives rise to a rebuttable presumption of alienage, and the burden shifts to the respondent to prove citizenship." *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001).

In this case, the respondent acknowledged his name (Tr. at 90), but did not otherwise testify (IJ at 3). The DHS submitted a birth certificate for Felipe de Jesus Medina Velez, excerpts from a United States Citizenship and Immigration Services database showing that a person named Felipe de Jesus Medina Velez had been granted public interest parole in 2012 and employment authorization, an Application for Employment Authorization (Form I-765) for Felipe de Jesus Medina-Velez, a U.S. VISIT printout for a person named Felipe de Jesus Medina Velez, and some federal court documents (IJ at 1-2; Exhs. 2-2A). With the exception of the birth certificate and court documents, the remaining documents all contain the same alien registration number. The birth certificate and immigration documents all show that the named person was born in Mexico.

The Immigration Judge noted that the documents contained apparently conflicting birth dates (IJ at 3). For example, the birth certificate, Form I-765, and the U.S. VISIT printout list birthdates such as 04/06/1968 or April 6, 1968, respectively (IJ at 3; Exhs. 2-2A). However, the database printout shows a birthdate of 06041968, which the Immigration Judge found was June 4, 1968 (IJ at 2). This finding is not clearly erroneous. The Immigration Judge noted that the DHS did not submit testimonial evidence to explain the documentary evidence or present other evidence showing how the respondent was identified or came to the DHS's attention (IJ at 3-4). The Immigration Judge found that the DHS's documents do not clearly and convincingly relate to the respondent (IJ at 4). He noted that the documents had similar names but different birth dates (IJ at 4).

We acknowledge the differences on these documents, including the birthdates and variations in the name. These discrepancies support the Immigration Judge's determination that the documents do not clearly and convincingly relate to the same person (IJ at 3). However, we are not persuaded that the Immigration Judge considered all the evidence of record and will remand the record for further fact finding and analysis.

For example, the Immigration Judge's decision does not discuss in detail the U.S. VISIT printout, which includes a birthdate and name consistent with the respondent's alleged birth certificate (*compare* Exh. 2 at 8 *with* Exh. 2A). The U.S. VISIT document also contains a photograph, and the Immigration Judge did not compare that photograph to how the respondent appeared in court. The U.S. VISIT document also indicates that the subject at issue was born in Mexico. Lastly, that printout indicates that the subject's fingerprints were captured, which may raise an inference as to the reliability of that document.[1] The Immigration Judge on remand should appropriately analyze all of the evidence of record.

On remand, the parties shall have the opportunity to update the evidentiary record with any relevant evidence. We express no opinion on the ultimate outcome of the case.

Accordingly, the following order will be entered.

[1] We acknowledge that the Immigration Judge concluded that the DHS did not clearly and convincingly establish that the respondent is the same person identified in the documents (IJ at 3-4). The Immigration Judge should reevaluate this conclusion after considering the totality of the evidence on remand.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD