U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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606 S. Olive Street, 8th Floor
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Name: AYALA-CHAN, WILLIAM FRANCISCO **A200-244-079**

Date of this notice: 1/13/2012

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:
Adkins-Blanch, Charles K.
Guendelsberger, John
Hoffman, Sharon

File: A200 244 079 - Los Angeles, CA

Date: JAN 13 2012

In re: WILLIAM FRANCISCO AYALA-CHAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

The respondent is a native and citizen of Mexico. He signed a written stipulation pursuant to 8 C.F.R. § 1003.25(b), and an Immigration Judge ordered him removed from the United States to Mexico on August 8, 2011. On August 15, 2011, the respondent filed a timely appeal of the Immigration Judge's order claiming that a waiver of appeal in the written stipulation agreement was not knowing or voluntary. On August 16, 2011, the respondent was removed from the United States. The issues before the Board are whether we have jurisdiction over the respondent's appeal and, if so, whether the respondent knowingly, voluntarily, and intelligently waived appeal. We find that we have jurisdiction in this case and that the record must be remanded for further fact-finding regarding the waiver of appeal.

I. JURISDICTION

The Board has long had jurisdiction over appeals by aliens claiming that a waiver of appeal was not knowing or voluntary. *See Matter of Rodriguez-Diaz*, 22 I&N Dec. 1320 (BIA 2000); *Matter of Shih*, 20 I&N Dec. 697 (BIA 1993). In such cases, the Board determines whether a waiver of appeal was knowing and voluntary. If it was, the waiver of appeal is valid and the Immigration Judge's decision becomes final as if no appeal had been filed. *See* 8 C.F.R. §§ 103.3(a)(1) (final sentence), 1003.39. If it was not, then the Board has jurisdiction over the merits of the appeal. Although the respondent in this case waived appeal in a written stipulation removal agreement, that document does not alter the Board's long-standing jurisdiction to consider whether a waived appeal was knowing and voluntary. Thus, the Board has jurisdiction to consider an appeal from an alien who has signed a written stipulation which contains a waiver of appeal where the alien argues that the waiver was not knowing and voluntary.

The alien in this case was removed from the United States the day after filing his appeal. We therefore consider whether the departure bar at 8 C.F.R. § 1003.4 precludes the Board from asserting jurisdiction over this appeal. We find that it does not. The pertinent regulation, 8 C.F.R. § 1003.6(a), provides in relevant part that

> the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal until a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

Although the regulation excludes an automatic stay of removal for those removal orders for which an alien has waived appeal, that does not end our inquiry. Because the Board has jurisdiction to determine whether a waiver of appeal was knowing or voluntary, it follows that an alien receives an automatic stay of removal pending the Boards' determination regarding the validity of the appeal waiver. To find otherwise would allow the Department of Homeland Security ("DHS") to remove any alien who challenges an appeal waiver before the Board could adjudicate the validity of such claims and thus vitiate the Board's jurisdiction and potentially implicate an alien's due process rights. We find that a reading of the stay regulation necessarily requires that an alien who files an appeal contesting an appeal waiver is entitled to an automatic stay until the Board determines whether the waiver of appeal was valid.

II. REVIEW OF WRITTEN STIPULATED REMOVAL AGREEMENT

On appeal, the respondent argues that his due process rights were violated because he did not understand the content of the written stipulated removal agreement he signed at the DHS office. He requests an opportunity to appear before an Immigration Judge and he contests that he waived his right to file an appeal.

Under 8 C.F.R. § 1003.25(b), an Immigration Judge is allowed to enter an order of removal without a hearing if it is stipulated to by the respondent and the DHS. The regulation further requires that, where the respondent is unrepresented, the Immigration Judge "must determine that the alien's waiver is voluntary, knowing, and intelligent." *Id.*

The United States Court of Appeals for the Ninth Circuit has held that waivers of the rights to a hearing, counsel, and to appeal, as well as the other waivers set forth in the written stipulated removal agreement underlying the Immigration Judge's order, must be obtained in such a manner that ensures that the waivers are considered and intelligent. *See United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010).

The issue before us is whether the respondent's waiver of rights, including his right to appeal, was knowing, voluntary, considered and intelligent as required by *Ramos* and the regulations. In this case, the respondent was unrepresented and did not appear before an Immigration Judge prior to being removed from the United States. Relying solely on the written stipulated removal agreement signed by the respondent, the Immigration Judge granted the DHS motion for stipulated removal and noted that the appeal was waived by both parties.

While the regulation states that no hearing is required, the regulation does not preclude a hearing. Moreover, the regulation requires that the Immigration Judge determine that waivers are "voluntary, knowing, and intelligent" in cases where the respondent is not represented by counsel. 8 C.F.R. § 1003.25(b). In *Ramos,* the Ninth Circuit noted several factors that led them to conclude that the respondent's waiver of his right to appeal was defective. Key among these was the fact that the respondent was not represented by counsel and that the respondent never had the benefit of appearing before the Immigration Judge when "navigating the labyrinth of our immigration laws..." *United States v. Ramos*, *supra,* 681-682 (*citing Castro-O'Ryan v. U.S. INS*, 847 F.2d 1307, 1312 (9th Cir. 1988) (internal quotation marks omitted). Similarly, the respondent here was not represented by

counsel and did not appear before an Immigration Judge. Furthermore, there is no indication in the Immigration Judge's order dated August 8, 2011, reflecting that a determination that the respondent's waiver of his rights, including his right to counsel and his right to appeal was knowing, considered, and intelligent as required by *United States v. Ramos*, *supra*, and the regulation.

Had the unrepresented respondent appeared before an Immigration Judge in this case, the Immigration Judge could have assessed whether the respondent's waiver of rights was considered and intelligent. At no time did an Immigration Judge direct any questions to the respondent concerning the implications of proceeding without an attorney. Similar to the alien in *Ramos,* the respondent here also never received the benefit of a review by counsel or the Immigration Judge of his potential eligibility for relief. *See United States v. Ramos*, *supra* at 681-682. Given these circumstances, we cannot conclude the respondent's signature on the stipulated removal agreement establishes that his waiver of rights, including his right to appeal, was considered and intelligent.

Because the respondent did not receive the benefit of procedural safeguards necessary to ensure a valid waiver of appeal, we conclude that his waiver of appeal was invalid. *See Ubaldo-Figueroa*, 364 F.3d at 1042, 1049 (9th Cir. 2004) ("An alien can not make a valid waiver of his right to appeal a removal order if an Immigration Judge does not expressly and personally inform the alien that he has a right to appeal"), *citing United States v. Ramos*, *supra*, at 682. Accordingly, we remand these proceedings to the Immigration Judge for further fact-finding regarding the respondent's intent and understanding at the time he signed the stipulated removal agreement.

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

FOR THE BOARD