U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Alexandrovich, Marina N.
MARINA ALEXANDROVICH ESQ PC
405 W Southern Avenue
Suite 1-24
Tempe, AZ 85282

DHS/ICE Office of Chief Counsel - PHO
2035 N. Central Ave.
Phoenix, AZ 85004

Name: F[redacted]-T[redacted], J[redacted] A[redacted]

A[redacted]-564

Date of this notice: 8/23/2018

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:
O'Connor, Blair

Userteam: Docket

File: [redacted] 564 – Phoenix, AZ

Date: AUG 2 3 2018

In re: J[redacted] A[redacted] F[redacted]-T[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marina N. Alexandrovich, Esquire

ON BEHALF OF DHS: Ariel I. Worth
Assistant Chief Counsel

APPLICATION: Cancellation of removal

The respondent is a native and citizen of Mexico who appeals from an Immigration Judge's July 27, 2017, decision finding him ineligible for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b), and granting his application for voluntary departure.[1] The Immigration Judge pretermitted the cancellation application, without addressing continuous physical presence or hardship, after finding that the respondent was convicted of a disqualifying criminal offense under section 240A(b)(1)(C) of the Act. For the following reasons, the appeal will be sustained and the record will be remanded for further proceedings consistent with this order.

We review an Immigration Judge's factual determinations, including credibility determinations, for clear error.[2] *See* 8 C.F.R. § 1003.1(d)(3)(i). The Board uses a de novo standard

[1] The respondent filed two motions while this appeal was pending. In a Motion to Remand received by the Board on June 6, 2018, the respondent argues that the Board reported to his counsel that it lost his brief. Based on this, the respondent argues that the Board committed "a due process violation" and the record should be remanded. Leaving aside the issues of whether a lost brief would constitute a due process violation or whether the remedy for such a violation would be remanding the record, we will deny this motion, since the record reflects that the respondent's brief was not lost, was received by the Board on or about March 12, 2018, and was incorporated into the record of proceedings. The respondent has also filed a Motion to Terminate, relying on the Supreme Court's recent opinion in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). We will deny that motion for the reasons set forth herein.

[2] The Immigration Judge did not render a factual finding as to the specific state statute that the respondent was found guilty of violating (IJ at 4-6). The respondent presented evidence that he was initially charged with felony possession of methamphetamine under section 453.336 of the Nevada Revised Statutes, but that this charge was later amended to the misdemeanor offense of possession of a drug not to be introduced into interstate commerce, in violation of section 454.351

of review for questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

At issue in this appeal is whether the Immigration Judge correctly found that the respondent was convicted for violating a law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act [the "CSA"] (21 U.S.C. 802))," rendering him ineligible for cancellation of removal. *See* IJ at 6-7; sections 237(a)(2)(B) and 240A(b)(1)(c) of the Act. For purposes of resolving this appeal, we will accept as true the respondent's statement that he was convicted under section 454.351 of the Nevada Revised Statutes. *See supra* note 2. On January 5, 2018, the United States Court of Appeals for the Ninth Circuit held in *Villavicencio v. Sessions*, 879 F.3d 941 (9th Cir. 2018), that a conviction arising under section 454.351 of the Nevada Revised Statutes was not a categorical match for a controlled substance violation under section 237(a)(2)(B) of the Act. *See Villavicencio v. Sessions*, 879 F.3d at 947 (finding, *inter alia*, that Nevada does not require a unanimous jury verdict on identity of the controlled substance at issue). Moreover, the Nevada statute was both overbroad and indivisible, meaning that the Immigration Judge was not permitted to examine the respondent's conviction documents, including the charging instrument, to determine whether the controlled substance at issue was one listed in the Federal Controlled Substances Act. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). Given the issuance of this controlling decision, we will remand this record for the Immigration Judge to reconsider the respondent's eligibility for cancellation of removal.[3]

While this appeal was pending, the respondent filed a motion to terminate based on the recent decision of the United States Supreme Court in *Pereira v. Sessions*, *supra*, holding that a Notice to Appear that did not include the time and place of the hearing was insufficient to trigger the stop-time rule at section 240A(d)(1) of the Act. We do not find that this decision supports the respondent's appellate argument in favor of terminating proceedings for lack of proper jurisdiction. The Court addressed a narrow question in *Pereira*, *i.e.*, how the service of a Notice to Appear affects an alien's ability to accrue continuous residence or continuous physical presence under section 240A of the Act. The Court's decision that a Notice to Appear lacking information as to the date and time of the hearing does not properly trigger the stop-time rule does not impact existing precedent decisions holding that such a Notice to Appear nevertheless can confer jurisdiction over removal proceedings, particularly where (as here) the respondent subsequently received notice of the hearing dates and locations and appeared for those hearings. *See Popa v. Holder*, 571 F.3d 890, 895-96 (9th Cir. 2009). Given that the Court did not terminate proceedings in *Pereira* (as might be expected where a court lacked jurisdiction over the

---

of the Nevada Revised Statutes, to which the respondent eventually pled guilty. *See* Respondent's Br. at 4; Exh. 10.

[3] Although the Immigration Judge noted that the respondent had at least one conviction for driving under the influence (IJ at 7), he did not render factual findings to identify the statute of conviction or determine whether such a conviction rendered the respondent inadmissible or ineligible for relief. On remand, the Immigration Judge may further examine whether the respondent has other convictions that affect his eligibility for relief. Both parties may introduce evidence bearing on the respondent's eligibility and fitness for any relief from removal.

respondent), but rather remanded the record for further proceedings, we conclude that the respondent's motion to terminate finds inadequate support in *Pereira*.

We therefore will vacate the Immigration Judge's decision pretermitting the respondent's application for cancellation of removal. In light of *Villavicencio v. Sessions*, we will remand this record for reconsideration of the respondent's eligibility for cancellation of removal.

Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The respondent's motion to terminate is denied.

FURTHER ORDER: The Immigration Judge's decision is vacated and the record is remanded for further proceedings consistent with this opinion.

FOR THE BOARD