U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: STEVENS, KIM **A035-172-124**

Date of this notice: 10/12/2011

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:
Neal, David L

File: A035 172 124 - Detroit, MI

Date: OCT 12 2011

In re: KIM STEVENS a.k.a. Daniel Gordon a.k.a. Daniel Gordon Stevens a.k.a. Kim Sang Chul

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jon Eric Garde, Esquire

ON BEHALF OF DHS: Rosario S. Shoudy
Assistant Chief Counsel

CHARGE:

Notice: Sec. 241(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Lodged: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1251(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Reopening and remand

This case was last before us on September 29, 1998, when we sustained the Department of Homeland Security's (DHS) appeal, and found that the respondent's conviction rendered him ineligible for a waiver under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). On July 12, 2011, the respondent filed a motion to reopen to seek 212(c) relief and an emergency motion to stay deportation. The Department of Homeland Security opposes the motion.

The respondent, a native and citizen of Korea, was convicted on March 5, 1990, of attempted embezzlement in violation of MICH. COMP. LAWS § 750.174-B, and sentenced to 24 months probation (Exh. 3). On October 26, 1990, the respondent was convicted of fraud withdraw/transfer in violation of MICH. COMP. LAWS § 750.157W-B and sentenced to 10 days in jail (unmarked Michigan criminal records). On December 7, 1992, the respondent was convicted of attempted uttering and publishing in violation of MICH. COMP. LAWS § 750.249 and sentenced to 36 to 60 days in jail (unmarked Michigan criminal records). On May 12, 1993, the respondent's probation for the attempted embezzlement conviction was revoked and the respondent was sentenced to 36 to 60 months in jail to run concurrent with the sentence he was already serving (Exh. 3). Based on these convictions, the Immigration and Naturalization Service (now the DHS), issued an Order to Show Cause (OSC) charging the respondent with deportability for having been convicted of two or more

crimes of moral turpitude not arising out of a single scheme of criminal misconduct.[1] *See* former section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1251(a)(2)(A)(ii) (Exh. 1). On February 2, 1997, the DHS lodged an additional charge, claiming that the respondent was deportable for having been convicted of an aggravated felony. *See* former section 241(a)(2)(A).

The Immigration Judge found on March 4, 1997, that the respondent had conceded deportability and was not eligible for a 212(c) waiver because changes made by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) rendered 212(c) waivers unavailable to those who were removable pursuant to the crime of moral turpitude grounds of section 241(a)(2)(A)(ii) of the Act. The Immigration Judge found, however, that the DHS had not met its burden of establishing that the May 12, 1993, revocation of the respondent's probation was a theft aggravated felony.

On appeal, we found on September 29, 1998, that the respondent's May 12, 1993, probation revocation constituted a conviction for count 2 of the original embezzlement charge and that the respondent was sentenced to 36 to 60 months. We found that based on the respondent's embezzlement conviction and his December 7, 1992, uttering and publishing conviction the respondent was ineligible for 212(c) relief because he had been convicted of an aggravated felony as well as two or more crimes involving moral turpitude.

The respondent indicates that on March 19, 2007, he was convicted of conspiracy to commit larceny in violation of NEV. REV. STAT. §§ 199.480 and 205.220 and sentenced to 355 days (Respondent's July 12, 2011, Special Motion to Seek 212(c) Relief at 5 and attachment to Form I-191). [2]

On July 12, 2011, the respondent filed a motion to reopen to seek 212(c) relief, and it is that motion that is now before us.

Pursuant to 8 C.F.R. § 1003.44(h), the deadline for filing a special motion to reopen to apply for a 212(c) waiver was April 26, 2005. The respondent argues, however, that his delay in filing should be excused because his prior counsel was ineffective and because he had diminished mental capacity during the relevant time period.

Regarding the respondent's argument that his prior counsel was ineffective because he failed to notify the respondent about the Board's September 29, 1998, decision dismissing his appeal, he has

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[1] Both the OSC and the Immigration Judge's March 4, 1997, decision identify the dates of sentencing rather than the dates of conviction.

[2] The respondent has filed a motion with the District Court of Clark County, Nevada, to withdraw his plea (Respondent's August 8, 2011, Supplement to Special Motion to Seek 212(c) Relief). The respondent asks that we stay adjudication of this case pending the outcome of the motion to withdraw his plea. Because we adjudicate this case on grounds not related to the 2007 conviction, however, we decline to stay or delay our decision.

not met all of the requirements for establishing ineffective assistance of counsel. *See Matter of Lozada*, 19 I&N Dec. 637 (BIA); *Matter of Compean, Bangaly & J-E-C-*, 24 I&N Dec. 710 (A.G. 2009). However, the respondent has submitted an affidavit from his father indicating that the attorney knew how to contact the family as well as several documents indicating that the respondent's prior attorney, Kenneth Rastello, has been suspended from the practice of law in Michigan and Louisiana and no longer practices law (Respondent's July 12, 2011, Motion to Seek Section 212(c) Relief, Attachments 2, 5). We find these documents to be sufficient to substantially comply with *Matter of Lozada, supra.*

The DHS argues that the respondent has not established prejudice due to his prior attorney's actions because he is not eligible for a waiver under former section 212(c) of the Act. We disagree. Pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001), 212(c) relief remains available for aliens in removal proceedings whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect. The respondent pled guilty to attempted embezzlement, fraud withdraw/transfer, and attempted uttering and publishing prior to April 24, 1996 (the date of the changes made by AEDPA). Therefore, the respondent is only ineligible for 212(c) relief if a term of more than 5 years was served for the offense. *See* 8 CFR § 1212.3(f)(4)(i). In this case, although the respondent was sentenced to 36 to 60 months, the record does not reflect that he actually served the full 60 months. Therefore, the respondents 1990s convictions do not bar him from eligibility for 212(c).[3] In addition, a section 212(c) waiver is required only if the alien has been charged and found to be deportable or removable on the basis of the conviction in question, and the respondent has not been charged or found removable for the 2007 attempted larceny conviction. *Matter of Fortiz*, 21 I&N Dec. 1199 (BIA 1998); 8 CFR 1212.3(f)(4).

We also consider whether the respondent exercised the requisite diligence in filing his motion to reopen. *See Matter of Compean, supra*, at 732 (noting that a discretionary tolling of the time limit for filing a motion to reopen will typically require that the alien promptly file a motion to reopen within a "reasonable period after discovering his lawyer's deficient performance"). In this case, the respondent argues that he was not mentally competent to take action and he submits two evaluations to support his claim. We find that there is sufficient evidence in the evaluations to establish that the respondent was not able to follow up with his attorney or to take action against him (Respondent's July 12, 2011, Motion to Seek Section 212(c) Relief, Attachments 3, 4).

Therefore, we will grant the motion to reopen and remand the record to the Immigration Court for further proceedings regarding the respondent's eligibility for a waiver of inadmissibility under former section 212(c) of the Act and for the entry of a new decision.

ORDER: The motion to reopen is granted.

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[3] Because the respondent's convictions do not constitute aggravated felonies that bar his eligibility for 212(c) relief, we need not address the DHS's arguments regarding whether those convictions have a comparable inadmissibility ground.

FURTHER ORDER: The record is remanded for further proceedings in accordance with this decision.

FOR THE BOARD