



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

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Falls Church, Virginia 22041*

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Prisoners' Legal Services of New York
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**USICE/DHS Litigation/ULS
15 Governor Drive
Newburgh, NY 12550**

Name: J [REDACTED], V [REDACTED] A [REDACTED]

A [REDACTED]-968

Date of this notice: 2/3/2020

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:
Wendtland, Linda S.

Humadyi
Userteam:

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Falls Church, Virginia 22041

File: A-968 – Napanoch, NY

Date:

FEB 03 2020

In re: V-A-J- a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Yuriy Pereyaslavskiy, Esquire

ON BEHALF OF DHS: Daniel W. Kelly
Assistant Chief Counsel

APPLICATION: Reopening; termination

This case was previously before the Board on May 1, 2019, when we dismissed the respondent's appeal of the Immigration Judge's denial of his application for deferral of removal under the Convention Against Torture. On July 17, 2019, the respondent, a native and citizen of Jamaica, filed a timely motion to reopen and terminate his removal proceedings. The Department of Homeland Security ("DHS") opposes the motion. The motion will be granted in part and the record will be remanded.

At the time of the Board's May 1, 2019, decision, there was no dispute that the respondent was removable as charged as his conviction for assault in the first degree in violation of N.Y.P.L. § 120.10(2), was deemed final. However, with his motion, the respondent has submitted evidence from the Supreme Court of the State of New York, Appellate Division: Second Judicial Department, that his motion for an extension of time to take an appeal from his conviction upon a plea of guilty was granted and his motion was deemed to constitute a timely notice of appeal (Respondent's Motion at 2; Attachment B). As such, he argues that his conviction is no longer final for immigration purposes.

We acknowledge the DHS's argument that the respondent bears the burden to show that his appeal relates to the issue of his guilt or innocence or another substantive defect in order to justify reopening (DHS's Br. at 3-4). *See Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA 2018). However, we agree with the respondent that the documents he submitted show that his criminal conviction is now on direct appeal (Respondent's Motion at 2, 5-8; Attachments). Further, the respondent has submitted a letter from his counsel in his criminal appeal, stating that "we expect to challenge [the respondent's] conviction on the merits," including but not limited to the raising of "issues involving a client's right to due process of law and effective assistance of counsel under the Federal and New York State Constitutions" (Respondent's Motion; Attachment A). Consequently, we will reopen the respondent's proceedings and remand the record to the Immigration Judge to re-assess whether the respondent is removable as charged. The parties on remand may update the Immigration Court on the status of the respondent's criminal appeal, including the issues actually raised. Hence, under the facts presented here, we decline to terminate proceedings at this time.

Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted in part and the respondent's removal proceedings are reopened.

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



FOR THE BOARD