U.S. Department of Justice

Executive Office for Immigration Review

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Name: MENA LOPEZ, WALDY

A 044-132-788

Date of this notice: 12/15/2016

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

Washorea
Userteam: Docket

File: A044 132 788 – New York, NY Date: **DEC 15 2016**

In re: WALDY MENA LOPEZ a.k.a. Wadly Mena Lopez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel E. Salazar, Esquire

AMICUS CURIAE FOR RESPONDENT: Minyao Wang, Esquire[1]

ON BEHALF OF DHS: Kamephis Perez
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(G)), [8 U.S.C. § 1101(a)(43)(G)] - Theft offense

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(R)), [8 U.S.C. § 1101(a)(43)(R)] - Forgery offense

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals the Immigration Judge's May 19, 2015, decision terminating the respondent's removal proceedings. The respondent and amicus curiae filed briefs in support of the Immigration Judge's decision. The DHS's appeal will be sustained in part and the record will be remanded to the Immigration Judge.

The Board reviews an Immigration Judge's findings of fact, including credibility determinations and the likelihood of future events, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

[1] We acknowledge and appreciate the briefs submitted by the parties and by amicus curiae representing the Immigrant Defense Project.

The Immigration Judge erred by terminating the respondent's removal proceedings based on a legal conclusion that, under the law of the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, "[a] conviction becomes final for immigration purposes only once direct appellate review has been exhausted or waived" (I.J. at 2-3). For the reasons stated below, we conclude that the Second Circuit case law is unsettled, the other circuits are split on the issue, and the Board has not issued a precedential decision directly on point.

The parties, the Immigration Judge, and amicus curiae all agree that, prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), a conviction became final for immigration purposes only once direct appellate review had been exhausted or waived. However, they disagree whether in this circuit the "finality rule" survived IIRIRA's creation, for the first time, of a statutory definition for "conviction."

About a decade after IIRIRA's enactment, the Second Circuit stated in dicta that "IIRIRA did . . . eliminate the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute." *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 332 (2d Cir. 2007), citing *Abiodun v. Gonzales*, 461 F.3d 1210, 1213 (10th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Moosa v. INS*, 171 F.3d 994, 1009 (5th Cir. 1999). The following year, a different panel of the Second Circuit appeared to accept the DHS's argument that an alien's "March 1996 conviction was not deemed final for immigration purposes until July 1, 1998, when direct appellate review of it was exhausted." *Walcott v. Chertoff*, 517 F.3d 149, 154 (2d Cir. 2008). Taken at face value, these two decisions are in tension with one another.

Then, in an unpublished disposition in 2010, the Second Circuit vacated the Board's precedential decision in *Matter of Cardenas Abreu*, 24 I&N Dec. 795 (BIA 2009), and remanded to the Board "to address, in the first instance, whether the IIRIRA's definition of conviction is ambiguous with respect to the finality requirement" and to "determine on remand whether a conviction is sufficiently final to warrant removal when a petitioner has a direct appeal pending." *Abreu v. Holder*, 378 F. App'x 59, 62 (2d Cir. 2010). In doing so, the *Abreu* court explicitly stated that it was not expressing a view whether the statute is ambiguous on this point. *Id.* In sum, the Second Circuit has not determined whether the pre-IIRIRA finality rule is still viable.

The courts of appeals that have ruled on this issue are split on the result. The Third Circuit, in *Orabi v. Att'y Gen. of U.S.*, 738 F.3d 535, 540-41 (3d Cir. 2014), squarely held that the finality requirement for direct appeals survived the enactment of IIRIRA. *Id.* ("We do not agree that the IIRIRA eliminated a direct appeal from the finality rule in its definition of conviction."). However, in a case concerning a deferred adjudication, the Fifth Circuit held that "finality is no longer a requirement" "of the term 'conviction' in immigration laws." *Moosa v. INS*, *supra*, at 1009. Further, the Tenth Circuit has held that the plain language of section 101(a)(48)(A) of the Act means that a "conviction" does not require exhaustion or waiver of the direct appeal process. *United States v. Saenz-Gomez*, 472 F.3d 791 (10th Cir. 2007). The Ninth Circuit has also held that a "conviction" under section 101(a)(48)(A) of the Act "requires only that the trial court enter a formal judgment of guilt, without any requirement that all direct appeals be exhausted or waived." *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) (*reh'g en banc denied*, 686 F.3d 1033 (9th Cir. 2012)).

Given the above, we will sustain the DHS's appeal in part, vacate the Immigration Judge's May 19, 2015, order terminating the respondent's removal proceedings, and remand the matter to the Immigration Judge to make additional findings of fact and to apply, inter alia, our intervening decision in *Matter of Montiel*, 26 I&N Dec. 555 (BIA 2015), to determine whether the respondent merits an adjournment or other delay to await the outcome of his criminal appeals.

ORDER: The DHS's appeal is sustained in part.

FURTHER ORDER: The Immigration Judge's May 19, 2015, order terminating proceedings is vacated.

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

FOR THE BOARD

File: A044 132 788 – New York, NY

Date: DEC 15 2016

In re: WALDY MENA LOPEZ a.k.a. Wadly Mena Lopez

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent from the majority's decision to remand these proceedings to the Immigration Judge, presumably to consider an administrative closure of the proceedings. However, the Immigration Judge in May 2015, terminated the respondent's removal proceedings because the respondent did not have a "final" conviction that could sustain the charge of removability. The legal issue before the Board is whether a conviction must be "final" for immigration purposes. The parties and amicus curiae have submitted comprehensive briefs of the issue and we need to decide whether conviction can support a charge of removal when the respondent has a direct appeal pending.

Patricia A. Cole
Board Member

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET, ROOM 1140
NEW YORK, NEW YORK

File No.: A044-132-788 May 19, 2015

In the Matter of:	
MENA LOPEZ, Waldy,	**IN REMOVAL PROCEEDINGS**
Respondent.	

CHARGES:	INA § 237(a)(2)(A)(ii)	Two Crimes Involving Moral Turpitude
	INA § 237(a)(2)(A)(iii) as defined in INA § 101(a)(43)(G)	Aggravated Felony, Theft Offense
	INA 237(a)(2)(A)(iii) as defined in INA § 101(a)(43)(R)	Aggravated Felony, Forgery
APPLICATION:	8 C.F.R. § 1239.2(c)	Motion to Terminate

ON BEHALF OF RESPONDENT
Rachel Salazar
The Legal Aid Society
199 Water Street, 3rd Floor
New York, NY 10038

ON BEHALF OF DHS
Kamephis Perez, Esq.
Assistant Chief Counsel
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Waldy Mena Lopez ("Respondent") is a native and citizen of the Dominican Republic. [Exhs. 1; 3]. He was admitted to the United States ("U.S.") on or about June 4, 1993, as a legal permanent resident ("LPR"). On July 31, 2013, Respondent pleaded guilty to burglary in the third degree, in violation of section 140.20 of the New York Penal Law ("NYPL"), and possession of a forged instrument in the second degree, in violation of NYPL § 170.25. [Exh.3, Tab C]. For each of these crimes he was sentenced to a year imprisonment, to run concurrently. Id.

The Department of Homeland Security ("DHS") personally served Respondent with a Notice to Appear ("NTA") dated August 20, 2014. [Exh. 1]. Based on the aforementioned convictions, the NTA charged him with removability pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA"), two crimes involving moral turpitude; INA § 237(a)(2)(A)(iii), an aggravated felony as defined in INA § 101(a)(43)(G), a theft offense; and INA § 237(a)(2)(A)(iii), an aggravated felony as defined in INA § 101(a)(43)(R), a forgery offense. Id. On October 7, 2014, through counsel, Respondent denied factual allegations four through six, and denied the charges of removability. On that same date, the immigration judge ("IJ") sustained the factual allegations and all charges of removability.

On January 20, 2015, Respondent filed a motion to terminate proceedings, based on the fact that Respondent had been granted permission to file a late notice of appeal on both criminal convictions that serve as the grounds for the charges of removability. For the reasons outlined below, the Court finds that DHS is unable to establish Respondent's removability by clear and convincing evidence. Thus, Respondent's motion to terminate is granted.

II. EXHIBITS

Exh. 1: NTA (dated Aug. 20, 2014);
Exh. 2: RAP sheet;
Exh. 3: Immigrant visa face sheet; record of conviction # 04228-2009, record of conviction # 01381-2012.

III. LEGAL STANDARDS & ANALYSIS

A. Legal Framework

DHS bears the burden of establishing that Respondent is deportable as charged. See INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). Thus, to sustain the charges in the NTA, DHS must establish Respondent's alienage and removability by clear and convincing evidence. See 8 C.F.R. § 1240.8(c); Matter of Guevara, 20 I&N Dec. 238, 242 (BIA 1991) (citing Woodby v. INS, 385 U.S. 276 (1966). Respondent has been charged with removability pursuant to INA § 237(a)(2)(A)(ii), two crimes involving moral turpitude; INA § 237 (a)(2)(A)(iii), an aggravated felony as defined in INA § 101(a)(43)(G), a theft offense; and INA § 237(a)(2)(A)(iii), an aggravated felony as defined in INA § 101(a)(43)(R), a forgery offense. In order to support these charges, DHS cites to Respondent's convictions for burglary in the third degree, in violation of NYPL § 140.20, and possession of a forged instrument in the second degree, in violation of NYPL § 170.25, for which Respondent was sentenced to a term of imprisonment of at least one year.

1. Finality of convictions

The Immigration and Nationality Act ("INA") defines "conviction" as "a formal judgment of guilt...entered by a court." INA § 101(a)(48)(A). A conviction becomes final for

immigration purposes only once direct appellate review has been exhausted or waived. See Pino v. Landon, 349 U.S. 901 (1955); Walcott v. Chertoff, 517 F.3d 149, 154 (2d Cir. 2008); Orabi v. Atty'y Gen., 738 F.3d 535, 540-41 (3d Cir. 2014). Further, the Second Circuit has found no distinction between a timely-filed appeal and a late appeal once permission has been granted by the appellate court. See Abreu v. Holder, 378 Fed.Appx 59 (2d Cir. May 24, 2010). Recently, in a matter arising in the Ninth Circuit, the BIA administratively closed proceedings in order to await the verdict of Respondent's criminal appeal, lending support to the conclusion that a conviction is not final for immigration purposes while an appeal is pending. Matter of Montiel, 26 I&N Dec. 555, 558 (BIA 2015) (acknowledging that when circumstances indicate the likelihood of success on appeal, it is appropriate to defer the matter (in that instance, via administrative closure), because ultimately the underlying ground of removability may not be sustained).

Here, Respondent requested, and was granted, a late-reinstated appeal. See Respondent's Motion to Terminate Proceedings, Tab A. Both convictions on appeal serve as the basis for the charges of removability contained in the NTA. For the purposes of finality, there is no distinction between a late-reinstated appeal and any other direct appeal, thus, the convictions are not final for immigration purposes. See Pino, 349 U.S. at 901; Walcott, 517 F.3d at 154; Orabi, 738 F.3d at 540-41. For these reasons, DHS is unable to prove Respondent's removability by clear and convincing evidence at this time, and Respondent's motion to terminate will be granted.

ORDER

IT IS HEREBY ORDERED that the Respondent's motion to terminate is **GRANTED.**

Gabriel C. Videla
Immigration Judge