U.S. Department of Justice

Executive Office for Immigration Review

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Name: CABADAS-ESQUIVEL, JAVIER **A 037-727-114**

Date of this notice: 5/13/2020

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:
Morris, Daniel
Gemoets, Marcos
Malphrus, Garry D.

Userteam: Docket

File: A037-727-114 – Phoenix, AZ

Date: MAY 13 2020

In re: Javier CABADAS-ESQUIVEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Benjamin T. Wiesinger, Esquire

APPLICATION: Adjustment of statute; administrative closure

This case was last before the Board on May 23, 2014, when we sustained the appeal of the Department of Homeland Security ("DHS") from the Immigration Judge's termination of the respondent's removal proceedings, and remanded the record to the Immigration Judge for further consideration of the respondent's removability. At the remanded proceedings, the Immigration Judge found the respondent removable as charged and concluded that he was ineligible for relief from removal. The respondent, a native and citizen of Mexico, now appeals from the May 8, 2018, decision of the Immigration Judge which denied his application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a).[1] The Department of Homeland Security ("DHS") has not responded to the appeal. We assume the parties' familiarity with the extensive procedural history of the respondent's removal proceedings and prior deportation proceedings under a different alien registration number and false name, and will not reiterate the same herein.[2] The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in an appeal from the decision of an Immigration Judge, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent argues that pursuant to *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the vacatur of his controlled substance conviction was analogous to a disposition under the Federal First Offenders Act ("FFOA"), such that the conviction no longer renders him inadmissible and thus ineligible to adjust his status (Respondent's Br. at 4-7). We agree.

[1] The respondent conceded through counsel before the Immigration Judge that he is not eligible for a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c), or cancellation of removal under section 240A(b)(1) of the Act, 8 U.S.C. § 1229b(b)(1) (Tr. (7/29/16) at 10, 16).

[2] Citations herein to the Immigration Judge's decision relate to the May 8, 2018, decision, unless otherwise indicated.

In 1995, the respondent was convicted of possession of a controlled substance, to wit, cocaine, in violation of California Health & Safety Code § 11350(a) (Exh. 26(G)). In 2007, this conviction was dismissed under a state rehabilitative statute (Exhs. 11, 17(2); *see generally* IJ at 2).[3]

The United States Court of Appeals for the Ninth Circuit held in *Lujan-Armendariz* that first-time simple drug possession offenses which have been vacated under a state rehabilitative statute do not qualify as convictions for immigration purposes, if the alien could have benefited from the FFOA had she or he been prosecuted under Federal rather than state law. *See, e.g.*, *Lujan-Armendariz v. INS*, 222 F.3d at 738 n.18 ("[T]he relevant question is whether the person involved could have received relief under the [FFOA] and does receive relief under a state rehabilitation statute. In short, if the person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation."). However, the Immigration Judge concluded that the respondent could not have benefited from the FFOA, because his 3-year sentence of probation exceeded the limit of a 1-year probationary sentence specified under the FFOA (IJ at 2). We disagree with this conclusion, and hold that this distinction between the breadth of the FFOA versus the respondent's sentence does not remove the respondent's case from the purview of *Lujan-Armendariz*. *See id.* at 738 (noting that the court had previously "rejected the rule that only expungements under exact state counterparts to the [FFOA] could be given effect in deportation proceedings").

Notably, both petitioners in *Lujan-Armendariz*, like the respondent herein, had been sentenced to probationary periods of more than 1 year, yet the Ninth Circuit held that the expungements of both of their first-time drug convictions should be treated the same as an expungement under the FFOA.[4] *Id.* at 732-34, 749-50. In that regard, the Ninth Circuit explained that it does not matter "whether the particular state law at issue utilizes a process identical to that used under the federal government's scheme" in order for an alien whose conviction was expunged under a state rehabilitative statute to be treated the same as an alien whose conviction was expunged under the FFOA. *Id.* at 738 n.18.

[3] The respondent asserts that pursuant to *Nath v. Gonzales*, 467 F.3d 1185 (9th Cir. 2006), the DHS bears the burden of establishing that the respondent's conviction was dismissed for rehabilitative purposes (Respondent's Br. at 5). However, the order dismissing the respondent's controlled-substance conviction clearly reflects that the conviction was dismissed "pursuant to [California] Penal Code [§§] 1203.3 & 1203.4 *due to defendant's good conduct and reform*" (Exh. 17(2) (emphasis added)).

[4] Although not addressed in the Immigration Judge's decision, we note that the respondent's multi-year probationary period also included jail time (Exh. 26(G)). The inclusion of jail time in his sentence likewise does not distinguish his case from *Lujan-Armendariz*. Like the respondent, Lujan-Armendariz himself was sentenced to a multi-year probationary period which included jail time, yet the Ninth Circuit held that his expunged conviction did not render him deportable under the Act, just as an alien whose conviction had been expunged under the FFOA could not be deported based on his or her expunged conviction. *See Lujan-Armendariz v. INS*, 222 F.3d at 732-33, 738 n.18, 749-50.

We are bound by the Ninth Circuit's holding in *Lujan-Armendariz*, and conclude that the respondent's case is not materially distinguishable from the cases of the two individuals who were therein found not deportable under the Act based on their convictions for first-time drug offenses which had been expunged under state rehabilitative statutes. *See generally Nunez-Reyes v. Holder*, 646 F.3d 684, 690, 694 (9th Cir. 2011) (for aliens convicted before the *Nunez-Reyes* publication date, *Lujan-Armendariz* applies);[5] *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989) (the Board follows the precedent of the circuit in which a case arises). Consequently, we conclude that the respondent's expunged conviction no longer renders him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), and he therefore is not barred on that basis from adjusting his status pursuant to section 245(a) of the Act. In view of the foregoing, we will remand the record so that the Immigration Judge may address in the first instance the respondent's application for adjustment of status. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

The respondent also states that his removal proceedings should be administratively closed so that he may pursue a U nonimmigrant visa (Respondent's Br. at 7-8). However, the Board does not have the authority to administratively close the respondent's case based on the cited circumstances. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018). Moreover, the current record does not support the respondent's assertion that he has filed an application for a U nonimmigrant visa (*see* Exh. 29). Nevertheless, the respondent may submit a motion to continue at the remanded proceedings, supported by relevant evidence demonstrating good cause for a continuance. *See Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012). In view of the foregoing, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

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

FOR THE BOARD

[5] While the Ninth Circuit prospectively overruled *Lujan-Armendariz* in *Nunez-Reyes*, the court held that *Lujan-Armendariz* would continue to control in cases where the alien had been convicted prior to the July 14, 2011, issuance of *Nunez-Reyes*. *See Nunez-Reyes v. Holder*, 646 F.3d at 688-94. As noted above, the respondent herein was convicted of possession of a controlled substance in 1995, and this conviction was expunged in 2007.