U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: M[redacted], N[redacted] J[redacted]

A[redacted]-225

Date of this notice: 1/3/2019

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:
Kendall Clark, Molly
Adkins-Blanch, Charles K.
Kelly, Edward F.

Userteam: Docket

File: A[redacted]-225 – Oakdale, LA Date: JAN - 3 2019

In re: N[redacted] J[redacted] M[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Ava C. Benach, Esquire

APPLICATION: Adjustment of status; waiver of inadmissibility; termination

The lawful permanent resident respondent, a native and citizen of India, appeals the Immigration Judge's July 12, 2018, written decision denying his applications for an inadmissibility waiver and adjustment of status under sections 212(h) and 245(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h) and 1255(a).[1] The respondent has also filed a motion to terminate the proceedings. The motion will be denied, and the appeal will be sustained as it pertains to the respondent's request for relief from removal.

We review the factual findings, including the Immigration Judge's credibility determination, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

As an initial matter, the respondent's motion to terminate will be denied, as *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), does not warrant termination of these proceedings. There, the Supreme Court held that a notice to appear that does not include the time and location of an alien's hearing as specified under section 239(a)(1)(G)(i) of the Act, 8 U.S.C. § 1229(a)(1)(G)(i), does not trigger the stop time rule, which would otherwise terminate an alien's continuous physical presence in the United States for purposes of seeking cancellation of removal. Section 240A(d)(1) of the Act, 8 U.S.C. § 1229b(d)(1). The respondent seeks to expand *Pereira v. Sessions*, alleging that the failure to specify the date and time of his initial hearing on his notice to appear deprived the Immigration Court of jurisdiction over his removal proceedings.

We disagree. First, the Supreme Court emphasized that its decision was limited to whether a notice to appear that does not specify the time and place of the hearing triggers the cancellation of removal stop-time rule. *Pereira v. Sessions*, 138 S. Ct. at 2113. Second, as the respondent observes, we recently rejected his argument in similar circumstances in *Matter of Bermudez Cota*, 27 I&N Dec. 441 (BIA 2018). There, as here, the Immigration Court followed up the notice to

[1] An Immigration Judge prepared a December 7, 2017, written decision finding the respondent removable under section 237(a)(2)(A)(ii)-(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii)-(iii), for an aggravated felony conviction involving fraud or deceit with a loss to the victims exceeding $10,000, and two or more crimes involving moral turpitude ("CIMT") not arising out of a single scheme (Exh. 6).

appear with service of a hearing notice identifying the initial hearing date, time, and location (Notice of Hearing, dated September 11, 2017). Id. at 442. Both Bermudez Cota and the respondent attended their hearings (Tr. at 1). Id. at 441. As in *Matter of Bermudez-Cota*, the Immigration Court had jurisdiction over the respondent's removal proceedings, given that it served him with a hearing notice reflecting the date, time, and location of his hearing. Nor are we persuaded that we wrongly decided *Matter of Bermudez Cota*.

Moreover, we agree with the Immigration Judge that the respondent is removable for having an aggravated felony conviction involving fraud or deceit with a loss to the victims exceeding $10,000 under section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i). The respondent was found guilty of five mail fraud counts under 18 U.S.C. § 1341, which explicitly involve fraud, and inherently concern deceit (Exhs. 5-6). *Matter of S-I-K-*, 24 I&N Dec. 324, 328 (BIA 2007) (recognizing that mail fraud in violation of 18 U.S.C. § 1341, where the loss exceeds $10,000 is an aggravated felony under section 101(a)(43)(M)(i) of the Act). Further, the Immigration Judge correctly relied on the $1,301,528 court-ordered restitution to conclude that the victims' losses exceeded the statutory threshold (Exh. 6 at 3). *Nijhawan v. Holder*, 557 U.S. 29 (2009) (holding that an Immigration Judge may consider evidence beyond the record to determine if a crime "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"); *Matter of Babaisakov*, 24 I&N Dec. 306, 319 (BIA 2007) (recognizing that immigration judge can rely on restitution order to determine whether the loss amount arising from a fraud-related offense exceeds $10,000); *Yang v. Holder*, 570 F. App'x 381, 383 (5th Cir. 2014) (same).

The record also shows by clear and convincing evidence that the respondent committed two CIMTs not arising out of a single scheme. Section 237(a)(2)(A)(iii) of the Act. The Board has long recognized that mail fraud under 18 U.S.C. § 1341, is a CIMT. *Matter of Alarcon*, 20 I&N Dec. 557, 559-560 (BIA 1992). As the Immigration Judge discussed, the respondent was convicted of five separate counts of mail fraud occurring on varying dates between August 31, 2007, and July 23, 2008 (Exh. 6 at 5). We are not persuaded that the respondent's crimes were part of a single scheme, as that term "is not defined by the fact that the crimes were similar in nature, closely followed one another in time, and may have been part of an overall plan of criminal misconduct." *Animashaun v. INS*, 990 F.2d 234, 238 (5th Cir. 1993). Given that each mailing offense occurred on different dates separated by weeks and sometimes months of delay, the respondent had "substantial interruption" between each distinct offense to disassociate himself from the criminal enterprise. *Matter of Adetiba*, 20 I&N Dec. 506, 509-510 (BIA 1992). We are not persuaded by the respondent's attempt to distinguish *Matter of Adetiba*, as each of his five separate mail fraud offenses was not a natural consequence of a previous offense (Exh. 6 at 5).

Notwithstanding the respondent's conviction and removability, however, we will sustain the respondent's appeal as it pertains to his request for a discretionary grant of adjustment of status and an inadmissibility waiver. As the Immigration Judge observed, the parties stipulated that the respondent was statutorily eligible for both adjustment of status and a waiver of inadmissibility pursuant to section 212(h) of the Act (IJ at 7). Thus, the only remaining issue is whether the respondent warrants a favorable exercise of discretion for the relief he seeks. We find that he merits such relief. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296 (BIA 1996).

As the Immigration Judge noted, the respondent's favorable equities include, inter alia, his lengthy residence, family ties, marriage, United States citizen wife and children, character references, friends, employment history, community service, and rehabilitation efforts (IJ at 7-9). Moreover, we agree that the respondent's mail fraud convictions and his corresponding sentence, including 71 months imprisonment running concurrently for each offense and restitution exceeding $1.3 million, demonstrates the severity of his crimes (IJ at 8-9). We also agree that his prison sentence is particularly noteworthy, given the absence of a prior criminal history (IJ at 8).

However, having reviewed the record and the Immigration Judge's decision, and the contentions made on appeal, we find that a favorable exercise of discretion is warranted in the respondent's case. *Id.* The respondent committed a serious crime during 2007 and 2008, over 10 years ago, but his 30 years of residency is otherwise free of criminal and immigration infractions. During these 30 years in the United States, the respondent has built a strong career and a strong family unit consisting of a U.S. citizen wife and three U.S. citizen children. The circumstances surrounding the respondent's adoption of his daughter in 2009 is particularly noteworthy (Exh. 14 at 237), as are the approximately 20 family members and friends who attended the hearing (IJ at 8, n. 4), and the 50 letters of support filed on the respondent's behalf (Exhs 12, 14). Lastly, it is noteworthy to recognize the ways in which the respondent alleviates his family's significant medical and emotional hardship (Tr. at 148-154)

Moreover, the respondent's rehabilitation is noteworthy. We recognize, particularly, Dr. Wakefield's recent extended psychological treatment of the respondent, and his assessment that, "I have rarely worked with individuals that showed his level of commitment and dedication to his personal awareness and personality growth, goals for the future and most of all, his family's well-being" (Exh. 12, pp. 104-05). And while the Immigration Judge rightly observed that the respondent has been imprisoned since his conviction, we also recognize the respondent's participation with rehabilitation programs in prison and his own, and witness' testimony, regarding his regret and his attempts to rehabilitate himself (IJ at 8; Tr. at 69, 154-56).[2]

Overall, we find that the respondent's positive equities outweigh his negative considerations, and that he has met his burden of demonstrating that he warrants discretionary relief. *Matter of Mendez-Moralez,* 21 I&N Dec. at 300. Accordingly, the following orders are entered.

ORDER: The motion to terminate is denied.

FURTHER ORDER: The appeal is sustained in part.

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[2] We also agree with the respondent's appellate argument that the respondent's inability to affirmatively demonstrate that he paid restitution should not be considered an adverse factor. He credibly informed the court that he divested his assets to satisfy the judgment, and that the restitution was addressed in a civil suit between him and his business partners (IJ at 6; Tr. at 57 58, 65 67, 156). We also agree that the USCIS did not find that the respondent had "poor moral character," but rather found that he had not produced sufficient evidence to support his good moral character (IJ at 7; Exh 15 at 4).

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD