U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: ROMERO, DEBORAH ANN

A 017-176-264

Date of this notice: 6/10/2014

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:
Guendelsberger, John

schwarzA
Userteam: Docket

File: A017 176 264 - Eloy, AZ Date: JUN 10 2014

In re: DEBORAH ANN ROMERO a.k.a. Deborah Ann Wheeler

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Kara Hartzler, Esquire

ON BEHALF OF DHS: Christopher S. Kelly
Assistant Chief Counsel

CHARGE:

Lodged: 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 by section 101(a)(43)(B))

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

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility under section 212(c); remand

This case is before the Board pursuant to a May 7, 2012, order of the United States Court of Appeals for the Ninth Circuit, granting the Government's unopposed motion to remand. The Government sought a remand for the Board to reevaluate the respondent's eligibility for a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996), in light of *Judulang v. Holder*, 132 S. Ct. 476 (2011). Following remand, the parties have filed briefs on the merits. The record will be remanded to the Immigration Court for further proceedings and the entry of a new decision.

We review an Immigration Judge's findings of fact for clear error, but questions of law, discretion, and judgment, and all other issues in appeals, are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(i), (ii).

The record reflects that the respondent was admitted to the United States as a lawful permanent resident (LPR) on April 4, 1967. On April 24, 1989, the respondent was convicted of Possession for Sale of a Controlled Substance, methamphetamine, in violation of Cal. Health & Safety Code § 11378. The respondent was sentenced to 2 years' incarceration for this offense. On April 11, 1996, the respondent was convicted of two counts of Forgery of a Check, under

former Cal. Penal Code § 470. She received 40 months' imprisonment for the first count and 8 months' imprisonment for the second count. On April 13, 2005, the respondent was convicted of Shoplifting, in violation of Ariz. Rev. Stat. § 13-1805(A)(1), and she received 12 months' probation for this offense.[1]

Based on these convictions, the Department of Homeland Security (DHS) placed the respondent into removal proceedings on September 27, 2010, and charged her with being subject to removal from the United States pursuant to sections 101(a)(43)(B), (R), 237(a)(2)(A)(ii), (iii), and (B)(i) of the Act, 8 U.S.C. §§ 1101(a)(43)(B), (R), 1227(a)(2)(A)(ii), (iii), (B)(i). The Immigration Judge found that the respondent was removable as charged. The Immigration Judge then pretermitted the respondent's application for section 212(c) relief after finding that the respondent's aggravated felony conviction under sections 101(a)(43)(R) and 237(a)(2)(A)(iii) of the Act had no statutory counterpart under section 212 of the Act (I.J. at 13-14).[2] We affirmed this determination and dismissed the respondent's appeal. The respondent petitioned for review of our decision with the Ninth Circuit.[3]

In the interim, the Supreme Court invalidated the Board's precedents applying the statutory counterpart rule. *Judulang*, *supra*, at 490. On remand from the Ninth Circuit, the respondent argues that she is eligible for a waiver of inadmissibility under section 212(c) in light of *Judulang*.[4] After the briefing schedule expired in this matter, we articulated the post-*Judulang* eligibility criteria for section 212(c) relief in *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014). Pursuant to *Matter of Abdelghany*, *supra*, the respondent is statutorily eligible for section 212(c) relief.

In *Matter of Abdelghany*, *supra*, at 272, we held that an otherwise eligible LPR who is removable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for section 212(c) relief in removal proceedings *unless* the applicant is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act, 8 U.S.C. § 1182(a)(3)(A), (B), (C), or (E), (10)(C); or the applicant has served an aggregate term of

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[1] The respondent's conviction for Shoplifting was vacated pursuant to Ariz. Rev. Stat. § 13-907. However, a conviction set aside under section 13-907 has not been eliminated for immigration purposes. *Poblete Mendoza v. Holder*, 606 F.3d 1137, 1142 (9th Cir. 2010); *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

[2] The Immigration Judge also pretermitted the respondent's applications for cancellation of removal and voluntary departure on account of her convictions of aggravated felonies. *See* sections 240A(a)(3) and 240B(b)(1)(C) of the Act, 8 U.S.C. §§ 1229b(a)(3), 1229c(b)(1)(C) (*id.*).

[3] While the respondent's petition for review was pending, the respondent was removed to the United Kingdom. We nevertheless retain jurisdiction to consider the respondent's appeal. *Coyt v. Holder*, 593 F.3d 902, 907 (9th Cir. 2010) (citing *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009)).

[4] The respondent also asserts that her Shoplifting offense is not a crime involving moral turpitude. She does not argue that her other convictions do not qualify as removable offenses under sections 101(a)(43)(B), (R), 237(a)(2)(A)(ii), (iii), and (B)(i) of the Act.

imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996. We noted, moreover, that the latter prohibition is inapplicable by regulation to any aggravated felony conviction resulting from a plea agreement made before November 29, 1990. *See id.* at 260 n.10 (citing 8 C.F.R. § 1212.3(f)(4)(ii); *Toia v. Fasano*, 334 F.3d 917, 919-21 (9th Cir. 2003)).

There is no indication that the respondent is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act. Furthermore, the respondent's aggravated felony convictions do not bar her from applying for section 212(c) relief. The respondent's conviction of two counts of Forgery of a Check were entered on April 11, 1996, prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996.[5] In addition, she was sentenced to less than 5 years' incarceration for this offense. The respondent's 1989 conviction of Possession for Sale of a Controlled Substance also does not bar relief, as it was entered prior to the effective date of the Immigration Act of 1990.[6] Further, her 2 years' incarceration stemming from this offense cannot be aggregated with her term of imprisonment for her forgery offense. *See Matter of Abdelghany*, *supra*, at 260 n.10. Accordingly, the respondent is statutorily eligible for section 212(c) relief because she has served an aggregate term of imprisonment of less than 5 years as a result of an aggravated felony conviction entered between November 29, 1990, and April 24, 1996. *Id.* at 272. We therefore find it appropriate to remand the record for the Immigration Judge to conduct a full evidentiary hearing and to make a ruling as to whether the respondent merits section 212(c) relief in the exercise of discretion.

On remand, the parties should have the opportunity to update the record, and to provide any additional testimony, documentary evidence, and arguments regarding the respondent's removability, her application for section 212(c) relief, or any other form of relief for which the respondent may be eligible. The Immigration Judge should also reexamine whether the respondent's 2005 Shoplifting conviction, under Ariz. Rev. Stat. § 13-1508(A)(1), qualifies as a crime involving moral turpitude in light of intervening precedent. *See Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013) (addressing the appropriate application of an elements-based examination of a statute of conviction) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005) (holding that a conviction based on a guilty plea can qualify as a predicate offense only if the defendant "*necessarily* admitted [the] *elements* of the generic offense.") (emphases added)); *Matter of Chavez-Alvarez*, 26 I&N Dec. 274, 279-80 (BIA 2014) (clarifying what constitutes an "element" of an offense for immigration purposes); *see also Olivas-Motta v. Holder*, 716 F.3d 1199, 1203 (9th Cir. 2013) (requiring Immigration Judges to evaluate whether an offense qualifies as a crime involving moral turpitude under the categorical and modified categorical approaches outlined in *Shepard*, *supra*, and *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

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[5] Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (effective Apr. 24, 1996) (AEDPA).

[6] Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (effective Nov. 29, 1990) (IMMACT 90), *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751 (effective as if included in IMMACT 90).

Irrespective of whether this conviction is a crime involving moral turpitude, it does not render the respondent statutorily ineligible for section 212(c) relief. On remand, the DHS contends that while the respondent may use section 212(c) relief to cure her removability on account of her 1989 and 1996 convictions, she cannot use 212(c) to cure her removability on account of her 2005 Shoplifting conviction, which was entered after the effective date of that Illegal Immigration Reform and Immigrant Responsibility Act of 1996[7] (Br. at 21-23) (citing *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991)). In other words, even if 212(c) relief were granted, the respondent would remain removable as the waiver cannot cure her 2005 crime involving moral turpitude, which serves as a predicate for the charge under section 237(a)(2)(A)(ii) of the Act.

However, this argument relates to the *efficacy of* section 212(c) relief, not the respondent's *eligibility for* such relief. We additionally note that, on remand, the Immigration Judge may find that the respondent's Shoplifting offense is not a crime involving moral turpitude, which would eliminate the issue. The Immigration Judge may also determine that the respondent does not deserve section 212(c) relief in the exercise of discretion, despite her eligibility for the same. *See Matter of Abdelghany*, *supra*, at 272 (outlining eligibility criteria). We express no opinion regarding the outcome on remand.

In any event, the respondent's removability under section 237(a)(2)(A)(ii) of the Act is amenable to waiver under former section 212(c) because it depends in part on at least *one* conviction that resulted from a plea agreement made before section 212(c) was repealed. *Accord INS v. St. Cyr*, 533 U.S. 289 (2001). A grant of 212(c) relief for the 1989 and 1996 convictions would effectively undermine the respondent's charge of removability for having been convicted of *two* crimes involving moral turpitude. For once it is hypothesized that the respondent is eligible for 212(c) relief with respect to one of the two pillars supporting the charge of deportability, the two-CIMT charge must necessarily fall, because the remaining 2005 conviction or pillar—standing alone—would not support the charge.

We find *Matter of Balderas*, *supra*, to be inapposite because that decision stands for the proposition that a grant of section 212(c) relief does not immunize an alien from being subjected to new deportation proceedings if he subsequently reoffends. In arriving at that holding, we had no occasion to address the very different question presented here, i.e., whether a two-CIMT charge is waived if section 212(c) relief is granted with respect to only one of the underlying convictions. In short, *Matter of Balderas* was not a case about *eligibility for* section 212(c) relief; rather, it was about clarifying an important limitation on the *prospective effect* of section 212(c) relief for repeat offenders, i.e., those who continue to commit deportable offenses after having been granted such relief.

[7] Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (effective Apr. 1, 1997) (IIRIRA). Section 212(c) relief is unavailable to any individual in post-IIRIRA removal proceedings who is removable by virtue of pleas or convictions entered on or after April 1, 1997. *See Matter of Abdelghany*, *supra*, at 261.

We additionally find it significant that a central feature of the *Judulang*'s Court's reasoning was its repudiation of the notion that section 212(c) waives "grounds of exclusion." 132 S. Ct. at 487-88. Indeed, the Court emphasized that "the thing the Attorney General waives [under section 212(c)] is not a particular exclusion ground, but the simple denial of entry." *Id.* at 487; *cf. Matter of Balderas*, *supra*, at 391 (finding that "a grant of section 212(c) relief 'waives' the finding of excludability or deportability"). In other words, section 212(c) waives neither crimes, nor grounds, nor convictions; rather, it simply authorizes the Attorney General to waive enforcement or execution of removability determinations.

In accordance with the Supreme Court's holding, we conclude that the Attorney General has authority under former section 212(c) to waive the execution of any removability determination made pursuant to section 237(a)(2)(A)(ii) of the Act that depends, in whole or in part, on a conviction that resulted from a plea agreement made before April 1, 1997. The respondent was found removable under section 237(a)(2)(A)(ii) of the Act based in part on her pre-IIRIRA conviction(s), and thus the Attorney General retains authority to waive execution of that removability determination under former section 212(c) of the Act.

In light of the foregoing, we will remand the record to the Immigration Judge to determine, in the first instance, whether the respondent warrants section 212(c) relief in the exercise of discretion and to reexamine whether the respondent's Shoplifting conviction is a crime involving moral turpitude.

Accordingly, the following order will be entered:

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