U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: W[redacted], C[redacted] A[redacted]... **A [redacted]-539**

Date of this notice: 2/1/2019

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:
Grant, Edward R.

Userteam: Docket

File: A[redacted]-539 – Boston, MA Date: FEB - 1 2019

In re: C[redacted] A[redacted] W[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nichole V. Micheroni, Esquire

APPLICATION: Termination; waiver of inadmissibility

The respondent, a native and citizen of Jamaica and a lawful permanent resident of the United States, appeals the August 7, 2018, decision of the Immigration Judge denying his motion to terminate, finding him removable as charged, and denying his application for a waiver of his inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

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

The Immigration Judge found the respondent removable under section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien convicted of a crime involving moral turpitude within five years after admission for which a sentence of one year or longer may be imposed (IJ at 3). The Immigration Judge denied the respondent's motion to terminate based on lack of jurisdiction due to an alleged defective Notice to Appear (NTA) (IJ at 3-5). The Immigration Judge also granted the Department of Homeland Security's (DHS) motion to pretermit the respondent's application for a waiver of his inadmissibility under former section 212(c) of the Act (IJ at 5-8).

The respondent, invoking *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), initially argues that the Immigration Judge lacked jurisdiction over his removal proceedings because his notice to appear, which was served on him on April 3, 2018, did not specify a time and place for his initial removal hearing. However, that argument is foreclosed by *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). Specifically, there is no dispute that the respondent received a valid hearing notice and actually attended multiple hearings in Immigration Court after being served with the notice to appear.

We are also not persuaded by the respondent's argument that our decision in *Matter of Bermudez-Cota*, 27 I&N Dec. at 441, ignores the plain language in *Pereira v. Sessions*, provides an impermissible two-step notice process, and that no deference is due to the agency with regard to the contents of a NTA (Respondent's Br. at 15-16). We are not convinced that our reasoning in *Matter of Bermudez-Cota*, disregards the regulatory requirement of notice of proceedings, results in a presumption of prejudice to the alien, and encourages violations of the due process right to adequate notice. *Id.* Accordingly, we find no merit to the respondent's

jurisdictional argument and the Immigration Judge properly denied his motion to terminate on this basis.

Alternatively, the respondent does not contest he is removable under section 237(a)(2)(A)(i) of the Act, but rather, argues that he is eligible for waiver of his admissibility under former section 212(c) of the Act. Specifically, he argues that his 2017 conviction for failure to appear in the first degree in violation of CONN. GEN. STAT. ANN. § 53a-172 is not an aggravated felony under section 101(a)(43)(T) of the Act, 8 U.S.C. § 1101(a)(43)(T), rendering him eligible for relief. However, we need not reach the issue of whether the respondent's conviction is for an aggravated felony because the respondent was not charged and found removable as an aggravated felon. The regulations at 8 C.F.R. § 1212.3(f)(4) specify that a person is ineligible for a waiver under former section 212(c) if charged as an aggravated felon. Moreover, the Board held in *Matter of Fortiz*, 21 I&N Dec.1199 (BIA 1998), that in order for an alien to be barred from eligibility for a waiver under section 212(c) of the Act as one who "is deportable" by reason of having committed a criminal offense covered by one of the criminal deportation grounds enumerated in the statute, he or she must have been charged with, and found deportable on, such grounds. Given that the DHS did not charge the respondent with removability as an aggravated felon, he is not barred from eligibility for a waiver under former section 212(c) on this basis. Thus, the Immigration Judge improperly granted the DHS's motion to pretermit the respondent's waiver application.

Based on the above, we will remand these proceedings for the Immigration Judge for further consideration of the respondent's application for a waiver of his inadmissibility under former section 212(c) of the Act. Upon remand, the DHS is not precluded from filing any additional charges of removability, including removability as an aggravated felon.

Accordingly, the following order will be entered.

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

FOR THE BOARD