U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: J[redacted], G[redacted]

A [redacted]110

Date of this notice: 4/9/2014

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:
Pauley, Roger
Wendtland, Linda S.
Greer, Anne J.

yungc
Userteam: Docket

File: [redacted] 10 - Detroit, MI

Date: APR - 9 2014

In re: G[redacted] J[redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Marshal E. Hyman, Esquire

ON BEHALF OF DHS: [redacted]
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings; waivers of inadmissibility

The respondent appeals the Immigration Judge's January 30, 2012, decision finding him removable as charged and denying his applications for waivers of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), and section 212(h) of the Act. During the pendency of his appeal, the respondent filed a motion to remand. The motion will be granted, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

The respondent raises several arguments on appeal. First, the respondent contends that the Immigration Judge erred in finding him removable as charged based on his [redacted] 1987, conviction for assault with intent to do great bodily harm in violation of Michigan General Laws section 750.84 because his conviction predates the Anti-Drug Abuse Act of 1988 ("ADAA") and subsequent amendments to the Act which he claims did not extend the "aggravated felony" definition to reach convictions predating the ADAA. *See* Respondent's Brief at 4-9. However, as noted by the Immigration Judge, the Board has already addressed the respondent's arguments in this regard and has found that the retroactive application of the current aggravated felony provisions to aliens with pre-ADAA convictions is proper (I.J. at 3-5). *See Matter of Lettman*, 22 I&N Dec. 365 (BIA 1998); *see also Saqr v. Holder*, 580 F.3d 414, 421 (6th Cir. 2009) (recognizing as a general matter that the current "aggravated felony" definition applies to convictions regardless of when they occurred); *Hamama v. INS*, 78 F.3d 233 (6th Cir. 1996) (holding that application of explicitly retroactive firearms removability provision to pre-enactment conviction did not violate Constitution).[1] Further, we are unpersuaded by the

[1] The respondent relies on the decisions in *Ledezma-Galicia v. Holder*, 636 F.3d 1059 (9th Cir. 2010), and *Zivkovic v. Holder*, 724 F.3d 894 (7th Cir. 2013), in support of his argument. Those (. . . cont'd)

respondent's contention that he is not subject to the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") to the definition of "aggravated felony" because he had contact with the former Immigration and Naturalization Service ("INS") in 1991 while he was in prison. *See* Respondent's Brief at 8-9. Relying on the Sixth Circuit's decision in *Saqr v. Holder, supra*, the respondent argues that, inasmuch as he was questioned about his potential deportability by the INS while he was in prison in 1991, the post-IIRIRA definition does not apply to him because, he claims, questioning him constitutes "some action" taken by the INS before IIRIRA's enactment. *See id.* at 421 (interpreting section 321(c) of IIRIRA, which states that the legislation's amendment of the aggravated felony definition "shall apply to actions taken on or after the date of . . . enactment . . . , regardless of when the conviction occurred"). In *Saqr*, the Sixth Circuit held that the term "actions taken" under section 321(c) of IIRIRA derives from the point at which the removal action begins, for purposes of determining whether the pre- or post-IIRIRA definition of aggravated felony applies and, in accordance with two other circuits, it found that removal proceedings begin when an alien is served with the Notice to Appear. *See id.* at 422. Therefore, mere questioning by an INS agent prior to the actual service of the Notice to Appear (which did not occur in this case until June 17, 2011) does not constitute the beginning point of a removal action against an alien. *See id.* The respondent does not dispute that if current law may properly be applied (as we hold that it may), his offense is a categorical aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), as found by the Immigration Judge (I.J. at 7-8).

The respondent next argues that he is eligible for a waiver under former section 212(c) of the Act despite the fact that he was convicted after a jury trial rather than as the result of a plea agreement (I.J. at 8). *See* Respondent's Brief at 9-10. In this regard, we note, as did the Immigration Judge, that the United States Court of Appeals for the Sixth Circuit, where this case arises, has specifically concluded that a waiver under former section 212(c) of the Act is not available to those whose convictions were obtained after trial by a jury (I.J. at 8). *See Kellermann v. Holder*, 592 F.3d 700, 705-07 (6th Cir. 2010). In so holding, the Sixth Circuit and some other circuit courts, emphasizing the United States Supreme Court's focus on the "contractual nature of plea agreements" in *INS v. St. Cyr*, 533 U.S. 289 (2001), have determined that application of the amendments effected by the Antiterrorism and Effective Death Penalty Act of 1996 and by IIRIRA has no impermissible retroactive effect on individuals who were convicted of deportable offenses after trial. In turn, such determinations have been based on the theory that individuals who were convicted after trial cannot demonstrate detrimental reliance on the potential availability of section 212(c) relief. *See Kellermann v. Holder, supra*; *see also Ferguson v. U.S. Att'y Gen.*, 563 F.3d 1254, 1271 (11th Cir. 2009).

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decisions declined to defer to *Matter of Lettman, supra*, and instead held that the current "aggravated felony" removability provision does not apply to pre-ADAA convictions. However, the present case arises in the Sixth Circuit, which has not addressed the validity of the Board's decision in *Matter of Lettman*, which we consequently are bound to apply. We also note that decisions issued by two other courts of appeals *have* deferred to *Matter of Lettman*. *See Lettman v. Reno*, 207 F.3d 1368 (11th Cir. 2000); *Lewis v. U.S. INS*, 194 F.3d 539 (4th Cir. 1999).

However, subsequent to the Immigration Judge's decision in this case, the Board decided *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014), in which we held that a lawful permanent resident who is otherwise eligible for relief under former section 212(c) of the Act, such as the respondent, may apply for such relief in removal proceedings without regard to whether his conviction resulted from a plea agreement or a trial and without regard to whether he was removable under the law in effect when the conviction was entered. We concluded that judicial decisions and regulatory provisions that had been premised on a presumed requirement of detrimental reliance had been superseded by the Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479, 1490-91 (2012), which unequivocally stated that the presumption against retroactive application of statutes does not require such reliance. *Id.* at 266-69. After we issued our decision in *Matter of Abdelghany*, the respondent filed a motion to remand based on our decision. Under *Matter of Abdelghany*, the respondent is not barred from applying for a waiver under former section 212(c) of the Act due to his conviction by a jury, and he should be provided the opportunity to apply for such relief.[2]

Accordingly, the motion to remand will be granted, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

ORDER: The motion to remand is granted, and the record is remanded to the Immigration Judge for further proceedings consistent with this opinion and for entry of a new decision.

FOR THE BOARD

[2] The respondent also contends that he is eligible for a waiver under section 212(h) of the Act despite his lawful permanent resident status prior to his conviction, because he obtained his status through adjustment of status (I.J. at 11-12). *See* Respondent's Brief at 13-15. However, we find it unnecessary to address this issue at this time.