U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: LIRA-MARTINEZ, ANTONIO

A 090-116-421

Date of this notice: 6/21/2018

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:
Greer, Anne J.
Wendtland, Linda S.
Crossett, John P.

Userteam: Docket

File: A090 116 421 – Tucson, AZ

Date: JUN 21 2018

In re: Antonio LIRA-MARTINEZ a.k.a. Antonio Lira

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Patricia G. Mejia, Esquire

ON BEHALF OF DHS: Joey L. Caccarozzo
Assistant Chief Counsel

APPLICATION: Termination; Cancellation of removal under section 240A(a) of the Act

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decisions denying his motion to terminate and denying his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed in part and sustained in part. The record will be remanded.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On April 6, 1988, the respondent was admitted as a temporary resident, and he later became a lawful permanent resident on February 8, 1990 (IJ at 1; Exh. 1). On May 3, 1993, the respondent was convicted of attempted aggravated robbery, with the underlying offense occurring on January 30, 1993, in violation of Arizona Revised Statutes (Ariz, Rev. Stat.) §§ 13-1001, 13-1902, and 13-1903 (IJ at 1-2; Exh. 1). He was sentenced to 4 years intensive probation (Exh. 4 at Tab A). On January 31, 2003, the respondent was convicted of domestic violence assault and threat to intimidate, in violation of Ariz. Rev. Stat. §§ 13-1203, 13-1201.A.1, and 13-1306 (IJ at 2; Exh. 4 at 16-19). The respondent was granted deferred prosecution and ordered to complete domestic violence counseling and attend drug and alcohol evaluation. (October 7, 2016, IJ at 3; Exh. 4 at 18-19). On February 2, 2004, these charges were dismissed without prejudice (October 7, 2016, IJ at 3; Exh. 4 at 16).

The DHS subsequently charged the respondent with three grounds of removability. First, he is alleged to have been convicted of a crime involving moral turpitude committed within 5 years of admission for which a sentence of 1 year or longer may be imposed. *See* section 237(a)(2)(A)(i) of the Act, 8 U.S.C. § 1227(a)(2)(A)(i). Second, he is changed with, after being admitted to the United States, having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. *See* section 237(a)(2)(A)(ii) of the Act. Lastly, the respondent is charged with having been convicted of a crime of domestic violence, a crime of

stalking, or a crime of child abuse, neglect, or child abandonment. *See* section 237(a)(2)(E)(i) of the Act. The Immigration Judge sustained these three grounds of removability.

The respondent first argues that his 2003 domestic violence case against him did not result in a conviction within the meaning of section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) (Respondent's Br. at 2-3). For purposes of the Act, the term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Act. The respondent notes that acceptance of the guilty plea was deferred (Respondent's Br. at 3). However, the record plainly indicates that the respondent entered a plea of guilty and that some restraint on the respondent's liberty was imposed (October 7, 2016, IJ at 3; Exh. 4 at 18). Thus, even though acceptance of the plea and adjudication were withheld, the respondent remains convicted within the meaning of the Act.[1] *See Matter of Punu*, 22 I&N Dec. 224, 227 (BIA 1998) (holding that "even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws").

Moreover, the respondent's appellate arguments do not cause us to reverse any other grounds of removability. For example, the conduct underlying the respondent's attempted aggravated robbery conviction occurred on January 30, 1993, which was within 5 years of his April 6, 1988, admission. He notes that he was sentenced to probation (Respondent's Br. at 5), but removability under section 237(a)(2)(A)(i) of the Act turns on the sentence that may be imposed. At the time of the respondent's conviction, which was a class four felony, the maximum punishment was 4 years in prison. *See* Ariz. Rev. Stat. § 13-701 (1993). He has not meaningfully argued on appeal that his convictions do not encompass moral turpitude. Aside from arguing that he is not convicted within the meaning of the Act, he does not argue that his 2003 conviction does not fall within the definition of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act. We do not disturb the Immigration Judge's decision to sustain the three grounds of removability.

The respondent next contends that the Immigration Judge improperly denied his application for cancellation of removal under section 240A(a) of the Act (Respondent's Br. at 3-5). For the

[1] The respondent's appellate pleadings cite to section 101(a)(48)(A) of the Act. However, his brief elides the critical language in subsection (i) "the alien has entered a plea of guilty" (Respondent's Br. at 3). *See* section 101(a)(48)(A)(i) of the Act. A plea of guilty may be entered and be valid for immigration purposes without it being accepted in accordance with a state's deferred prosecution program.

following reasons, we agree and will remand the record for further evaluation of this claim for relief.

The parties dispute the applicability of the stop-time rule. To be eligible for cancellation of removal, an alien must, among other requirements, have resided in the United States continuously for 7 years after having been admitted in any status. *See* Section 240A(a)(2) of the Act. However, the stop-time rule limits how continuous residence is calculated and is set forth as follows:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2), when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

Section 240A(d)(1) of the Act. The stop-time rule was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[2] *See Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006); *see also Matter of Perez*, 22 I&N Dec. 689 (BIA 1999) (en banc).

The respondent argues that the stop-time rule cannot be applied retroactively to his offense preceding the effective date of IIRIRA (Respondent's Br. at 4-5). The application of the stop-time rule is material to the respondent's case, as he committed the attempted aggravated robbery offense less than 5 years after being admitted as a temporary permanent resident. Application of the stop-time rule in this case would preclude the respondent from establishing the requisite 7 years of continuous residence.

This Board has consistently held that the stop-time rule should be applied retroactively. *See Matter of Robles*, 24 I&N Dec. 22, 27 (BIA 2006); *Matter of Perez*, 22 I&N Dec. at 692–93. However, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that section 240A(d)(1)(B) of the Act "does not apply retroactively to the seven-year continuous residence requirement of [section 240A(a)(2) of the Act] for an alien who pled guilty before the enactment of IIRIRA and was eligible for discretionary relief at the time IIRIRA became effective." *Sinotes-Cruz v. Gonzales*, 468 F.3d at 1202–03. The effective date of the pertinent provisions of IIRIRA is April 1, 1997. *See Matter of Perez*, 22 I&N Dec. at 691.

[2] The stop-time rule in IIRIRA differs slightly from the stop-time rule in effect today. The prior rule was not divided into respective subsections (A) and (B). *Compare* 8 U.S.C. § 1229b(d)(1) (1994 & Supp. II 1997) *with* 8 U.S.C. 1229b(d)(1) (2000). However, both versions of the stop-time rule turn on when the charging document was served upon the alien or when the alien committed a certain offense.

The respondent appears to fall within the exception set forth in *Sinotes-Cruz v. Gonzales*. First, the respondent's attempted aggravated robbery conviction would not have made him deportable at the time of his conviction and at the effective date of the pertinent provisions of IIRIRA. For his attempted aggravated robbery conviction, the respondent was sentenced to 4 years of intensive probation, but no confinement (IJ at 1-2; Exh. 3 at 3). Thus, the respondent was not deportable for being convicted of a crime involving moral turpitude under former section 241(a)(2)(A)(i) of the Act because the sentence did not involve the requisite sentence of 1 year of confinement or longer. In holding that the stop-time rule did not apply retroactively to the alien in *Sinotes-Cruz v. Gonzales*, the Ninth Circuit relied in part on the fact that he had pleaded guilty to an offense that did not make him deportable. 468 F.3d at 1202.

Second, the respondent appears to have been statutorily eligible for discretionary relief at the time of IIRIRA's pertinent effective date, but for application of the stop-time rule. *Id.* The Ninth Circuit noted the "serious adverse consequences" of applying the stop-time rule retroactively in such cases. *Id.* This eligibility to apply for discretionary relief is an important distinguishing factor. *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1327-28 (9th Cir. 2006) (applying the stop-time rule retroactively when the alien was not eligible for discretionary relief).

In sum, we cannot distinguish the respondent's case from *Sinotes-Cruz v. Gonzales*. We thus reverse the Immigration Judge's application of the stop-time rule and will remand the record for further consideration of the respondent's application for cancellation of removal. On remand, the parties shall have the opportunity to update the evidentiary record with any relevant evidence. We express no opinion on the ultimate outcome of the case.

Accordingly, the following orders will be entered.

ORDER: The appeal of the Immigration Judge's decision sustaining the grounds of removability is dismissed.

FURTHER ORDER: The appeal of the Immigration Judge's denial of cancellation of removal under section 240A(a) of the Act is sustained.

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

FOR THE BOARD