U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: F[redacted],U[redacted]

A[redacted]-217

Date of this notice: 12/30/2019

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:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

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File: [redacted]-217 –Miami, FL Date: DEC 30 2019

In re: U[redacted] F[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Anis N. Saleh, Esquire

APPLICATION: Reopening

On July 27, 2009, the Board affirmed the Immigration Judge's November 19, 2008, decision finding the respondent removable under sections 212(a)(2)(A)(i)(II) and 212(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II) and 1182(a)(2)(C). The Immigration Judge also denied the respondent's applications for relief under sections 212(c) and 212(h) of the Act. On September 28, 2018, the respondent, a native and citizen of Haiti, filed the instant untimely motion to reopen to enable him to apply for relief from removal. *See* section 240(c)(7)(C)(i) of the Act, 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2). The respondent seeks reopening. The Department of Homeland Security has not opposed this motion. The motion will be granted.

On November 30, 1981, the respondent was convicted of unlawful possession of cannabis under Florida law, and on January 12, 1988, the respondent was granted lawful permanent resident (LPR) status as of January 1, 1982. On May 31, 1991, the respondent was convicted under Florida law for possession of cocaine with intent to sell or purchase. The Immigration Judge determined that the respondent was never lawfully admitted for permanent residence due to his November 30, 1981, drug conviction, and was therefore ineligible for certain forms of relief.

The respondent has now offered evidence that on February 12, 2016, he filed a motion to vacate the 1981 conviction, arguing that he was not advised of the immigration consequences of his guilty plea, and evidence that on August 30, 2016, the criminal court vacated the 1981 conviction based on due process grounds (Motion Exhs. C, D). Therefore, the respondent's November 30, 1981, conviction is not final for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621, 624-25 (BIA 2003) (distinguishing convictions that have been set aside for reasons related to a defect in the underlying criminal proceedings, which are not final for immigration purposes, from those vacated because of rehabilitation or immigration hardship). The respondent, who is 68 years old and entered the United States in 1976, has also offered evidence of his family ties to the United States (Motion Exhs. F-H), as well as evidence of his medicals status, including records of brain damage (aphasia) and other complications associated with a cerebral infarction (stroke) in 2014 that have required intermittent hospitalizations (Motion Exhs. M, N).

In proceedings before the Immigration Judge, the respondent admitted to the allegation, set forth in the Notice to Appear (Exh. 1), that he arrived in, and applied for admission to the United States as a returning LPR, and that his inspection was deferred pursuant to section 212(d)(5) of the Act (humanitarian parole). Subsequent to the Board's prior order in this case, the Board held in

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Matter of Pena, 26 I&N Dec. 613 (BIA 2015), that an alien returning to the United States who has been granted LPR status cannot be regarded as seeking an admission and may not be charged with inadmissibility under section 212(a) of the Act, if they do not fall within any of the exceptions in section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C). The United States Supreme Court has held that section 101(a)(13)(C) of the Act does not apply retroactively to LPRs returning from abroad who committed crimes prior to September 30, 1996, the date on which the Illegal Immigration Reform and Immigrant Responsibility Act (IRRIRA) was enacted. *Vartelas v. Holder*, 566 U.S. 257, 271-75 (2012). It appears, therefore, that the respondent was not an alien seeking admission, and that he was improperly charged with inadmissibility under section 212 of the Act in these removal proceedings.

In view of the particular circumstances presented, we will grant this unopposed motion to reopen pursuant to the Board's sua sponte authority, and remand the record to the Immigration Judge to consider the respondent's removability further, and to enable the respondent to apply for any available form of relief from removal. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997); 8 C.F.R. § 1003.2(a). Accordingly, the following orders will be entered.

ORDER: The motion to reopen is granted.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

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