U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: ORTIZ ORELLANA, VICENTE **A 201-593-124**

Date of this notice: 5/26/2020

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:
Creppy, Michael J.
Morris, Daniel
Liebowitz, Ellen C

Userteam: Docket

File: A201-593-124 – New York, NY Date: MAY 26 2020

In re: Vicente ORTIZ ORELLANA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Allison C. Wilkinson, Esquire

APPLICATION: Termination; continuance; remand

The respondent, a native and citizen of Guatemala, appeals the Immigration Judge's September 18, 2019, decision finding him removable as charged. The Department of Homeland Security ("DHS") did not respond. The record will be remanded.

We review findings of fact determined by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On May 10, 2019, the DHS issued a Notice to Appear (NTA), which designated the respondent as an "arriving alien" (Exh. 1). The NTA contained the following factual allegations:

> (1) You are not a citizen or national of the United States; (2) You are a native of Guatemala and a citizen of Guatemala; (3) On or about January 15, 2019 you applied for admission into the United States at the Paso Del Norte Port of Entry in, El Paso, Texas; (4) You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or another valid entry document required by the Immigration and Nationality Act.

(Exh. 1). Based on these factual allegations, the DHS charged the respondent with inadmissibility under section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien who "at the time of application for admission [] is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by th[e] Act…" (Exh. 1).

The respondent, through counsel, declined to admit or deny the factual allegations contained in the NTA, and he contested the charge of inadmissibility (IJ at 1; Tr. at 23). The Immigration Judge sustained the first, second, and fourth factual allegations, held in abeyance the third factual allegation, and sustained the charge of inadmissibility (IJ at 1; Tr. at 26). On appeal, the respondent argues, among other things, that the Immigration Judge erred in sustaining the charge of inadmissibility (Respondent's Br. at 5-11).

As an initial matter, we note that the respondent admits on appeal he is a native and citizen of Guatemala who entered the United States on January 15, 2019 (Respondent's Br. at 1, 3).

Therefore, the record supports the Immigration Judge's decision to sustain the first and second factual allegations contained in the NTA. *See Matter of Amaya-Castro*, 21 I&N Dec. 583, 588 (BIA 1996) (noting that the respondent's admission that he was born in another country is "clear, unequivocal, and convincing evidence" of alienage). We also note that the respondent has not made a claim that he entered, or attempted to enter, the United States in a lawful manner.

At this point, the issue in this case centers on the third factual allegation in the NTA regarding whether the respondent applied for admission into the United States at a port of entry. If the respondent applied for admission at a port of entry, he is properly designated as an "arriving alien" subject to removability under section 212(a)(7)(A)(i)(I) of the Act. *See* 8 C.F.R. § 1003.1(q) (defining an "arriving alien" as "an applicant for admission coming or attempting to come into the United States at a port-of-entry"). If not, the respondent is not properly categorized as an "arriving alien" subject to section 212(a)(7)(A)(i)(I) of the Act, the only charge of removal in this case.

There has been no evidence submitted by either party to establish or refute the third factual allegation contained in the NTA. Although the DHS apparently had a Form I-213, Record of Deportable/Inadmissible Alien, it did not submit it into evidence to establish the respondent's place and manner of entry (Tr. at 23-25). The respondent did not admit to the factual allegations contained in the record, and neither party asked the respondent any questions regarding his entry into the United States (Tr. at 22-26). Due to the number of "indiscernible" notations in the transcript, it is unclear from the record why such evidence was not submitted or elicited (*see* Tr. at 22-26).

In addition to (or because of) this lack of evidence, the Immigration Judge did not make clear findings regarding the third factual allegation contained in the NTA. As noted above, the Immigration Judge sustained factual allegations one, two, and four, but "held in abeyance the third allegation" (IJ at 1). The third factual allegation in the NTA—"On or about January 15, 2019 you applied for admission into the United States at the Paso Del Norte Port of Entry in, El Paso, Texas"—is essential to whether the respondent is removable under section 212(a)(7)(A)(i)(I) of the Act, which requires the respondent "at the time of application for admission" not be in possession of valid entry documents. Regardless of which party bears the burden to determine if the respondent applied for admission at a port of entry, the Immigration Judge must make clear findings about this factual issue before sustaining a charge of removal under section 212(a)(7)(A)(i)(I) of the Act. The Immigration Judge did not make clear factual findings in this case, and therefore we find that a remand is necessary in order to determine whether the respondent is removable as charged.

Upon remand, the parties should be allowed to supplement the record and submit evidence regarding the third factual allegation contained in the NTA. Further, the Immigration Judge must make clear findings regarding that factual allegation. If, upon remand, the Immigration Judge determines that the third factual allegation has not been established and that the respondent is not removable under section 212(a)(7)(A)(i)(I) of the Act, the DHS may have an opportunity to lodge alternative removal charges. *See* 8 C.F.R. § 1003.30. Because the respondent's removability is an open question at this time, we decline to address his appellate arguments pertaining to relief from removal and his motion to reopen. We express no opinion as to the outcome of this case.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD