U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MANZO HERNANDEZ, JAIME HE... **A 092-425-597**

Date of this notice: 11/1/2018

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:
Guendelsberger, John

GilbertR
Userteam: Docket

File: A092-425-597 – Los Angeles, CA Date: NOV - 1 2018

In re: Jaime Hernandez MANZO HERNANDEZ a.k.a. Jaime Manzo Hernandez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Vanessa O. Bartsch, Esquire

ON BEHALF OF DHS: Prashanthi Rangan
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The Department of Homeland Security (DHS) has appealed from the Immigration Judge's May 24, 2018, decision granting the respondent's motion to terminate. The respondent, a native and citizen of Mexico, has filed a brief in opposition to the DHS appeal. For the reasons set out below, the DHS appeal will be dismissed.

We review an Immigration Judge's findings of fact, including credibility determinations, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent testified that he first entered the United States in 1980 with a visa (IJ at 2; Tr. at 9; DHS Br. at 3-4; Respondent's Opp. Br. at 3). Between 1980 and 1985, the respondent made multiple entries into the United States from Mexico without inspection (IJ at 1-2; Tr. at 9-10; DHS Br. at 4; Respondent's Opp. Br. at 3). In 1989, the respondent's status was adjusted to that of a lawful temporary resident under section 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a (I.J. at 3; DHS Br. at 1-2; Respondent's Opp. Br. at 3). The respondent subsequently traveled to Mexico and returned to the United States on several occasions as a lawful temporary resident (IJ at 3; DHS Br. at 1).

As more fully described below, the respondent last traveled to Mexico in 1995 to pick up his son and then returned to the United States (IJ at 3; Tr. at 11-12; DHS Br. at 1-2, 4; Respondent's Opp. Br. at 3). In 1998, the respondent's temporary status was terminated (DHS Br. at 1-2). DHS charged the respondent with being removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien who is present in the United States without being admitted or paroled (IJ at 2; Exh. 1).[1] On May 24, 2018, the Immigration Judge

[1] As set forth in the Immigration Judge's decision, DHS withdrew this inadmissibility charge via a Form I-261 and instead lodged a removability charge under section 237(a)(1)(B) of the Act, 8 U.S.C. § 1227(a)(1)(B), which indicated that the respondent had been admitted to the United States (IJ at 5; Exh. 1A). However, DHS ultimately withdrew this Form I-261 and filed a second Form I-261, which essentially reinstated the original inadmissibility charge and factual allegations under section 212(a)(6)(A)(i) of the Act (IJ at 5; Form I-261, served on March 20, 2018).

concluded that the respondent was not removable as charged and granted the respondent's motion to terminate. DHS has appealed from that decision.

Upon our de novo review, we affirm the Immigration Judge's decision that the respondent was lawfully admitted to the United States in 1995 (IJ at 4-7). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). To demonstrate a lawful admission under the Act, an alien need only demonstrate procedural regularity in his entry, i.e., presenting himself to an immigration officer for questioning and then entering the United States after receiving authorization from the immigration officer. *See* section 101(a)(13)(A) of the Act, 8 U.S.C. § 1101(a)(13)(A); *Matter of Quilantan*, 25 I&N Dec. 285, 290-91 (BIA 2010).

In the case at bar, it is undisputed that when the respondent entered the United States for the last time in 1995 he: (1) was the driver of the car, (2) presented his lawful temporary resident card to the immigration officer, (3) presented himself for questioning to the immigration officer, and (4) the immigration officer then allowed the respondent to enter the United States (IJ at 3-4; Tr. at 12-14, 18; DHS Br. at 1, 4; Respondent's Opp. Br. at 3-4). Given these facts, the respondent's 1995 entry into the United States clearly qualified as an admission under the Act. *See Saldivar v. Sessions III*, 877 F.3d 812, 814-15 (9th Cir. 2017) (concluding that an alien was admitted into the United States when an immigration officer waived him through a port of entry).

We also agree with the respondent that DHS's reliance on *Aguilera-Medina*, 137 F.3d 1401 (9th Cir. 1998) is misplaced (*see* IJ at 6, 8; Respondent's Opp. Br. at 13-14). DHS contends that the respondent did not make an "entry" for purposes of "admission" in 1995 because he reentered the United States in 1995 after a brief departure to Mexico to pick up his son (DHS Br. at 6-7). However, the cases above that have directly addressed the admission issue have not placed any such temporal limitation on what qualifies as an admission under the Act. In addition, the court in *Aguilera-Medina* was addressing a narrow, unrelated issue, i.e., whether a return to the United States after a brief, casual departure is an "entry" for purposes of starting the clock and establishing deportability for alien smuggling within 5 years of entry into the United States. *See Id.* at 1402. Consequently, we affirm the Immigration Judge's conclusion that the respondent was lawfully admitted to the United States in 1995.

DHS also contends that the termination of the respondent's temporary status in 1998 returned him to his prior unadmitted status based on 8 C.F.R. § 245a.2(u)(4) (DHS Br. at 5-6). Consequently, according to DHS, the respondent is removable under section 212(a)(6)(A)(i) of the Act, as an alien present in the United States without being admitted or paroled. We disagree.

The regulation provides in pertinent part as follows:

> Return to unlawful status after termination. Termination of the status of any alien previously adjusted to lawful temporary residence under section 245A(a) of the Act shall act to return such alien to the unlawful status held prior to the adjustment, and render him or her amenable to exclusion or deportation proceedings under section 236 or 242 of the Act, as appropriate.

8 C.F.R. § 245a.2(u)(4).

Although not in the controlling jurisdiction, we agree with the Immigration Judge and the respondent that the most persuasive case on this issue is *Gomez v. Lynch*, 831 F.3d 652 (5th Cir. 2016) (IJ at 7-9; Respondent's Opp. Br. at 17-18).[2] In a similar manner to the respondent in the case at bar, the alien in *Gomez* was lawfully admitted to the United States while in a temporary status, and his temporary status subsequently expired. *Id.* at 655. After carefully examining 8 C.F.R. § 245a.2(u)(4) and case law, the court concluded that the expiration of an alien's temporary status, and return to his unlawful status, did not undo his prior, factual admission. *Id.* at 662-63. The court reasoned that status and admission are fundamentally different concepts, and noted that an admission is defined in wholly factual and procedural terms. *Id.* at 658. An alien "who presents himself at an immigration checkpoint, undergoes a procedurally regular inspection, and is given permission to enter the United States has been admitted, regardless of whether he had any underlying legal right to do so." *Id.* at 658. Consequently, the respondent's prior, factual admission was not undone by the subsequent expiration of his temporary status.

Finally, for the reasons set forth in *Gomez* and the respondent's brief, we conclude that *United States v. Hernandez-Arias*, 757 F.3d 874 (9th Cir. 2014), is inapplicable to the case at bar (Respondent's Opp. Br. at 16-17). *See Gomez v. Lynch*, 831 F.3d at 661-62. In *Hernandez-Arias*, the U.S. Court of Appeal for the Ninth Circuit concluded that the termination of an alien's temporary status operated to revoke his "admission" resulting from a prior adjustment of status. *Hernandez-Arias*, 757 F.3d at 877, 881. For the sake of argument, the Ninth Circuit deemed the alien "admitted" by operation of law based on his adjustment to temporary status. *Id.* at 880. Based on this reasoning, the Ninth Circuit concluded that the legal fiction of this admission was undone by the expiration of temporary residency. *Id.* at 881. Consequently, *Hernandez-Arias* only addressed an admission by operation of law, not a prior, factual admission at a port of entry, like in the case at bar.

Although the respondent may have returned to his previous unlawful status when his temporary resident status expired, for the foregoing reasons, his lack of status did not undo his prior, factual admission under the Act. Consequently, we affirm the Immigration Judge's decision that the respondent is not removable as charged under section 212(a)(6)(A)(i) of the Act as an alien who is present in the United States without being admitted or paroled, and enter the following order.

ORDER: The DHS appeal is dismissed.

FOR THE BOARD

[2] Based on our research, *Gomez* appears to be the only published federal circuit case that squarely addresses the legal and factual issues before us.