U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: CASTILLO, MILTON RAFAEL

A 042-889-639

Date of this notice: 5/2/2019

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:
Kendall Clark, Molly

Userteam: Docket

File: A042-889-639 – Batavia, NY

Date: MAY - 2 2019

In re: Milton Rafael CASTILLO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Nicholas J. Phillips, Esquire

ON BEHALF OF DHS: John C. Moellering
Assistant Chief Counsel

APPLICATION: Termination

On November 13, 2018, the Immigration Judge granted the respondent's motion to terminate the proceedings, and terminated the removal proceedings without prejudice. The respondent moved to terminate the proceedings based on evidence showing that a criminal court granted him permission to file a late notice of appeal challenging the convictions underlying his removability under section 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii). The Department of Homeland Security (DHS) now appeals from the Immigration Judge's decision terminating the proceedings. The respondent opposes this appeal. The appeal will be dismissed.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

A conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived. *Matter of J. M. Acosta*, 27 I&N Dec. 420 (BIA 2018). As in the instant case, once the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes. *Id.* An alien, however, can rebut the presumption of finality with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court, and that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings. *Id.*

The DHS argues that the evidence offered in support of the motion to terminate was insufficient to rebut the presumption of finality of the respondent's convictions, and that absent an appeal brief in the criminal case, it cannot be determined whether the respondent's appeal relates to the merits of his criminal case or to a substantive defect in the criminal proceedings.

The Immigration Judge considered the timing of the convictions and the appeal, as well as a letter to the Immigration Judge from the attorney to whom the respondent's criminal appeal has been assigned. The Immigration Judge determined that such evidence was sufficient to rebut the presumption of finality and therefore terminated the proceedings without prejudice (IJ at 4-6; Exh.

12, Tab B). We find no error in the Immigration Judge's finding regarding the sufficiency of the evidence to rebut the presumption of finality in this case, and we affirm the Immigration Judge's decision terminating the proceedings without prejudice. *See Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous).[1]

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

[1] As we are upholding the Immigration Judge's decision terminating the proceedings without prejudice, we do not reach the Immigration Judge's alternative findings.