U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted] C[redacted], P[redacted]

A[redacted]-731

Date of this notice: 11/27/2019

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:
Wilson, Earle B.

Humadyl
Userteam: Docket

File: A[redacted]-731 – Los Fresnos, TX

Date: NOV 27 2019

In re: P[redacted] C[redacted] C[redacted]

IN BOND PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Cathy J. Potter, Esquire

ON BEHALF OF DHS: Lily Dideban
Assistant Chief Counsel

APPLICATION: Redetermination of custody status

The Department of Homeland Security (DHS) has appealed from the Immigration Judge's November 5, 2018, bond order granting the respondent's request for a change in custody status and releasing the respondent on his own recognizance. The respondent opposes the DHS's appeal. The reasons for the Immigration Judge's custody order are set forth in a bond memorandum, dated December 20, 2018. The DHS's appeal will be dismissed.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On June 30, 2015, the respondent was admitted to the United States as a lawful permanent resident (Bond Memo at 1). On or about December 12, 2016, the respondent was convicted of gambling promotion in violation of Texas Penal Code 47.03(a)(1) (Bond Memo at 1). The Immigration Judge determined that the respondent's conviction does not constitute an aggravated felony under section 101(a)(43)(J) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(J), as an offense relating to gambling, and thus, he is not subject to mandatory detention under section 236(c)(1)(B) of the Act, 8 U.S.C. § 1226(c)(1)(B) (Bond Memo at 2-3). After the DHS perfected its appeal, the respondent submitted additional evidence, which includes a state court order entered on September 3, 2019, setting aside his conviction because "the judgment of conviction was not legally obtained" (*see* "Respondent's Supplement to Briefing and Motion to Dismiss as Moot," submitted on September 11, 2019, at 7-13). The respondent argues that since he no longer has a criminal conviction for immigration purposes, he is not removable or subject to mandatory detention.

At issue on appeal is whether the Immigration Judge properly found that the respondent is not subject to mandatory detention pursuant to section 236(c)(1)(B) of the Act (Bond Memo at 2-3). The regulations generally do not confer jurisdiction on an Immigration Judge over custody or bond determinations governing those aliens who are subject to mandatory detention. *See* 8 C.F.R. § 1003.19(h)(2)(i)(D). However, an alien may seek a determination by an Immigration Judge that the alien is "not properly included within" certain regulatory provisions which would deprive the

Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue in this matter. *See* 8 C.F.R. § 1003.19(h)(2)(ii); *Matter of Joseph*, 22 I&N Dec. 799, 802 (BIA 1999). An alien is considered not properly included in such a class if the Immigration Judge or the Board determines that the DHS is "substantially unlikely" to prove a removal charge subjecting the alien to mandatory custody. *Matter of Joseph*, 22 I&N Dec. at 806. The respondent must show that the DHS would be substantially unlikely to prevail on a charge of removability under a section of the Act mandating custody. *See id.; Matter of Kotliar*, 24 I&N Dec. 124 (BIA 2007).

We will affirm the Immigration Judge's bond determination. The respondent has submitted new evidence showing that his conviction for gambling promotion was recently set aside based on the state court's findings that he was not properly advised of the immigration consequences of his guilty plea (*see* Respondent's Supp. Br. at 7-13). *See Matter of Thomas-Thompson*, 27 I&N Dec. 674, 690 (A.G. 2019) (holding that state court orders will be given effect for immigration purposes only if based on a procedural or substantive defect in the underlying criminal proceeding and such orders will have no effect for immigration purposes if based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or the avoidance of immigration consequences).

Accordingly, upon consideration of the record before us, we conclude that the respondent is not subject to mandatory detention pursuant to section 236(c)(1)(B) of the Act. Thus, we affirm the Immigration Judge's order releasing the respondent from custody on his own recognizance.[1]

Accordingly, the following order will be entered.

ORDER: The DHS's bond appeal is dismissed.

FOR THE BOARD

[1] In light of our decision, we find it unnecessary to address any of the remaining issues raised by the parties on appeal. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (stating that, as a general rule, courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976)).