U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: ELIZONDO GONZALEZ, RUBEN **A 034-076-469**

Date of this notice: 6/27/2016

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:
Pauley, Roger
Wendtland, Linda S.
Cole, Patricia A.

Userteam: Docket

File: A034 076 469 – Los Fresnos, TX

Date: JUN 27 2016

In re: RUBEN ELIZONDO GONZALEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Hugo Pina, Esquire

ON BEHALF OF DHS: Brandon Bayliss
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(B), I&N Act [8 U.S.C. § 1182(a)(2)(B)] -
Two or more offenses for which the aggregate sentences imposed were five years or more (sustained)

APPLICATION: Termination

The respondent appeals the February 12, 2016, decision of the Immigration Judge, finding him removable as charged and denying his motion to terminate proceedings. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained.

We review findings of fact under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including issues of law, judgment, or discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Mexico, is a lawful permanent resident of the United States since 1972. In March 1989, the respondent sustained a conviction, pursuant to a guilty plea, for a March 1989 burglary of a habitation with intent to commit theft for which he was sentenced to 10 years' probation (Exh. 2 at 3-4). In September 1989, the respondent sustained a conviction, pursuant to a guilty plea, for possession of marijuana (*id.* at 5). Upon violation of his probation, he was sentenced to 5 years' incarceration and fines (*id.* at 1-2). On January 8, 2009, an Immigration Judge granted the respondent a waiver of inadmissibility under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (I.J. at 1; Exh. 2 at 9-10).

In January 2015, the respondent sustained a conviction, pursuant to a guilty plea, for a 2013 violation of TEXAS STATUTES AND CODES ANNOTATED § 49.04(b), driving while intoxicated, for which he was sentenced to 30 days' incarceration, fees, and fines (I.J. at 1; Exh 2 at 15). On December 1, 2015, the respondent applied for admission to the United States at the Hidalgo, Texas, port of entry (I.J. at 1). The DHS served the respondent with a Notice to Appear (NTA) (Form I-862), alleging that he was inadmissible under section 212(a)(2)(B) of the Act as an alien

convicted of two or more offenses for which the aggregate sentences imposed were 5 years or more, rendering him an "arriving alien" under section 101(a)(13)(C)(v) of the Act,[1] 8 U.S.C. § 1101(a)(13)(C)(v) (I.J. at 1; Exh. 1). Before the Immigration Judge, the respondent moved to terminate proceedings on the basis that he is not an arriving alien because DHS had not met its burden of establishing by clear and convincing evidence his inadmissibility.

On the basis of the 1989 convictions, the Immigration Judge determined that the respondent was inadmissible to the United States as an arriving alien convicted of two or more offenses for which the aggregate sentences to confinement were 5 years or more. Section 212(a)(2)(B) of the Act. The Immigration Judge, relying on *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991), concluded that, although the respondent had received a section 212(c) waiver for his 1989 convictions, a grant of relief under 212(c) is not a pardon or expungement of the conviction underlying the grounds for inadmissibility and that "he may still be charged with new grounds of inadmissibility based on the same convictions of his previous crimes" (I.J. at 2). The Immigration Judge denied the motion to terminate. As no application for relief was before him, he ordered the respondent removed to Mexico.

On appeal, the respondent argues that a returning lawful permanent resident cannot be regarded as seeking admission under section 101(a)(13) of the Act where his conviction for an offense under section 212(a)(2) predated the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639 (IIRIRA) (Respondent's Br. at 8-12). *Vartelas v. Holder*, 132 S. Ct. 1479, 1478-92 (2012). We agree.

A waiver of deportability under former section 212(c) of the Act unconditionally negates all grounds of removability then appertaining to the alien, thereby preserving the alien's existing lawful permanent resident status. *See Matter of Gordon*, 20 I&N Dec. 52, 55 (BIA 1989) (holding that a section 212(c) waiver is an unconditional form of relief that "fully returns an alien to the same lawful permanent resident status previously held") (citing *Matter of Przygocki*, 17 I&N Dec. 361, 364 (BIA 1980)). However, a grant of such relief does not pardon or expunge the criminal offense or conviction underlying the grounds of deportability; on the contrary, those convictions remain in effect and may, in the event of further misconduct by the alien, be used as the basis for future charges of deportability.[2] *Matter of Balderas*, *supra*, at 391-92; *Matter of Mascorro-Perales*, 12 I&N Dec. 228, 231 (BIA 1967). Accordingly, a grant of a section 212(c) waiver will not prospectively immunize the respondent against a future charge predicated on the same conviction where the applicability of the new charge arises by virtue of additional

[1] Section 101(a)(13)(C)(v) of the Act provides that a lawful permanent resident shall be regarded as an "arriving alien" if he "has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a)."

[2] Here the respondent committed an offense after the grant of the section 212(c) waiver, which, combined with his 1989 offense, affected the aggregate sentence imposed. Although the Immigration Judge does not appear to rely on the more recent offense, this offense alone is not sufficient to sustain the charge of removability under section 212(a)(2)(B) of the Act.

misconduct. *See Matter of Gordon*, *supra* (holding that an alien cannot be charged with deportability based *solely* on the basis of a criminal conviction as to which a § 212(c) waiver has been granted).

Nevertheless, the Supreme Court recently addressed the question regarding a lawful permanent resident convicted of a crime before the effective date of IIRIRA and the temporal reach of the IIRIRA provision in question, section 101(a)(13) of the Act. Before IIRIRA, the respondent's conviction did not affect his ability to make a brief, casual, and innocent trip outside the United States, because, under the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449, 461–62 (1963), a lawful permanent resident's return from such a trip did not qualify as "entry" into this country. *See Vartelas v. Holder*, *supra*, at 1484.[3] But IIRIRA superseded *Fleuti* by subjecting one returning from a trip abroad to "admission" procedures and, with them, potential removal from the United States on the ground of inadmissibility. *See id.* at 1484–85. In *Vartelas*, *supra*, the Court concluded that, if applied to the petitioner, IIRIRA's "admission" provision—by attaching a new disability, in the form of an effective bar on foreign travel, to his pre-IIRIRA conviction—would operate with retroactive effect. *See id.* at 1486–88. Congress having failed to make clear that it desired retroactive application of the provision in question, the Court held that it applied only prospectively. *See id.* at 1491–92. The Supreme Court held impermissible applying IIRIRA to an alien because it attached a new disability to conduct "over and done well before the provision's enactment." *Id.* at 1487. Here, the convictions upon which the respondent was determined inadmissible occurred prior to IIRIRA; thus, retroactive application of section 101(a)(13) of the Act is proscribed.[4] Accordingly, the respondent is not removable, and the following orders will be entered.

ORDER: The appeal is sustained, and the Immigration Judge's February 12, 2016, decision is vacated.

FURTHER ORDER: Removal proceedings are terminated.

FOR THE BOARD

[3] It is undisputed that the respondent's hours long departure to Mexico met the *Fleuti* criteria.

[4] The respondent is not removable on any ground set forth in section 237 of the Act.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
27991 BUENA VISTA BLVD
LOS FRESNOS, TX 78566

Law Offices of Hugo Pina
Pina, Hugo Eloy
801 W. Nolana Ave.
Suite 100
McAllen, TX 78504

IN THE MATTER OF FILE A 034-076-469 DATE: Feb 16, 2016
ELIZONDO GONZALEZ, RUBEN

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

✓ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:
BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
27991 BUENA VISTA BLVD
LOS FRESNOS, TX 78566

✓ OTHER: **ORDER OF THE IMMIGRATION JUDGE**

COURT CLERK
IMMIGRATION COURT FF

CC: ASSISTANT DEPUTY CHIEF COUNSEL
27991 BUENA VISTA BLVD.
LOS FRESNOS, TX, 78566

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
PORT ISABEL IMMIGRATION COURT
LOS FRESNOS, TEXAS

Matter of RUBEN ELIZONDO GONZALEZ, *Respondent*	)	Case No. A 034-076-469 IJ: Hon. Robert L. Powell
In Removal Proceedings	)	Date: February 12, 2016

Decision and Order Denying Respondent's Motion to Terminate

Statement of the Case

Respondent is a 64-year-old male and a native and citizen of Mexico. He is currently in the custody of United States Immigration and Customs Enforcement and is detained at the Port Isabel Detention Center in Los Fresnos, Texas. Respondent was admitted to the United States as a lawful permanent resident on March 18, 1972.

On March 27, 1989, Respondent was convicted for the offense of burglary of a habitation and was sentenced to ten years of imprisonment, which was probated for a period of ten years. Respondent's probation was revoked on September 18, 1989, and sentenced to five years confinement. On September 20, 1989, Respondent was convicted of possession of marijuana and was sentenced to thirty days confinement. On January 8, 2009, an Immigration Judge granted Respondent a waiver of inadmissibility under former section 212(c) of the Act. On January 15, 2015, Respondent was convicted for the offense of driving while intoxicated and was sentenced to thirty days imprisonment.

On December 1, 2015, Respondent applied for admission to the United States at the Hidalgo (Texas) Port of Entry. The Department of Homeland Security (DHS) served Respondent with a Notice to Appear (NTA) on December 1, 2015. The NTA alleged that Respondent was convicted of two or more offenses (other than purely political offenses) for which the aggregate sentences to confinement were five years or more pursuant to section 212(a)(2)(B) of the Act.

At a February 8, 2016, individual hearing, Respondent, through counsel, submitted a motion requesting his proceedings be terminated. See *Respondent's Motion to Terminate*, filed January 22, 2016. The Court orally denied Respondent's motion whereupon Respondent stated his intention to appeal. The Court, therefore, substitutes this written decision.

Discussion and Analysis

Respondent contends that he is not an arriving alien. Specifically, Respondent asserts he was improperly charged under section 212(a)(2)(B) of the Act, as an alien who has been

convicted of two or more offenses for which the aggregate sentences of confinement were five years or more. Respondent argues that he has been improperly charged under §212(a)(2)(B) because the charges in the NTA are based on criminal conduct for which he previously received a §212(c) waiver. Respondent further argues that he has not been convicted of any conduct subsequent to 1989 which would support a charge under §212(a)(2)(B).

Respondent received a sentence of 10 years' probation and a subsequent sentence of five years imprisonment for the 1989 burglary charge. Respondent also received a sentence of 30 days imprisonment for his 1989 possession of marijuana charge and for his 2015 conviction for driving while intoxicated. Although Respondent received a §212(c) waiver for his prior 1989 convictions, a grant of relief under 212(c) is not a pardon or expungement of the conviction underlying the grounds for inadmissibility. *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Further, the convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes following a grant of 212(c) relief. *Id.* Therefore, Respondent's previous crimes, for which he received a 212(c) waiver, do not disappear from his record for immigration purposes and he may still be charged with new grounds of inadmissibility based on the same convictions of his previous crimes.

Respondent contends that he was not an applicant for admission because he was a lawful permanent resident at the time he sought entry to the United States. However, INA §101(a)(13)(C)(v) indicates that an arriving lawful permanent resident who has "committed an offense identified in section 212(a)(2)" of the Act and who has not been granted relief under sections 212(h) or 240A(a) is seeking admission to the United States. Respondent was properly charged under section 212(a)(2) and was therefore seeking admission when he presented himself at the Hidalgo Port of Entry. Respondent remains inadmissible. Denial of Respondent's motion to terminate proceedings is indicated.

Respondent has informed the Court that he is not seeking any other relief.

ORDERED that Respondent's motion to terminate is *denied.*

FURTHER ORDERED that Respondent be removed to Mexico.

ROBERT L. POWELL
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: ALIEN ( ) ALIEN C/O CUSTODIAN ALIEN'S ATTY/REP (M) DHS (P)

DATE: 2/12/16 BY: COURT STAFF

ATTACHMENTS: ☐ EOIR-33 ☐ EOIR-28 ☐ LEGAL SERVICES LIST ☐ OTHER