U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Adams, Thomas P., Esq.
631 St. Charles Avenue
New Orleans, LA 70130

DHS/ICE Office of Chief Counsel - NOL
1250 Poydras Street, Suite 325
New Orleans, LA 70113

Name: PHAM, DUNG TUAN

A 027-824-163

Date of this notice: 5/30/2013

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

TranC
Userteam: Docket

File: A027 824 163 – New Orleans, LA Date: MAY 30 2013

In re: DUNG TUAN PHAM

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thomas P. Adams, Esquire

ON BEHALF OF DHS: Veronica H. Cromwell
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination

The respondent appeals from the Immigration Judge's May 3, 2011, decision finding him inadmissible as charged and ordering him removed from the United States. The Department of Homeland Security urges summary affirmance of the Immigration Judge's decision. The record will be remanded for further proceedings.

We review Immigration Judges' findings of fact for clear error, but review de novo questions of law, discretion, and judgment, and all other issues in appeals. 8 C.F.R. §§ 1003.1(d)(3)(i), (ii).

The record reflects that the respondent was admitted to the United States as a lawful permanent resident on July 24, 1986. On June 16, 1989, he was convicted of arson in violation of Illinois Criminal Code § 38-20-1-A. A Notice to Appear (NTA) was issued on January 9, 2007, charging him as an arriving alien as being inadmissible to the United States for having committed a crime involving moral turpitude under section 212(a)(2)(A)(i)(I)of the Act. In a written decision dated May 3, 2011, the Immigration Judge sustained the charge in the NTA, ruling that the respondent's 1989 arson conviction was a crime involving moral turpitude.

After the Immigration Judge's decision in this case, the Supreme Court issued a decision in *Vartelas v. Holder*, 132 S.Ct. 1479 (2012), holding that a provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which treated a returning lawful permanent resident (LPR) as an applicant for admission, could not be applied retroactively to an LPR who committed a felony offense before the provision's effective date. Given that the respondent's conviction in this case pre-dated the IIRIRA, we find that a remand for further consideration of the respondent's removability from the United States is appropriate. Accordingly, the record will be remanded for further proceedings.

ORDER: **The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.**

FOR THE BOARD

U. S. Department of Justice

Executive Office for Immigration Review

Immigration Court

One Canal Place, 365 Canal Street, Room 2450
New Orleans, Louisiana 70130

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
PHAM, Dung	)	**File No.:** 027-824-163
Respondent	)	

CHARGE: Section 212(a)(2)(A)(i)(I) - Alien convicted of a crime involving moral turpitude

MOTION: **Motion to Reopen or Reissue Decision**

ON BEHALF OF RESPONDENT:
Thomas P. Adams, Esq.
631 St. Charles Ave.
New Orleans, LA 70130

ON BEHALF OF DHS:
Veronica Cromwell
Department of Homeland Security
U.S. Immigration & Customs Enforcement
1250 Poydras, Rm. 325
New Orleans, LA 70113

ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

Respondent is a native and citizen of Vietnam. He was admitted to the United States for permanent residence on July 24, 1986. On or about June 16, 1989, respondent was convicted in Cook County, Illinois for arson. A Notice to Appear (NTA) was issued on January 9, 2007, charging respondent as an arriving alien and inadmissible under Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA) for having been convicted of a crime involving moral turpitude. Respondent denied the charge of removability.

On May 10, 2007, respondent filed a motion requesting permission to change his plea in order to concede removability. The motion was granted and respondent was given time to file an application for relief under former INA § 212(c). Respondent failed to file the application and instead, on June 29, 2007, filed a motion requesting permission to change his plea once again. The motion was denied and respondent appealed to the Board of Immigration Appeals (BIA).

The BIA sustained the appeal in part and remanded the case for a determination as to whether respondent's conviction was a crime involving moral turpitude.

On May 3, 2011, this Court held that respondent's conviction for arson, under Section 38-20-1-A of the Illinois Criminal Code, was a crime involving moral turpitude. Respondent was given until June 3, 2011 to file an appeal of the Immigration Judge's decision. Respondent did not file an appeal within the specified time period.

On August 23, 2011, respondent filed a Motion to Reopen or Reissue Decision requesting that this Court either reopen proceedings or reissue its May 3, 2011 decision so that respondent may file an appeal. The Department of Homeland Security (DHS) opposes respondent's motion and filed a brief in support of its position on September 9, 2011. On September 15, 2011, respondent filed a response to DHS' opposition to the motion.

II. Respondent's Motion

Respondent wishes to appeal the Immigration Judge's decision that his prior conviction constitutes a crime involving moral turpitude or have removal proceedings reopened. According to respondent, the Court's May 3, 2011 decision was served upon respondent's counsel (Counsel) but was not directly served on respondent.

Respondent alleges that after receiving a copy of the decision, Counsel called respondent's cell phone several times in an attempt to inform him of the June 3 deadline to file an appeal. Counsel, however, was unable to reach respondent or leave him a message. Counsel later learned that respondent's cell phone was broken and did not allow respondent to receive calls or listen to messages. *Respondent's Motion to Reopen*, p. 2.

As he was unable to reach respondent through his cell phone, Counsel allegedly contacted respondent's wife, Hien Vo, several times and informed her of the upcoming filing deadline for the appeal. Hien Vo allegedly told Counsel that she would tell the respondent about the filing deadline. *Respondent's Affidavit,* p. 2. In the past, Counsel frequently contacted Hien Vo concerning respondent's immigration matters as respondent was difficult to reach due to his work hours. *Respondent's Motion to Reopen*, p. 2-3. After not hearing back from respondent, Counsel concluded that respondent had obtained other counsel for the appeal. Counsel did, however, contact respondent and his wife one additional time to leave a message reminding respondent of the deadline for the appeal. *Respondent's Motion to Reopen*, p. 2.

On June 30, 2011, respondent arrived at Counsel's office unannounced. According to respondent, it was not until this occasion that he first learned he was subject to a final order of removal. Respondent alleges that his wife filed for divorce in mid-June, 2011 and failed to inform respondent of Counsel's phone calls. *Respondent's Motion to Reopen*, p. 2; *Respondent's Affidavit,* p. 1. As a result, respondent alleges that he was unaware of the Immigration Judge's decision and the deadline for filing an appeal.

Respondent asks the Court to either reopen removal proceedings or re-issue its May 3, 2011 decision so that respondent may appeal to the BIA. According to respondent, the Court may either find that respondent has shown exceptional circumstances excusing the untimely filing or exercise its *sua sponte* power to reopen the case on its own motion. *Respondent's Response to DHS' Opposition*, p. 2.

III. Government's Position

DHS opposes respondent's Motion to Reopen or Reissue Decision. DHS argues that the motion is untimely as it was filed more than ninety days after the Immigration Judge's decision. DHS alleges that in order to succeed, DHS must either join the motion or respondent must prove exceptional circumstances excusing the untimely filing. DHS refuses to join the respondent's motion. Additionally, DHS contends that respondent has failed to show exceptional circumstances which would excuse the untimely filing of the motion. *DHS' Opposition to the Motion to Reopen*, p. 2-3. Further, DHS argues that the motion to reopen fails to comply with the requirements for a motion under 8 C.F.R. § 1003.23(c)(1). *DHS' Opposition to the Motion to Reopen*, p. 3.

IV. Statement of Law

Title 8, Code of Federal Regulations, section 1003.23(b)(1) contains deadlines for the filing of motions to reopen and motions to reconsider. It provides:

> An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals.

Reopening *sua sponte*, under 8 C.F.R. § 1003.23(b)(1), is an "extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999). It is not meant to merely cure filing defects and or to otherwise circumvent regulations. *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997). The respondent bears the burden to show that an exceptional situation exists. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000).

Title 8 Code of Federal Regulations, section 1003.23(b)(1) goes on to state:

> Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of the final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the

date of entry of a final administrative order of removal, deportation, or exclusion, or before September 30, 1996, whichever is later.

Title 8, Code of Federal Regulations, section 1003.23(b)(3) provides:

> *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing....The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

V. Analysis and Conclusions

The Court finds that respondent has presented facts that constitute an exceptional situation allowing for *sua sponte* reopening of its decision dated May 3, 2011. When a respondent is represented by counsel, the Court serves copies of documents, including any decision, on counsel. 8 C.F.R. § 1292.5(a); *see also Matter of Barocio*, 19 I&N Dec. 255 (BIA 1985) (holding that notice to an alien's counsel constitutes notice to the alien).

In the present matter, although respondent's counsel received notice of the Court's decision, it appears that the respondent did not receive actual notice of the decision until after the time for an appeal had passed. Respondent supported his motion with an affidavit in which he explained that during the time his case was pending, his cell phone became unserviceable which prevented him from receiving calls and messages. *Respondent's Affidavit*, p. 2; *Respondent's Motion to Reopen*, p. 2. Additionally, respondent states that during this same time, his wife, upon whom he depended to communicate with Mr. Adams, left him and filed for divorce. Although Mr. Adams spoke with respondent's then-wife about the filing deadline, she failed to pass that information along to respondent. *Respondent's Motion to Reopen*, p. 2-3. It was not until respondent visited Mr. Adams' office, after the filing deadline had passed, that he learned of the May 3, 2011 decision and the deadline for filing an appeal.

Under *Matter of Barocio*, 19 I&N Dec. 255, the Court is satisfied that respondent had legal notice of the Court's decision. However, the Court is also satisfied that respondent did not

have actual notice until after the time for filing an appeal had passed. Accordingly, the Court grants respondent's motion to reopen for re-issuance of its May 3, 2011 decision.

ORDER: **IT IS HEREBY ORDERED that the Respondent's Motion to Reopen is GRANTED.**

FURTHER ORDER: The Court's decision of May 3, 2011 is re-issued as of today with a new appeal date.

Date 10/31/2011

/s/ W. Wayne Stogner
W. Wayne Stogner
U.S. Immigration Judge

Appeal due date: 11/30/2011

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: ( ) ALIEN ( ) ALIEN c/o Custodial Officer (X) ALIEN's ATT/REP (X) DHS
DATE: 10/31/2011 BY: COURT
STAFF

Attachment(s): ( ) EOIR-33 ( ) EOIR-28 ( ) Legal Services List ( ) Other