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]-R[redacted], E[redacted] ... **A[redacted]-188**

Date of this notice: 8/18/2020

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:
Morris, Daniel
Hunsucker, Keith
Gemoets, Marcos

Userteam: Docket

File: A[redacted]-188 – Boston, MA Date:

AUG 1 8 2020

In re: E[redacted] B[redacted] C[redacted]-R[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Stephen M. Born, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The applicant, a native and citizen of El Salvador, appeals from the Immigration Judge's June 1, 2017, decision denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture.[1] *See* sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13, 16-18. The appeal will be sustained and these proceedings will be terminated for the reasons outlined below.

We review the findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Department of Homeland Security (DHS) determined that the applicant was subject to expedited removal proceedings, but it conducted a credible fear interview on account of his expressed fear of return to El Salvador. *See* 8 C.F.R. § 208.30(e)(2)-(3). Upon determining that the applicant did not have a credible fear of persecution, the DHS issued a Notice of Referral to an Immigration Judge (Form I-863). In a written order, the Immigration Judge vacated the negative credible fear determination but did not enter an explicit finding on whether the applicant established a significant possibility of eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. Instead, the Immigration Judge accepted an asylum application from the applicant and considered his eligibility for asylum, withholding of removal, and protection under the Convention Against Torture in asylum-only proceedings.

Normally, we do not consider an issue that is not raised on appeal. *Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012). However, in this case we will consider the threshold jurisdictional issue of whether the applicant was placed in the proper type of proceedings. *See Jalbert v. SEC*, 945 F.3d 587, 593 (1st Cir. 2019) (explaining that non-waivable jurisdictional issues can be raised at any time), *petition for cert. filed* (U.S. May 21, 2020) (19-1310); *see also Matter of Bulnes*, 25 I&N Dec. 57, 59 (BIA 2009) (explaining that Immigration Judges and this Board have "jurisdiction to determine [our] jurisdiction"); *Matter of G-N-C-*, 22 I&N Dec. 281, 287 (BIA 1998) (similar); *but see Matter of D-M-C-P-*, 26 I&N Dec. 644, 645-46 (BIA 2015) (placing

[1] We consider the applicant's untimely appeal by way of certification. 8 C.F.R. § 1003.1(c).

certain limitations on our ability to define the scope of our jurisdiction to consider whether an applicant was in the proper proceedings based on the distinguishable question of whether the applicant was admitted under the Visa Waiver Program).

Upon reviewing a negative credible fear finding by the DHS, an Immigration Judge must determine whether the applicant established a credible fear of persecution or torture insofar as he has demonstrated a significant possibility of eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. 8 C.F.R. § 1208.30(g)(2)(iv). If the Immigration Judge affirms the negative credible fear finding, the proceedings are concluded and the DHS may remove the alien. 8 C.F.R. § 1208.30(g)(2)(iv)(A). By contrast, if the Immigration Judge determines that the applicant has a credible fear of persecution or torture and vacates the negative credible fear finding, "further consideration" of the application for asylum is warranted by way of full removal proceedings under section 240 of the Act, 8 U.S.C. § 1229a, in most instances. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(B); *see also Matter of M-S-*, 27 I&N Dec. 509, 512 (A.G. 2019) (discussing the regulation that provides for full removal proceedings where an Immigration Judge reverses an asylum officer's negative credible fear determination, except in the case of stowaways); 8 C.F.R. § 208.30(f) (outlining a similar process for placing any non-stowaway alien who establishes a credible fear before an asylum officer in removal proceedings pursuant to section 240 of the Act).

The record does not contain a Notice to Appear and the applicant does not fall into any of the specific categories of aliens subject to asylum-only proceedings. *See* 8 C.F.R. § 1208.2(c)(1), (3) (limiting asylum-only proceedings to specific categories of aliens, such as certain crewmen, stowaways, or Visa Waiver Program applicants); *Matter of D-M-C-P-*, 26 I&N Dec. at 645-46; *compare* 8 C.F.R. § 1208.30(g)(2)(iv)(B), *with* 8 C.F.R. § 1208.30(g)(2)(iv)(C). Accordingly, we conclude that the applicant was improperly placed into limited "asylum-only" proceedings instead of full removal proceedings under section 240 of the Act.

Thus, because there was no authority for the applicant to be in asylum-only proceedings, we must terminate proceedings. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(B). Nothing in this order shall be construed as precluding the DHS from placing the applicant in removal proceedings under section 240 of the Act through the filing of a Notice to Appear. *See id.* Accordingly, the following order will be entered.

ORDER: The proceedings are terminated without prejudice.

FOR THE BOARD