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

DELGADO, MARIA TERESA
Law Office of Elsa I Martinez
523 W. 6th Street, Suite 633
Los Angeles, CA 90014

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, 8th Floor
Los Angeles, CA 90014

Name: ALCARAZ-DE VASQUEZ, ESPE... **A 076-626-660**

Date of this notice: 3/16/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Liebowitz, Ellen C
Malphrus, Garry D.

Userteam: Docket

File: A076 626 660 – Los Angeles, CA Date: MAR 16 2017

In re: ESPERANZA ALCARAZ-DE VASQUEZ a.k.a. Alicia Ortiz-Herrera

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maria Teresa Delgado, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (withdrawn)

Sec. 212(a)(6)(C)(ii), I&N Act [8 U.S.C. § 1182(a)(6)(C)(ii)] - False claim of United Stated citizenship (withdrawn)

Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document (sustained)

Lodged: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of a material fact (not sustained)

Sec. 212(a)(9)(C)(i)(II), I&N Act [8 U.S.C. § 1182(a)(9)(C)(i)(II)] - Reentry without admission after being ordered removed (sustained)

APPLICATION: Motion to terminate

In a May 24, 2016, order, the United States Court of Appeals for the Ninth Circuit granted the Government's unopposed motion requesting that the case be remanded so that the Board can reconsider, under *Matter of Pena*, whether the respondent was properly charged as an arriving alien under section 212(a) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a). *See Matter of Pena*, 26 I&N Dec. 613 (BIA 2015). The respondent has filed a brief on remand. The Department of Homeland Security (DHS) has not responded. Upon further consideration, the appeal will be sustained, and record will be remanded for further proceedings.

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).

This case was previously before the Board on February 18, 2014.[1] The Board's decision, which affirmed the Immigration Judge's determination that the respondent was properly charged as an arriving alien, provides the facts and procedural history of these proceedings. Briefly, on May 13, 2010, the Immigration Judge issued an interim order sustaining the charges under sections 212(a)(7)(A)(i)(I) and 212(a)(9)(C)(i)(II), finding that the respondent was properly charged as an "arriving alien," but not sustaining the charge under section 212(a)(6)(C)(i) of the Act, based on the allegation that her visa application was procured by fraud or willful misrepresentation of material fact (May 13, 2010, I.J. at 8). The Immigration Judge determined that, although none of the exceptions at section 101(a)(13)(C) of the Act, 8 U.S.C. § 1101(a)(13)(C), applied to the respondent to charge her as an arriving alien, she did not have a "substantively lawful admission" for permanent residence and therefore was not entitled to be considered a lawful permanent resident upon reentry (May 13, 2010, I.J. at 4). The Immigration Judge therefore denied the respondent's motion to terminate proceedings. The Immigration Judge relied on *Matter of Koloamatangi*, 23 I&N Dec. 548, 551 (BIA 2003), for her determination. On October 15, 2010, the Immigration Judge issued a final decision, and ordered the respondent removed to Mexico. On appeal, the Board affirmed the Immigration Judge's determination, indicating that *Matter of Koloamatangi*, *supra*, held "that where permanent resident status has been wrongly conferred, i.e., as lacking substantive 'lawfulness,' it is deemed never to have been properly granted and is void ab initio."

In *Matter of Pena*, the Board held that section 1101(a)(13)(C) did not extend to returning lawful permanent residents whose original admissions had not been in compliance with the immigration laws and who did not fall within the six exceptions listed in section 1101(a)(13)(C). *Matter of Pena*, *supra*, at 620. In so holding, the Board relied on the language of the statute as well as earlier case law affirming that, given the nature of their due process rights, individuals who held lawful permanent resident status were entitled to be placed in deportation proceedings rather than exclusion proceedings unless they were effectuating an "entry." *Id.* at 616-18. The Board distinguished *Matter of Koloamatangi*, *supra*, on the basis that the earlier case arose "in the context of eligibility for relief;" the alien in *Matter of Koloamatangi* had not been treated as an arriving alien but instead had been placed in deportation proceedings; and the case had thus not examined the precise issue at hand. *Id.* at 618-19 (noting that the unlawfulness of Koloamatangi's permanent resident status was resolved after Koloamatangi was afforded the due process owed to him through removal proceedings and not prior to the commencement of removal proceedings). Thus, because the respondent is a lawful permanent resident who does not fall within one of the exceptions in section 101(a)(13)(C) of the Act, she should not have been regarded as seeking admission to the United States. Therefore, she cannot be charged under section 212(a) of the Act, notwithstanding any questions regarding the lawfulness of her status. *Matter of Pena*, *supra*, at 619.

We conclude that remand of the record is appropriate to allow the DHS to lodge any substituted charges the agency may wish to pursue, and the respondent should have the opportunity to apply for any relief from removal for which she may be eligible. In remanding,

[1] On September 28, 2015, the Board denied the respondent's untimely motion to reconsider.

we intimate no opinion regarding the ultimate outcome of the respondent's proceedings. Accordingly, the following order will be entered.

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

FOR THE BOARD