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

GRAY, SOLOMON Y
A055-673-913
STEWART DETENTION CENTER
146 CCA ROAD
P.O. BOX 248
LUMPKIN, GA 31815

DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815

Name: GRAY, SOLOMON Y

A 055-673-913

Date of this notice: 3/6/2020

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cassidy, William A.

Userteam: Docket

File: A055-673-913 – Lumpkin, GA

Date: MAR - 6 2020

In re: Solomon Y. GRAY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Termination

The respondent, a native and citizen of Liberia, appeals from the Immigration Judge's November 5, 2019, decision ordering his removal. We have accepted and considered the respondent's late-filed brief. The respondent contests the Immigration Judge's determination that he is removable and he argues that the Immigration Judge erred in denying his motion to terminate proceedings. The respondent's appeal will be sustained in part, dismissed in part, and the respondent will be ordered removed to Liberia as provided for in the Immigration Judge's decision.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States as a lawful permanent resident on January 19, 2004 (IJ at 1; Ex. 1; Tr. at 6). The record reflects that the respondent was convicted of conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 371 & 1344 on April 6, 2009. The judgment of conviction and count one of the indictment state that this offense occurred on or about September 2007.

The respondent is charged in the Notice to Appear with removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(i), on the basis that he was convicted of a crime involving moral turpitude committed within 5 years of his admission for which a sentence of 1 year or longer may be imposed. The respondent was also charged with removability under section 237(a)(2)(A)(iii) of the Act based on the allegation that his offense constitutes an aggravated felony under sections 101(a)(43)(M) and (U) of the Act, 8 U.S.C. 1101(a)(43)(M) and (U).

We acknowledge the respondent's argument that he was innocent of the conspiracy to commit bank fraud offense for which he was convicted. However, it is well-established that neither the Immigration Judge nor this Board may look behind the fact of conviction to re-litigate questions of guilt or innocence. *See Matter of Roberts*, 20 I&N Dec. 294, 301 (BIA 1991).

We will sustain the respondent's appeal to the extent that he contests the Immigration Judge's determination that he is removable for having been convicted of an aggravated felony (IJ at 2). The Immigration Judge concluded that the respondent's bank fraud offense does *not* constitute an

aggravated felony offense as defined in section 101(a)(43)(M) of the Act (IJ at 2). That is because the offense defined at section 101(a)(43)(M) of the Act requires a loss to the victim in excess of $10,000 and the Immigration Judge determined that the loss to the victim in the respondent's offense did not exceed $2,000 (IJ at 2). The Immigration Judge concluded that the respondent's offense *does* constitute an aggravated felony as defined in section 101(a)(43)(U) of the Act (IJ at 2), but we will sustain the respondent's appeal of that determination. An aggravated felony under section 101(a)(43)(U) of the Act refers to an attempt or conspiracy to commit another aggravated felony that is defined in section 101(a)(43) of the Act. In this case, we do not discern a basis for the conclusion that the respondent was convicted of an attempt or conspiracy to commit another aggravated felony given that the accompanying section 101(a)(43)(M) charge has not been sustained and the DHS has not alleged any other basis for the section 101(a)(43)(U) allegation. Accordingly, we will sustain the respondent's appeal of the determination that he is removable for having been convicted of an aggravated felony.

We will dismiss the respondent's appeal as it pertains to the charge that he is removable under section 237(a)(2)(A)(i) of the Act for having been convicted of a crime involving moral turpitude that was committed within 5 years of his admission for which a sentence of 1 year or longer may be imposed. The respondent has not meaningfully identified any error in the Immigration Judge's determination that conspiracy to commit bank fraud constitutes a crime involving moral turpitude. Further, conspiracy to commit such an offense is punishable by a sentence of 1 year or longer. *See* 18 U.S.C. §§ 371 & 1344. We understand the argument in the respondent's Notice of Appeal as challenging the determination that his offense satisfies the "within 5 years of admission" phrase contained in the charge of removability. This was the argument that the respondent raised during proceedings before the Immigration Judge (IJ at 2-3; Tr. at 25-26; Respondent's Motion to Terminate at 3-4). However, the plain language of the statute addresses a period that runs from the date of the alien's admission through the date of *commission* of a criminal offense, not the date of a subsequent conviction (IJ at 3). *See Matter of Alyazji*, 25 I&N Dec. 397, 408 (BIA 2011) (stating that "the date of the commission of [the] crime" is used in calculating the period since an alien's admission). The record of conviction reflects that the respondent's offense was committed on or about September 2007, well within the 5-year period following his 2004 admission.

Because the respondent committed his offense within 5 years of his admission, he cannot satisfy the continuous residence requirement for cancellation of removal. Pursuant to section 240A(d)(1) of the Act, the respondent's period of continuous residence was deemed to end when he committed the offense that rendered him removable. The respondent therefore cannot demonstrate 7 years of continuous residence as required under section 240A(a)(2) of the Act, 8 U.S.C. § 1229b(a)(2), for cancellation of removal for certain permanent residents.

On appeal, the respondent asserts that he may be eligible for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h). However, such a waiver is only available to arriving aliens or in conjunction with an accompanying application for adjustment of status. *See Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168 (11th Cir. 2012); *Matter of Rivas*, 26 I&N Dec. 130 (BIA 2013). The respondent is not an arriving alien, nor has he submitted any evidence that he has applied for adjustment of status. We are not otherwise persuaded that the respondent has demonstrated eligibility for any forms of relief from removal.

For the aforementioned reasons, the following orders will be entered.

ORDER: The respondent's appeal is sustained as to the charge that he is removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony.

FURTHER ORDER: The respondent's appeal is dismissed with respect to the determination that he is removable under section 237(a)(2)(A)(i) of the Act as the result of his conviction for a crime involving moral turpitude.

FURTHER ORDER: The respondent is ordered removed to Liberia consistent with the Immigration Judge's decision.

FOR THE BOARD