U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: T[redacted]-L[redacted], A[redacted]

A [redacted]-793

Date of this notice: 5/2/2019

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:
Greer, Anne J.
Wendtland, Linda S.
Donovan, Teresa L.

Userteam: Docket

File: A[redacted]-793 – Harlingen, TX Date: MAY - 2 2019

In re: A[redacted] T[redacted]-L[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jose M. Martinez, Esquire

ON BEHALF OF DHS: Carolyn Abdenour
Assistant Chief Counsel

APPLICATION: Waiver under former section 212(c) of the Act

The respondent appeals from an Immigration Judge's October 26, 2017, decision finding him ineligible to apply for a waiver of removal under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded.

The respondent, a native and citizen of Mexico, has been a lawful permanent resident of the United States since 1977. On July 14, 1995, he was charged in an Oklahoma court with possessing marijuana with the intent to distribute, based on an offense committed on or about July 13, 1995 (Group Exh. 2, tab A). About 17 months later, on December 6, 1996, the respondent pled guilty to that offense, for which he was sentenced to a suspended 5-year prison term and ordered to pay about $4,500 in fines, fees and costs (Group Exh. 2, tab E). As a result of this conviction, the Immigration Judge found the respondent removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii) and (B)(i) (IJ at 2; Exh. 1). That finding of removability is undisputed on appeal, so the only issue now before us is whether the respondent is eligible to apply for a section 212(c) waiver.

Because the respondent is removable based on a conviction that resulted from a guilty plea, his eligibility for a section 212(c) waiver depends on the "date the plea agreement was agreed to by the parties." 8 C.F.R. § 1212.3(h); *see also Alvarez-Hernandez v. Acosta*, 401 F.3d 327, 334 (5th Cir. 2005); *Matter of Abdelghany*, 26 I&N Dec. 254, 269 n.15 (BIA 2014). If the respondent's plea agreement was agreed to by the parties before April 24, 1996, he is eligible to apply for a waiver under the version of section 212(c) that was in effect at that time. If, however, his plea agreement was agreed to on or after April 24, 1996, then the Immigration Judge properly found him ineligible for a waiver, because by that date section 212(c) had been amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to disqualify "any alien who is deportable [under] section 237(a)(2)(A)(iii) [or] (B)...." The respondent, as the applicant for relief, bears the burden of proving when his plea agreement was agreed to. *Matter of Abdelghany*, 26 I&N Dec. at 269 n.15; *cf. also* 8 C.F.R. § 1003.44(b).

During the proceedings below, the respondent claimed that his conviction resulted from a plea agreement that was negotiated with prosecutors between November 1995 and March 1996—i.e.,

before AEDPA's effective date. The respondent acknowledged that the plea itself was not entered with the court until December 1996, but he explained that this delay was due to the fact that it took him months to raise the agreed-upon sum of $4,500 to pay his fines, fees and costs. The record does not contain a written plea agreement, but the respondent's version of events is substantiated by an affidavit, attested to by the criminal defense attorney who negotiated his plea agreement (Exh. 6).

The Immigration Judge found that the "letter" from the respondent's former defense attorney was insufficient to establish his eligibility for section 212(c) relief because it was not "prepared by the Court," and also because "[t]he court documents submitted clearly indicate that the plea agreement was entered into on December 6, 1996" (IJ at 3 (citing Group Exh. 2, tab E)). We respectfully conclude that these findings are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

The document submitted by the respondent's former defense attorney is a sworn and notarized affidavit. As such, it is more probative than an unsworn letter and may, if uncontradicted, carry the respondent's burden of proof under 8 C.F.R. § 1240.8(d). The Immigration Judge discounted the affidavit because it was not "prepared by the Court," but evidence of a plea agreement need not come from a court to be admissible and probative. Indeed, plea agreements are not usually prepared by courts. We agree that it would have been helpful for the respondent to submit a copy of his signed and dated plea agreement, but the absence of a signed plea agreement that was negotiated by the prosecutor and defense counsel is not fatal to his eligibility for section 212(c) relief if other probative evidence of the agreement's date exists.

Moreover, the "court documents" in the record do not "clearly indicate" that the respondent's plea agreement was "entered into on December 6, 1996." On the contrary, those documents reveal nothing specific about the course of the respondent's plea negotiations (although the long span of time separating the filing of his charge and the entry of his plea is consistent with his version of events). It is true that the court's "Judgment and Sentence" says that the respondent "entered a plea of guilty" on December 6, 1996 (Group Exh. 2, tab E), but as we have noted the date a plea is "entered" with the court is not necessarily the same as the date when the plea agreement was "agreed to by the parties" within the meaning of 8 C.F.R. § 1212.3(h).

In light of the foregoing, we will sustain the respondent's appeal and remand the record for further consideration of his application for section 212(c) relief. We express no present opinion as to the merits of that application.

ORDER: The appeal is sustained and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD