U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: RAMIREZ-CRUZ, MARGARITO R... **A 078-276-475**

Date of this notice: 5/18/2018

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:
Adkins-Blanch, Charles K.
Grant, Edward R.
Mann, Ana

Userteam: Docket

File: A078 276 475 – Harlingen, TX

Date: MAY 18 2018

In re: Margarito Raul RAMIREZ-CRUZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: William M. Sharma-Crawford, Esquire

ON BEHALF OF DHS: Christian Trann
Assistant Chief Counsel

APPLICATION: Reopening

The respondent has appealed from the Immigration Judge's May 3, 2017, decision denying his motion to reopen proceedings. The respondent requested reopening to apply for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a). Pursuant to the Board's request, the parties submitted supplemental briefing on the issue of whether U.S. Citizenship and Immigration Services (USCIS) has jurisdiction to adjudicate the respondent's application for adjustment of status. After consideration of the record and the parties' arguments, the appeal will be sustained and the record will be remanded for further proceedings.

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 ordered removed in absentia in 2000, but he was subsequently granted Temporary Protected Status (TPS) after El Salvador was designated for such protection. The respondent was later paroled into the United States after traveling abroad. *See* Motion to Reopen, Tab A; section 244(f)(1)-(3) of the Act, 8 U.S.C. § 1254a(f)(1)-(3); 8 C.F.R. § 244.10(f)(2)(iii). An immediate relative visa petition filed on the respondent's behalf by his spouse was approved by USCIS in 2015 (Motion to Reopen, Tab B). However, the respondent's accompanying application for adjustment of status was administratively closed as USCIS concluded that it did not have jurisdiction to adjudicate the application because the respondent remains the subject of an unexecuted removal order. *See* Motion to Reopen, Tab C; 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1). The respondent thereafter filed his Motion to Reopen, requesting that proceedings be reopened and terminated so that he might seek adjustment of status before USCIS.

As a threshold matter, we agree with the Department of Homeland Security's conclusion that the Immigration Judge retains jurisdiction to adjudicate the respondent's application for adjustment of status. *See* DHS Supplemental Brief at 10-11. As the Department of Homeland Security notes, where an alien who has been granted TPS travels abroad pursuant to a grant of advance parole, upon the alien's return to the United States he or she "shall be inspected and admitted in the same immigration status the alien had at the time of departure."

Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 304(c)(1)(A), PL 102-232, December 12, 1991 (codified as amended at section 244 of the Act, Note 3). Thus, in the respondent's case, he remains in removal proceedings that have not been terminated or concluded with the respondent's removal or departure under an order of removal. While the grant of Temporary Protected Status stays that removal and affords the respondent a lawful immigration status during the period of El Salvador's TPS designation, the respondent remains subject to removal upon the termination of the designation of El Salvador as a country for TPS. *See* sections 244(a)(1)(A), 244(f)(1), and 244(b)(3)(B) of the Act. Because removal proceedings have not concluded or been terminated, jurisdiction to adjudicate the respondent's application for adjustment of status remains with the Immigration Judge. *See* 8 C.F.R. 245.2(a)(1), 1245.2(a)(1).

We do not find support for the respondent's argument that he is properly regarded as an "arriving alien" as that term is defined in the Act because he has been paroled into the United States. *See* Respondent's Supplemental Br. at 3-7. The Notice to Appear charges the respondent with removability as an alien who is present in the United States without having been admitted or paroled, rather than as an arriving alien seeking admission. *See* Ex. 1. The respondent's citation to *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), is inapposite as that case addresses arriving aliens who have departed and returned to the United States pursuant to a grant of advance parole. Under the holding in that case and current regulations, such persons preserve their "arriving alien" status when they reenter pursuant to a grant of advance parole. *See* 8 C.F.R. §§ 1.1(q), 1001.1(q). As discussed above, the respondent was not charged as as an "arriving alien" prior to his departure and thus could not return to such status. The respondent cites several cases, including *Scheerer v. U.S. Attorney General*, 445 F.3d 1311 (11th Cir.2006), that invalidated a prior version of the regulation contained at 8 C.F.R. 1245.1(c)(8) (effective prior to May 11, 2006). *See* Respondent's Br. at 6. However, USCIS did not cite this regulation as the basis for concluding that it lacked jurisdiction to review the respondent's application for adjustment of status and we do not find support in the holding in *Scheerer* or related cases for the respondent's position.

While we disagree with the respondent's jurisdictional argument, we are persuaded that the respondent has demonstrated that sua sponte reopening is warranted in this case. We note that the respondent has remained in lawful immigration status since acquiring TPS and that he is the beneficiary of an immediate relative visa petition and is prima facie eligible for adjustment of status if proceedings are reopened. After consideration of the circumstances presented, including both positive and negative discretionary factors, we conclude that the exercise of our authority to reopen proceedings sua sponte is appropriate in this case. Accordingly, the following order will be entered.

ORDER: The respondent's appeal is sustained and the record is remanded to the Immigration Court for further proceedings and the entry of a new decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2009 WEST JEFFERSON AVENUE, SUITE 300
HARLINGEN, TEXAS 78550

IN THE MATTER OF:	)	
	)	
MARGARITO RAUL RAMIREZ-CRUZ	)	CASE NO. **A078 276 475**
	)	
RESPONDENT	)	
IN REMOVAL PROCEEDINGS	)	

MEMORANDUM AND ORDER

On June 10, 2016, Respondent, through his counsel of record Michael Sharma-Crawford, filed a motion to reopen this removal proceeding. The removal order was issued in this case on September 18, 2000 based upon a removal hearing conducted in absentia on that same date pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act (the Act). The Department of Homeland Security (DHS) has not filed a response to the motion to reopen.

In the motion to reopen, Respondent is only requesting that the Court reopen the removal proceeding *sua sponte* in order to allow him to apply for adjustment of status under section 245 of the Act. The Court concludes that Respondent's motion to reopen to apply for adjustment of status is untimely because it was not filed within 90 days of the date of entry of the final administrative order of removal. Section 240(c)(7)(C)(i) of the Act; 8 C.F.R. 1003.23(b)(1). The Court also concludes that Respondent has not demonstrated that his case involves an exceptional situation which warrants reopening on the Court's own motion. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999); *Matter of J-J-*, 21 I&N Dec. 976, 984-85 (BIA 1997).

WHEREFORE, it is hereby Ordered that Respondent's motion to reopen be denied.

DATED THIS 3rd day of May, 2017.

Howard Achtsam

HOWARD ACHTSAM
IMMIGRATION JUDGE

HEA/bjr