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

Isbister, Peter M
Southern Poverty Law Center
150 East Ponce de Leon Avenue
Suite 340
Decatur, GA 30030

DHS/ICE Office of Chief Counsel - JNA
PO Box 410
Trout, LA 71371

Name: M[redacted], V[redacted] J[redacted]

A [redacted]-639

Date of this notice: 8/17/2020

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:
Gemoets, Marcos
Liebowitz, Ellen C
Creppy, Michael J.

Userteam: Docket

File: A[redacted]-639 – Jena, LA Date: AUG 17 2020

In re: V[redacted] J[redacted] M[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Peter M. Isbister, Esquire

ON BEHALF OF DHS: Theresa L. Cummings
Assistant Chief Counsel

APPLICATION: Adjustment of status; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Liberia, has appealed the Immigration Judge's decision dated July 1, 2019, which denied his applications for adjustment of status under section 209(a) of the Immigration and Nationality Act, 8 U.S.C. § 1159(a), and concomitant waiver under section 209(c) of the Act, 8 U.S.C. § 1159(c), as well as his applications for withholding of removal under section 241(b)(3)(A) of the Act, 8 U.S.C. §1231(b)(3)(A), and protection under the Convention Against Torture under 8 C.F.R. §§ 1208.16(c)-1208.18.[1] The Department of Homeland Security (DHS) did not file a response to the appeal.[2] The record will be remanded for further proceedings.

We review for clear error the Immigration Judge's findings of fact, including the determination of credibility. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment or discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was admitted to the United States on January 26, 2000, as a refugee. On June 23, 2011, the respondent was convicted for the offense of indecent exposure, in violation of Minn. Stat. § 617.23.1(3). On September 12, 2016, the respondent was convicted for the offense of conspiracy to commit bank fraud, in violation of 18 U.S.C. §§ 1344, 1349, in which the revenue loss to the victim exceeded $10,000, and sentenced to 56 months in prison (Tr. at 151; Exh. 2:D).[3]

[1] The respondent did not appeal the denial of his asylum application (*see* Respondent's Br. at 10).

[2] The DHS has filed a motion to expedite.

[3] It is asserted on appeal that the respondent "very likely has post-conviction relief available to him" (Respondent's Br. at 4, fn. 4). There is, however, no evidence or indication that post-conviction relief has been sought or has been granted. The respondent's conviction remains valid

The respondent was charged with, and found removable under, sections 237(a)(2)(A)(iii) of the Act (as an alien convicted of aggravated felonies as defined in sections 101(a)(43)(M) and101(a)(43)(U) of the Act, after admission), and 237(a)(2)(A)(ii) of the Act (as an alien convicted of two or more crimes involving moral turpitude). The respondent's removability is not at issue on appeal.[4]

Before the Immigration Judge, the respondent sought to apply to adjust his status to that of a lawful permanent resident under section 209(a) of the Act, with a waiver of inadmissibility under section 209(c) of the Act. The Immigration Judge denied these applications for lack of initial jurisdiction because the respondent "is an unadjusted refugee," in that he did not first file these applications with the U.S. Citizenship and Immigration Services (USCIS), as required by 8 C.F.R. § 1209.1 (IJ at 6). The respondent on appeal argues that the Immigration Judge erred in so finding, noting that 8 C.F.R. § 1240.11, as well as Board precedent, "made clear that the Immigration Court has jurisdiction over applications for adjustment of status by [those] admitted as refugees," and that "such jurisdiction is not secondary to any 'initial jurisdiction' by legacy INS or USCIS" (Respondent's Br. at 3-4).

We affirm the Immigration Judge's determination that he was without jurisdiction to consider, in the first instance, the respondent's application for adjustment of status and waiver of inadmissibility under sections 209(a) and 209(c), respectively (IJ at 6; Tr. at 165). As correctly found by the Immigration Judge, the regulations in 8 C.F.R. §§ 209.1 and 1209.1 "shall provide the *sole and exclusive procedure for adjustment of status by a refugee*," like the respondent, who was "admitted under section 207 of the Act and whose application is based on his . . . refugee status" (IJ at 6). 8 C.F.R. §§ 209.1, 1209.1 (emphasis added); *see Matter of Smriko*, 23 I&N Dec. 836, 839 (BIA 2005) (recognizing that 8 C.F.R. § 209.1 provides the sole regulation applicable to refugees attempting to adjust status); *Matter of Jean*, 23 I&N Dec. 373, 381 (A.G. 2002) (same); *Matter of H-N-*, 22 I&N Dec. 1039, 1042 (BIA 1999) (same); *Matter of Garcia-Alzugaray*, 19 I&N Dec. 407, 410 (BIA 1986) (same). Thus, the respondent's reliance on the Board's decision in *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004), which addressed the regulations for adjustment of status by an asylee admitted under section 208 of the Act (as opposed to a refugee admitted under section 207), in 8 C.F.R. §§ 209.2, 1209.2, is unavailing as it is inapplicable in his case (Respondent's Br. at 4). *See Matter of K-A-*, 23 I&N Dec. at 663 (distinguishing two separate regulations for adjusting status under section 209 of the Act: under 8 C.F.R. § 1209.1, which applies to aliens who were admitted to the United States as refugees pursuant to section 207 of the Act; and under 8 C.F.R. § 1209.2, which applies to aliens who were granted asylum pursuant to section 208 of the Act).

---

and final for purposes of his immigration proceedings, unless and until the conviction is overturned. *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 327 (BIA 1996).

[4] The record shows that the Immigration Judge found the respondent mentally competent for purposes of his removal proceedings (Tr. at 49-50; 56-57). The respondent subsequently proceeded with his merits hearing represented by counsel, and the same counsel continues to represent him on appeal (Tr. at 88-241). The respondent's mental competency is also not at issue on appeal.

According to the pertinent regulations, an alien who is classified as a refugee and whose adjustment of status application is based on his refugee status "is required to apply to USCIS one year after entry in order for USCIS to determine his . . . admissibility under section 212 of the Act." 8 C.F.R. §§ 209.1(a), 1209.1(a). The regulations provide that USCIS will determine, "on a case-by-case basis, whether an interview by an immigration officer is necessary to determine" the alien's admissibility for permanent resident status. 8 C.F.R. §§ 209.1(d), 1209.1(d). An applicant who is inadmissible may, under section 209(c) of the Act, have the grounds of inadmissibility waived by USCIS (except for certain grounds). 8 C.F.R. § 209.1(f). Finally, the regulations state that if USCIS denies the application for adjustment of status, the applicant will be notified of his or her "*right to renew* the request for permanent residence in removal proceedings under section 240 of the Act." 8 C.F.R. §§ 209.1(e). 1209.1(e) (emphasis added).

We compare the procedures for asylee-applicants for adjustment of status under section 208 at issue in *Matter of K-A-*, which provides that if an alien has been placed in removal proceedings, "the [adjustment of status] application can be filed and considered only in proceedings under section 240 of the Act." 8 C.F.R. §§ 209.2(c), 1209.2(c). In *Matter of K-A-*, we found that this language can only be interpreted to mean that "Immigration Judges possess original and exclusive jurisdiction to adjudicate applications for adjustment of status filed by aliens granted asylum under section 208 of the Act who . . . have been placed in removal proceedings." *Matter of K-A-*, 23 I&N Dec. at 663. In contrast, the procedures delineated in 8 C.F.R. §§ 209.1 and 1209.1 pertaining to refugee-applicants do not contain the same or similar provision that we found in *Matter of K-A-* to 'unequivocally' confer initial jurisdiction to the Immigration Judge in the asylee-applicant context. *Cf.* 8 C.F.R. §§ 209.1(b), 1209.1(b) *with* 8 C.F.R. §§ 209.2(c), 1209.2(c).

Requiring the refugee-applicants to first file their applications to adjust status with the USCIS is consistent with the statutory requirement that a refugee "shall," after being physically present in the United States for at least a year, "return or be returned to the custody of the [DHS] for inspection and examination for admission to the United States as an immigrant." Section 209(a)(1) of the Act; *see* Adjustment of Status of Refugees and Asylees; Processing Under Direct Mail Program, 63 Fed. Reg. 30105-01 (June 3, 1998) (requiring refugees seeking permanent residence to submit their application with the USCIS constructively places them under its custodial control). We note that there is no comparable statutory requirement for asylee-applicants for adjustment of status, thus permitting the asylee-applicant to apply to adjust his or her status in the first instance in removal proceedings. *Cf.* section 209(a)(1) of the Act *with* section 209(b) of the Act.

The plain reading of the regulations in 8 C.F.R. §§ 209.1 and 1209.1, which solely and exclusively govern a refugee-applicant's adjustment of status application under section 209(a), makes clear that such an application must first be filed with the USCIS, and it is only after the USCIS denies such an application can the refugee-applicant pursue its renewal in removal proceedings. 8 C.F.R. §§ 209.1(a)-(b),(e), 1209.1(a)-(b), (e). *See Matter of Jean*, 23 I&N Dec. at 389, fn. 11 (noting that in the "governing regulatory scheme," the refugee-applicant initially submitted application for adjustment of status directly to the INS, and then after receiving an

adverse decision, renewed claim in removal proceedings before an Immigration Judge).[5] It follows that the initial jurisdiction for the concomitant waiver of inadmissibility under section 209(c) of the Act, which is necessary to establish admissibility and eligibility for adjustment of status, also lies with the USCIS and is subject to renewal in removal proceedings following an adverse decision by the USCIS. *See Matter of H-N-*, 22 I&N Dec. at 1044-45 (holding that "the Immigration Judges and the Board have jurisdiction to adjudicate a refugee's request for a waiver under section 209(c) *following the initial denial of such a waiver by the* [USCIS]" (emphasis added)).

There is no dispute that the respondent did not first file his applications for adjustment of status and waiver of inadmissibility pursuant to section 209(a) and 209(c) of the Act with the USCIS, and, thus, the USCIS has not had the occasion to adjudicate these applications such that would permit its renewal before the Immigration Judge as provided in the regulations (IJ at 6; Tr. at 164; Respondent's Br. at 3-4). Accordingly, the Immigration Judge properly determined that he did not yet have jurisdiction to consider the respondent's application for adjustment of status under section 209(a) of the Act, and waiver of inadmissibility under section 209(c) of the Act, at the time of the respondent's hearing.

The record will be remanded. The transcript shows that during the proceedings, the determination as to whether the Immigration Judge had initial jurisdiction over the respondent's applications for adjustment of status and waiver of inadmissibility was at the forefront but in flux, changing from hearing to hearing (*cf., e.g.,* Tr. at 82, 85, 89-93, 106, 108 *with* Tr. at 112-13, 115-18 *with* Tr. at 160-61 *with* Tr. at 164-66). Consequently, there is a lack of clarity in the record regarding the parties' position as to the appropriate procedural course of action under these circumstances, where a refugee failed to file to adjust his status with USCIS, or where the USCIS has not inspected and examined the refugee for admission as an immigrant as mandated by section 209(a) of the Act, prior to being placed in removal proceedings (*see, e.g.,* Tr. at 90-91, 117, 166). The respondent's appeal brief is silent on this issue, and DHS has not presented any appellate arguments on the merits of this case, including the adjustment of status issue. On remand, and informed by the arguments from both parties, the Immigration Judge should determine whether a continuance of the proceedings or other action is warranted in this case to permit the USCIS to

[5] The Board cases cited by the respondent on appeal are not inconsistent with these regulations. *Matter of D-K-*, 25 I&N Dec. 761 (BIA 2012), and *Matter of H-N-*, involved refugee-applicants for adjustment of status who first filed their applications with the DHS or the former INS and had their applications denied. *See Matter of D-K-*, 25 I&N Dec. at 762 (noting DHS's denial of application for adjustment of status because respondent failed to submit documentation regarding criminal history); *Matter of H-N-*, 22 I&N Dec. at 1039-40 (noting respondent placed in removal proceedings after Service denied respondent's application for waiver of inadmissibility under section 209(c) which accompanied pending application for adjustment of status under section 209). Recently, the Board issued *Matter of C-A-S-D-*, 27 I&N Dec. 692 (BIA 2019), which provided an analytical framework for adjudicating a section 209(c) waiver request by a refugee-applicant who is found to be violent and dangerous. The Immigration Judge's jurisdiction, however, was not at issue in this case.

enter a decision on the respondent's application for adjustment of status and waiver of inadmissibility. The Immigration Judge may also consider any and all matters which he deems appropriate in the exercise of his administrative discretion or which are brought to his attention in compliance with the appropriate regulations. *Matter of Patel*, 16 I&N Dec. 600 (BIA 1978). The following order will be entered.[6]

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

Ellen Rubowitz
FOR THE BOARD

Appellate Immigration Judge Michael J. Creepy respectfully dissents in part.

I agree with all parts of the majority's decision, except for the remanding of this case to the Immigration Judge. As the Immigration Judge correctly found that he was without jurisdiction to consider, in the first instance, the respondent's application for adjustment of status and wavier of inadmissibility under section 209(a) and 209(c) of the Act, I would dismiss the appeal.

[6] In view of this disposition, we will not at this time address the respondent's applications for withholding of removal under the Act or protection under the Convention Against Torture.