



U.S. Department of Justice

Executive Office for Immigration Review

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Name: THOMAS, MICHAEL VERNON

A 035-549-938

Date of this notice: 12/23/2019

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:
Hunsucker, Keith
Creppy, Michael J.
Noferi, Mark

Humadyl
Userteam: Docket

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RC

Falls Church, Virginia 22041

File: A035-549-938 – Atlanta, GA

Date:

DEC 23 2019

In re: Michael Vernon THOMAS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Fred Rawcliffe, Esquire

ON BEHALF OF DHS: Sarah L. Martin
Associate Legal Advisor

APPLICATION: Cancellation of removal; remand

This case was last before the Board on August 7, 2018, when we dismissed the respondent's appeal from an Immigration Judge's decision finding him removable under sections 237(a)(2)(A)(iii) and 237(a)(2)(E)(i) of the Immigration and Nationality Act, ineligible for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), and ordering him removed from the United States to Trinidad and Tobago. The Attorney General subsequently directed the referral of this case for his review. *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 556 (A.G. 2019). On October 25, 2019, the Attorney General vacated our prior decision and remanded the case to the Board to reassess whether the state court order clarifying the respondent's criminal sentence for family violence battery, *see* Ga. Code Ann. § 16-5-23.1(f), should be effective for purposes of federal immigration law. *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019).

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii).

The issue in this case is whether the respondent's November 2001 family violence battery conviction constitutes an aggravated felony that renders him removable under section 237(a)(2)(A)(iii) of the Act and statutorily ineligible for cancellation of removal. Sections 101(a)(43)(F) and 240A(a)(3) of the Act, 8 U.S.C. §§ 1101(a)(43)(F) and 1229b(a)(3). The term "aggravated felony" includes "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment is at least one year." Section 101(a)(43)(F) of the Act.

The respondent had been sentenced to a term of imprisonment of 12 months for his November 2001 family violence battery conviction. The respondent was placed in these removal proceedings in June 2016, and on September 15, 2016, the respondent, through counsel, admitted the factual allegations contained in the Notice to Appear and conceded that he is removable as charged under sections 237(a)(2)(A)(iii) and 237(a)(2)(E)(i) of the Act (Tr. at 14). The Immigration Judge found

that the respondent's removability on both grounds had been established by clear and convincing evidence and ordered him removed from the United States. The respondent appealed that decision.

While the respondent's appeal was pending, he filed a motion to reopen based on a January 5, 2017, Georgia state court order stating that his sentence was "clarified" to reflect that he was sentenced to a cumulative term of 11 months and 28 days of probation. The respondent asserted that the order renders ineffective the removal charge under section 237(a)(2)(A)(iii) of the Act, although he acknowledged his continued removability under section 237(a)(2)(E)(i) of the Act. In a decision dated February 9, 2017, we remanded the record to the Immigration Court to consider the effect of the court's order on the respondent's eligibility for relief from removal.

In his June 28, 2017, decision, the Immigration Judge considered the respondent's argument that he was no longer convicted of an aggravated felony because he was no longer sentenced to a term of imprisonment of at least 1 year but declined to give any effect to the clarifying order (IJ at 3-4). On August 7, 2018, we affirmed the Immigration Judge's decision. We relied on the test described in *Matter of Estrada*, 26 I&N Dec. 749 (BIA 2016) (governing the effect of state-court orders that clarify a criminal alien's sentence), and considered that the respondent's original sentencing order was clear, that a significant period of time (approximately 15 years) had passed between the original sentence and the clarification and that the state-court judge issuing the 2017 order differed from the original sentencing judge.

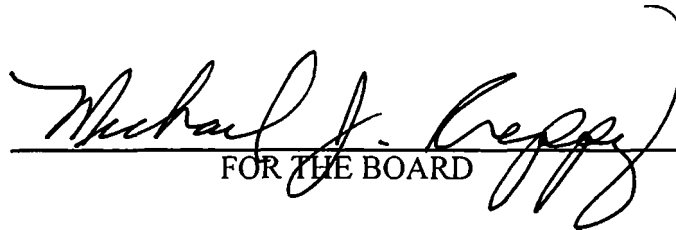
The Attorney General vacated our decision. The Attorney General held that, for reasons similar to those explained in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2006), *rev'd on other grounds*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2003), state-court orders that modify, clarify, or otherwise alter a criminal alien's sentence will be given effect for immigration purposes only when the orders are based on a procedural or substantive defect in the underlying criminal proceeding. *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. at 674. These orders will have no effect for immigration purposes when based on reasons unrelated to the merits of the underlying criminal proceeding, such as rehabilitation or immigration hardship. *Id.* The Attorney General overruled *Matter of Estrada*, 26 I&N Dec. at 749.¹ The Attorney General vacated our decision and remanded the case to the Board "to assess the state-court [alteration of the respondent's criminal sentence] in light of the *Pickering* test." *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. at 690.

Because the Attorney General announced a new test to determine whether a state court "clarification" of a criminal sentence will be given effect for immigration purposes and additional factfinding may be required, we will remand this case to the Immigration Court for further proceedings. The respondent's removability under section 237(a)(2)(E)(i) has not been contested. Thus, a determination whether the respondent's removability under section 237(a)(2)(A)(iii) of the Act has been established by clear and convincing evidence is unnecessary. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that "courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach");

¹ The Attorney General also overruled our decisions in *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), and *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

Matter of Gomez-Beltran, 26 I&N Dec. 765, 770 n.7 (BIA 2016) (same). However, the Immigration Judge should determine whether the respondent established that his sentence was clarified based on a substantive or procedural defect in the underlying criminal proceeding for purposes of establishing his eligibility for lawful permanent resident cancellation of removal. Section 240A(a)(3) of the Act. The respondent bears the burden of establishing that his sentence was clarified based on a substantive or procedural defect in the underlying criminal proceeding and not because of post-conviction events. Section 240(c)(4)(A)(i) of the Act, 8 U.S.C. § 1229a(c)(4)(A)(i); see *Ali v. U.S. Atty. Gen.*, 443 F.3d 804, 813 (11th Cir. 2006); *Matter of Pickering*, 23 I&N Dec. at 624. Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD