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

Pierre, Andre Dominique
Law Office of Andre Pierre P.A.
550 NE 124th Street
Miami, FL 33161

DHS/ICE Office of Chief Counsel - MIA
333 South Miami Ave., Suite 200
Miami, FL 33130

Name: DEROZIN, MARIE JEANNETTE **A 039-047-952**

Date of this notice: 11/4/2019

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:
Guendelsberger, John
Kendall Clark, Molly
Grant, Edward R.

Userteam: Docket

File: A039-047-952 – Miami, FL

Date: NOV - 4 2019

In re: Marie Jeannette DEROZIN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Andre D. Pierre, Esquire

APPLICATION: Cancellation of removal under section 240A(a) of the Act; waiver of inadmissibility under section 212(h) of the Act

The respondent is a native and citizen of Haiti. She appeals from the October 31, 2017, decision of an Immigration Judge, denying a request for cancellation of removal for certain permanent residents under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and a request for a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).[1] The respondent filed a brief concerning the decision of the Immigration Judge, while the Department of Homeland Security (DHS) has not responded to the appeal. The appeal will be sustained, and the record will be remanded to the Immigration Court.

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 admitted to being subject to removal under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), based on being convicted of a crime involving moral turpitude (IJ at 3; Tr. at 7, 18; Exh. 1).

As the respondent is subject to removal from the United States, it is her burden to establish eligibility for relief from removal. *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d); IJ at 6-7.

On April 24, 2002, the respondent was convicted in the United States District Court for the Northern District of Georgia, Atlanta Division, of bank fraud, in violation of 18 U.S.C. § 1344. The "Judgment in a Criminal Case" shows that the respondent pled guilty to Count 1 of a 3-count indictment. She was sentenced to 3 years' probation, and was ordered to make restitution in the amount of $1,751.10 (IJ at 3-4; Exhs. 1, 10, pp. 13-17).

[1] The appeal was dismissed as untimely on March 20, 2018, but was reinstated by the Board in an August 1, 2018, interim order.

The Immigration Judge concluded that the respondent is statutorily ineligible for cancellation of removal pursuant to section 240A(a)(3) of the Act (barring an alien convicted of an aggravated felony from applying for cancellation of removal) (IJ at 3-10). *See* section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i) (the term "aggravated felony" includes "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000").

The Immigration Judge similarly determined that the respondent's conviction of an aggravated felony barred an application for a waiver under section 212(h) of the Act (IJ at 8-9).

The crime of bank fraud, in violation of 18 U.S.C. § 1344, categorically involves fraud or deceit under section 101(a)(43)(M)(i) of the Act, and the respondent does not argue otherwise. Rather, the respondent contends that the "loss to the victim" did not exceed $10,000.

In *Nijhawan v. Holder*, 557 U.S. 29, 35-36 (2009), the Supreme Court held that the $10,000 "loss to the victim" requirement under section 101(a)(43)(M)(i) of the Act is analyzed under a "circumstance-specific" approach which allows consideration of the facts and circumstances underlying the conviction. *See also Fajardo v. U.S. Atty. Gen.*, 659 F.3d 1303, 1310 n. 7 (11th Cir. 2011); *Matter of Medina-Jimenez*, 27 I&N Dec. 399, 402 n.2 (BIA 2018); *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408, 410-411 (BIA 2014); IJ at 5-6, 9. Under this "circumstance-specific" inquiry, the loss must be "tied to the specific counts covered by the conviction." *Nijhawan v. Holder*, 557 U.S. at 42 (internal citation omitted). *See* Respondent's Br. at 16, 18, 22.

The record contains a January 29, 2002, "Guilty Plea and Plea Agreement" (Exh. 10, pp. 18-21). The parties stipulated that "the loss resulting from the offense(s) of conviction *and all relevant conduct* is more than $10,000 but less than $30,000" (Exh. 10, pp. 18-19) (emphasis added). The plea agreement states no specific amount of restitution. Respondent's Br. at 11-12.

As the respondent argues, in a January 29, 2002, plea colloquy concerning her conviction for bank fraud, the Assistant United States Attorney stated that there was "no actual loss as to Count 1" of the indictment, and the restitution amount of $1,751.10 was tied to Count 2 of the indictment (Respondent's Br. at 9, 12-13, 17-18, 21-22; Exh. 20 at 22-36). The April 24, 2002, criminal judgment shows that Count 2 of the indictment was dismissed based on a motion filed by the government (Exh 10, p. 13).

In consideration of the totality of the circumstances, including the April 24, 2002, criminal judgment; the January 29, 2002, "Guilty Plea and Plea Agreement;" and the January 29, 2002, plea colloquy, we conclude that the respondent was not convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, as it has not been shown that the loss to the victim or victims of her crime exceeded $10,000 under the "circumstance-specific" approach. *Nijhawan v. Holder*, 557 U.S. at 42.

As the respondent's conviction does not qualify as an aggravated felony, she appears to be statutorily eligible for cancellation of removal under section 240A(a) of the Act, as well as a waiver under section 212(h) of the Act.

The respondent's appeal will, therefore, be sustained. The record will be remanded to the Immigration Court for further proceedings.

ORDER: The appeal is sustained.

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

FOR THE BOARD