U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: VALDIVIA-MURO , CARLOS IVAN **A 095-494-769**

Date of this notice: 9/12/2019

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

Userteam: Docket

File: A095-494-769 – Aurora, CO

Date: SEP 12 2019

In re: Carlos Ivan VALDIVIA-MURO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James Todd Bennett, Esquire

APPLICATION: Adjustment of status

The respondent is a native and citizen of Mexico who filed a timely Notice of Appeal from an Immigration Judge's March 18, 2019, decision. For the following reasons, the record will be remanded for further findings of fact.

On September 24, 2018, the Board dismissed the respondent's appeal with respect to cancellation of removal, asylum, withholding of removal, and protection under the Convention Against Torture. However, the Board remanded the record for further consideration of whether the respondent was statutorily eligible for adjustment of status.

On remand, a different Immigration Judge was assigned this proceeding and held that the respondent was not removable under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The Department of Homeland Security (DHS) did not appeal this issue.

In addition, the Immigration Judge determined that the respondent was inadmissible under section 212(a)(9)(C)(i) of the Act, and therefore statutorily ineligible for adjustment. The Immigration Judge granted the respondent the limited relief of voluntary departure. The respondent has again appealed. The DHS has not filed a response. The only issue on appeal is whether the respondent is inadmissible under section 212(a)(9)(C)(i) of the Act.

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).

In deciding that the respondent was inadmissible under section 212(a)(9)(C)(i) of the Act, the Immigration Judge relied on a Form I-213, which indicated that the respondent accepted a voluntary departure, and the respondent's testimony that he was deported and then returned illegally. The Immigration Judge found that it was irrelevant whether the respondent's departure was voluntary or involuntary, and denied the respondent's application for adjustment of status. *See* IJ at 2-4.

On appeal, as below, the respondent argues that the Form I-213 was not valid. The respondent identified a number of errors on the Form I-213. In addition, the respondent testified, under oath, that he did not accept a voluntary return (Tr. at 129), which is inconsistent with a statement on the Form I-213.

A Form I-213 is inherently trustworthy and admissible as evidence to prove alienage or deportability absent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress. *See Matter of Gomez*, 23 I&N Dec. 522, 524 (BIA 2002), *citing Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988).

Although the respondent specifically challenged the validity of the Form I-213 (Respondent's Br. at 4-5, March 4, 2019), the Immigration Judge did not make any specific findings of fact as to the respondent's testimony that some of the information contained therein, including material facts, was inaccurate. Therefore, a remand is necessary for further findings of fact as to the accuracy of the Form I-213.

On appeal, as below, the respondent contends that his departure was not lawful because he requested the opportunity to have a hearing before the Immigration Judge, but his request was ignored and he was returned to Mexico. The respondent argues that since his departure was not lawful, he did not depart within the meaning of the Act and so cannot be found inadmissible under section 212(a)(9)(C)(i) of the Act for illegal reentry after a departure.

There were no findings of fact as to whether the respondent's departure was lawful. The respondent had the right to a hearing, and if he did not waive his right, his due process rights may have been violated. *See U.S. v. Benitez-Villafuerte*, 186 F.3d 651, 656-57 (5th Cir. 1999).

Throughout his testimony, the respondent consistently maintained that his request for a hearing before the Immigration Judge was ignored, and he refused to sign the Form I-863 (Tr. at 82-85, 127-130, 148, 159-161; Exh. 19). This issue was raised throughout the January 30, 2018, hearing (Tr. at 82-84, 90-95, 102, 127130, 146-148, 159-161). A prior Immigration Judge noted it as a disputed, important issue (Tr. at 102, 147), but did not resolve it in his oral decision due to an alternative resolution. Since we have limited fact finding power, we will remand the record for further fact finding on whether the Form I-213 is accurate and whether the respondent's departure was lawful.

On remand, there may be a question about venue and choice of law. During the pendency of the prior appeal, the respondent was transferred from a California detention center to a Colorado detention center. After the first remand, the respondent's counsel requested that the respondent be transported back to California so that he could be physically present for the hearing. Under such circumstances, it would be clear that venue, as well as governing circuit court precedent, would be in the United States Court of Appeals for the Ninth Circuit. *See e.g., Lee v. Lynch*, 791 F.3d 1261 (10th Cir. 2015). However, the Immigration Judge denied the transfer request and the respondent's request to physically appear at the hearing because an individual hearing on the issues was not necessary (IJ Interim Dec., Feb. 14, 2019).

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further fact finding in accordance with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of

CARLOS IVAN VALDIVIA-MURO,

Respondent

Date: March 18, 2019

File Number: **A095 494 769**

In Remanded Removal Proceedings

Charge: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

Applications: Adjustment of Status under INA § 245(i).

On Behalf of the Respondent:
James Todd Bennett, Esq.
P.O. Box 742
El Cerrito, California 94530

On Behalf of DHS:
Assistant Chief Counsel
Office of the Chief Counsel
630 Sansome Street, 11th Floor
San Francisco, California 94111

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

On September 24, 2018, the Board of Immigration Appeals (Board) remanded the above-captioned case to the Court, to consider the narrow issue of whether the respondent is statutorily eligible for adjustment of status. *See* Carlos Ivan Valdivia-Muro, A095 494 769 (BIA Sept. 24, 2018). In its decision, the Board affirmed the previous Immigration Judge's decision denying cancellation of removal under INA § 240(a)(b)(1), asylum under INA § 208, withholding of removal under INA § 241(b)(3), and protection under the Convention Against Torture. *Id.* However, the Board interpreted the previous Immigration Judge's decision as finding that the respondent's conviction for possession of methamphetamine statutorily barred him from adjustment of status, and it remanded the decision to determine what effect, if any, the expungement of the respondent's conviction may have on his eligibility for adjustment of status.

Upon remand, the Court set filing deadlines and an individual merit hearing on the respondent's application for adjustment of status. Before the merit hearing, the respondent filed several motions, including a Motion to Change Venue and a Motion to Continue. On February 14, 2019, the Court issued an order vacating the individual merit hearing date and asking both parties to brief two outstanding issues on adjustment eligibility that had been addressed at the previous merit hearing, namely:

1) Is the respondent subject to the ground of inadmissibility under INA § 212(a)(9)(C)(i) and thus ineligible for adjustment of status?

2) Is the respondent still subject to the ground of inadmissibility under INA § 212(a)(2)(A)(i)(II) for admitting the essential elements of a controlled substance offense, despite his successful completion of the deferred entry of judgment program?

See I.J. Interim Order, dated Feb. 14, 2019.

On March 4, 2019, both parties submitted briefs on adjustment eligibility. The Court held a master hearing on March 15, 2019, and allowed both parties to make any additional arguments. After considering the parties' arguments in their briefs and at the hearing on March 15, 2019, the Court found that the respondent is ineligible for adjustment of status because he is inadmissible under INA § 212(a)(9)(C)(i). The Court indicated it would issue its final decision in writing.

II. ADJUSTMENT OF STATUS

Generally, an individual is eligible for adjustment of status if: (1) he makes an application for such adjustment; (2) he is eligible to receive an immigrant visa and *is admissible to the United States for permanent residence*; and (3) an immigrant visa is immediately available to her at the time her application is filed. INA § 245(a) (emphasis added). The applicant bears the burden of establishing that he is eligible for any requested benefit. INA § 240(c)(4)(A)(ii); 8 C.F.R. § 1240.8(d).

A. INA § 212(a)(9)(C)(i)

Based on evidence in the record and the respondent's previous testimony before the Court, the Court first finds that the respondent is statutorily ineligible for adjustment of status because he accrued over one year of unlawful presence in the United States before returning to the United States unlawfully. Thus, he squarely fits within the statutory terms of INA § 212(a)(9)(C)(1), and he is inadmissible to the United States.

The relevant ground of inadmissibility states:

> Any alien who – (I) *has been unlawfully present in the United States for an aggregate period of more than 1 year*, or (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and *who enters or attempts to reenter the United States without being admitted is inadmissible.*

INA § 212(a)(9)(C)(i) (emphasis added). There is no waiver available for individuals who fall under this provision.

The Department submitted records that reliably indicate that the respondent was returned to Mexico by immigration authorities through the San Ysidro, California (SYS), Port of Entry, on December 4, 2007. Exh. 16. By his own admission, the respondent then returned to the United States by crossing the border without inspection by immigration officers in January 2008. *See* Tr. at 82-83; 127-130. At a hearing on December 12, 2017, the Department moved to

pretermit the respondent's adjustment of status application on the grounds that he was inadmissible under INA § 212(a)(9)(C)(i), and the Judge explicitly explained to the respondent:

> You cannot apply for the green card because you were here illegally for more than a year and then you went out and that, if I'm reading the statute correctly, it appears you cannot apply for a green card.

Tr. at 95.

Despite the Judge's statement at that hearing, he allowed the respondent to present his case for adjustment of status at the same time as he presented his case for all other applications. Ultimately, the Judge found the respondent ineligible for adjustment of status for admitting the essential elements of a controlled substance offense, but he did not explicitly address the 212(a)(9)(C)(i) ground of inadmissibility in his oral decision. Tr. at 2-3.

However, upon remand, the Court now finds that the respondent is inadmissible under INA § 212(a)(9)(C)(i) and is statutorily ineligible for adjustment of status based on the evidence in the record and the respondent's prior testimony.

The respondent argues that his unlawful entry in 2008 should not implicate the 212(a)(9)(C) bar because his return to Mexico was not voluntarily. He argues that he refused to sign any documents for a voluntary return, but that Immigration officers took him back to Mexico despite his lack of consent. However, although the evidentiary record confirms that the respondent refused to sign the official voluntary departure paperwork (Exh. 19), the Court does not find that this fact is relevant as to whether the ground of inadmissibility under INA § 212(a)(9)(C)(i) applies. By its plain statutory language, 212(a)(9)(C)(i) does not require that any departure from the United States be voluntary in order to trigger the bar. It only requires the accrual of one year of unlawful presence before re-entering the United States without inspection. In fact, the second portion of 212(a)(9)(C)(i) indicates that the bar is triggered after an individual reenters without inspection following an expedited removal order or an order following removal proceedings, both of which may occur without the respondent's voluntary consent. *See* INA § 212(a)(9)(C)(i)(II).

The Court finds that the respondent's reliance on *Delgado v. Carmichael*, 332 U.S. 388 (1947), is misplaced. In that case, the Supreme Court considered whether a respondent with lawful status whose ship was torpedoed in international waters, and who reentered the United States after being taken to Havana, Cuba, should be considered to have "entered" the United States within the meaning of section 19.a of the Immigration Act of 1917. First, that case does not address the 212(a)(9)(C)(i) bar found currently in the Immigration and Nationality Act and only applied the immigration laws as they existed 100 years ago. Second, the issue in that case was akin to whether a returning lawful permanent resident should be treated as seeking admission, not whether an illegal alien's subsequent illegal entry bars him from adjustment of status. Unlike the respondent in *Delgado*, the respondent has never had legal status and there is no dispute about whether his reentry to this country should be considered a legal entry – on the contrary, the respondent admitted that it was not a legal entry.

The evidence shows that the respondent turned eighteen years old on April 7, 2006, and that he left the United States on December 4, 2007, thereby accruing over one year of unlawful

presence at the time of his departure. When he reentered the United States illegally in January 2008, he thus triggered the inadmissibility bar under INA § 212(a)(9)(C)(i).

For these reasons, the Court pretermits the respondent's application for adjustment of status under INA § 245(i).

B. INA § 212(a)(2)(A)(i)(II)

The previous Immigration Judge found that the respondent was inadmissible because he "admit[ted] committing acts which constitutes the essential elements" of a violation of any law related to a controlled substance, because he testified that he was arrested for possession of methamphetamine. However, this Court declines to make the same finding.

The Board and Ninth Circuit have established three requirements which must be met for an admission to qualify as having been validly obtained. First, the admitted conduct must constitute the essential elements of a crime in the jurisdiction where it occurred. Second, the applicant for admission must have been provided with the definition and essential elements of the crime prior to his admission. Third, his admission must have been voluntary. *See Pazcoguin v. Radcliffe,* 292 F.3d 1209 (9th Cir. 2002); *Matter of K,* 7 I&N Dec. 594, 598 (BIA 1957); *Matter of J,* 2 I&N Dec. 285 (BIA 1945). Here, although the first and third prongs are met, the Department never confronted the respondent with the definition and essential elements of the crime prior to his admission. Therefore, the Court cannot find that he properly admitted the essential elements of a controlled substance offense.

Finally, the record establishes that the respondent's previous conviction under California Health and Safety Code section 11377 was expunged pursuant to California Penal Code section 1000.3, after his successful completion of the deferred entry of judgment program. Exh. 17. Because the respondent's plea was entered prior to July 14, 2011, the Court finds that *Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000), applies and his conviction is subject to treatment under the Federal First Offender's Act (FFOA). As such, the Court does not find that the respondent's conviction renders him inadmissible under INA § 212(a)(2)(A)(i)(II).

III. VOLUNTARY DEPARTURE

In the previous Immigration Judge's decision, he granted the respondent the privilege of voluntary departure under INA § 240B(b). The Department did not appeal that determination to the Board. Accordingly, for the reasons stated in the previous Judge's oral decision, this Court will reinstate the respondent's previous request for post-conclusion voluntary departure. The grant of voluntary departure shall be under safeguards, and no amount of bond will be required. Voluntary departure shall be granted for 30 days with an alternate order of removal to Mexico.

Based on the foregoing findings of the Court, the following orders will enter:

IT IS HEREBY ORDERED the respondent's application for Adjustment of Status under INA § 245(i) is **PRETERMITTED** and **DENIED**.

IT IS FURTHER ORDERED the respondent's application for Post-Conclusion Voluntary Departure under INA § 240B(b) is **GRANTED** under safeguards until April 17, 2019, with an alternate order of removal to **MEXICO**.

Julie L. Nelson
Immigration Judge

Appeal Due: April 17, 2019

***The right to appeal is reserved for both parties. The Board of Immigration Appeals must receive the Notice of Appeal by April 17, 2019.**

U.S. DEPARTMENT OF JUSTI
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
100 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94104

Date: March 18, 2019

In the Matter of: VALDIVIA-MURO , CARLOS IVAN

Case No(s): A 095-494-769

NOTICE TO RESPONDENTS GRANTED VOLUNTARY DEPARTURE

You have been granted the privilege of voluntarily departing from the United States of America. The Court advises you that, if you fail to voluntarily depart the United States within the time period specified, a removal order will automatically be entered against you. Pursuant to section 240B(d) of the Immigration and Nationality Act, you will also be subject to the following penalties:

1. You will be subject to a civil penalty of not less than $1,000 and not more than $5,000; and
2. You will be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

The Court further advises that:

☒ **You have been granted pre-conclusion voluntary departure.**

1. If you a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. § 1240.26(b)(3)(iii), (e)(1).
2. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000 (or $ _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

☐ **You have been granted post-conclusion voluntary departure.**

1. If the Court set any additional conditions, you were advised of them, and were given an opportunity to accept or decline them. As you have accepted them, you must comply with the additional conditions. 8 C.F.R. § 1240.26(c)(3).
2. The Court set a specific bond amount. You were advised of the bond amount, and were given an opportunity to accept or decline it. As you have accepted it, you have a duty to post that bond with the Department of Homeland Security, Immigration and Customs Enforcement, Field Office Director within 5 business days of the Court's order granting voluntary departure. 8 C.F.R. § 1240.26(c)(3)(i).
3. If you have reserved your right to appeal, then you have the absolute right to appeal the decision. If you do appeal, you must provide to the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if you do not submit timely proof to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).
4. If you do not appeal and instead file a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1).
5. There is a civil monetary penalty if you fail to depart within the voluntary departure period. In accordance with the regulation, the Court has set the presumptive amount of $3,000 (or $ _____ instead of the presumptive amount). 8 C.F.R. § 1240.26(j).

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