U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: E[redacted]-B[redacted], M[redacted] ... **A [redacted]-098**

Date of this notice: 11/18/2019

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:
Wendtland, Linda S.

Sch[illegible]
Userteam: Docket

File: A[redacted]-098 – Boston, MA

Date: NOV 18 2019

In re: M[redacted] A[redacted] E[redacted]-B[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kerry Elizabeth Doyle, Esquire

ON BEHALF OF DHS: Mary Kelly
Assistant Chief Counsel

APPLICATION: Adjustment of status

The Department of Homeland Security (DHS) has appealed the Immigration Judge's decision dated May 21, 2019, which granted the respondent's application for adjustment of status under sections 245(a), (h) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), (h). The respondent has opposed the appeal. The appeal will be dismissed, and the record remanded for security and background investigations.

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).

This case was first before us on November 6, 2017, when we dismissed the respondent's appeal of the Immigration Judge's denial of his application for adjustment of status under section 245(a), (h) of the Act, but remanded the record for consideration of his request for asylum pursuant to section 208(b)(1)(A) of the Act, for withholding of removal pursuant to section 241(b)(3)(A) of the Act, and for protection under the Convention Against Torture pursuant to 8 C.F.R. §§ 1208.16(c), 1208.18. This case was before us again on March 28, 2019, when we dismissed the respondent's appeal of the denial of his applications for asylum, withholding of removal under the Act, and for protection under the Convention Against Torture, but remanded the record for further consideration of the respondent's eligibility for adjustment of status.

In a May 21, 2019, decision, the Immigration Judge granted the respondent's application for adjustment of status, which the DHS has now appealed. The DHS argues that the Immigration Judge erred in granting the respondent's application as a matter of discretion, particularly when the Immigration Judge in his prior decision denied the same application as a matter of discretion.

We clarify at the outset that in remanding the case for further consideration of the respondent's application for adjustment of status and "entry of a new decision regarding the respondent's eligibility for adjustment of status," the Immigration Judge was free to reconsider de novo the record evidence in toto, and contrary to the DHS's suggestion on appeal, he was not bound by his prior findings. *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (finding that on remand, the Immigration Judge was generally free to consider the "stated purpose [in the remand order] and

for consideration of any and all matters" deemed appropriate) (DHS's Br. at 4-5, 10-11). The record does not support the DHS's allegation that the Immigration Judge "reversed the burden of proof" on the DHS to prove that the respondent is a gang member (DHS's Br. at 5, 13). The record reveals that both parties were accorded opportunities at the hearings to submit any relevant evidence. The Immigration Judge then properly "ma[d]e reasonable inferences from direct and circumstantial evidence in the record as a whole." *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011).

We affirm the Immigration Judge's decision granting the respondent's application for adjustment of status. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). We must defer to an Immigration Judge's factual findings unless they are "illogical or implausible," or without "support in inferences that may be drawn from the facts in the record." *Matter of A-B-*, 27 I&N Dec. 316, 340-41 (A.G. 2018). The Immigration Judge found, inter alia, that the respondent has distanced himself from gang members, gang activities, and other violent situations, since his troubled year in 2015, and with the resources and support given to him by the community and his family, he is now "equipped to abstain from community violence" (IJ at 3-4). We have considered the DHS's assertions on appeal, but we cannot conclude that the Immigration Judge's factual findings in this regard were clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (noting that the Immigration Judge was "not required to accept [any one party's] account where other plausible views of the evidence are supported by the record"). [1]

The Immigration Judge properly considered the adverse factors in the instant case, which included the respondent's past affiliation and "commingling" with gang members, his marijuana use, his assault of another student whom he punched in the head causing injuries, and his possession of a spring-assisted blade, all of which occurred shortly after the respondent arrived in the United States in 2014 at the age of 15 (IJ at 3-4). As recognized by the Immigration Judge, these incidents are undoubtedly alarming, concerning and cause great pause (*id*). Against these serious negative factors, however, the Immigration Judge considered the fact that the respondent has never been convicted, and since 2015, he has had no other adverse encounters with the police, he has since avoided social situations where he may encounter gang members, and he has expressed his concern with and avoided community violence (IJ at 4). The Immigration Judge also considered the humanitarian factors and equities present, such as the respondent's testimony that included his troubled life in El Salvador that was marked by physical abuse by his mother and grandmother, his mental health condition, his familial ties and support in the United States, as well as the committed support he has garnered from Roca, an organization that aims to disrupt the cycle of incarceration, and professionals such as Roca youth supervisor John Fleming who has testified and advocated in relentless support of the respondent at his hearings (IJ at 3-4; IJ at 21 (Oct. 3, 2018); Tr. at 97 (May 22, 2018)).

[1] Contrary to the DHS's assertion, the Immigration Judge did not improperly consider the time period when the respondent was detained by DHS, particularly when the respondent credibly testified that the opportunity for drug use and potential provocation for violence existed even while in detention (DHS's Br. at 11-12; *see* IJ at 6 (Oct. 3, 2018); *see, e.g.*, Tr. at 88-89 (May 31, 2017); Tr. at 48-49, 53, 64-67 (May 3, 2018); Tr. at 2 (Bond Hearing (June 6, 2019)).

Although a very close question, after consideration of the record, appellate arguments, and the deference to be accorded the Immigration Judge's factual findings, we ultimately agree with the Immigration Judge's decision to accord the respondent an opportunity to remain in this country, and grant his application for adjustment of status as a matter of discretion. As noted by the Immigration Judge, "adjustment of status does not shield a person from removal, nor does it qualify as a forgiveness of wrongdoing," but the respondent is encouraged to continue to accumulate more favorable equities in his time in the United States (IJ at 4). We caution that future criminal behavior may result in the loss of the respondent's permanent resident status and his possible removal from the United States.

In view of the foregoing, the following orders will be entered.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD