U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MENDOZA-OLIVAS, ERIK

A 044-547-316

Date of this notice: 2/26/2014

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:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

williame
Userteam: Docket

File: A044 547 316 - El Paso, TX Date: FEB 26 2014

In re: ERIK MENDOZA-OLIVAS a.k.a. Erik Duarte Olivas a.k.a. Eric Olivas a.k.a. Eric Mendoza

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Steve Spurgin, Esquire

ON BEHALF OF DHS: Sarah K. Mazzochi
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Cancellation of removal

On May 1, 2013, an Immigration Judge pretermitted the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). On May 7, 2013, the Immigration Judge issued an order of removal.[1] The respondent, a lawful permanent resident who is a native and citizen of Mexico, now appeals. The appeal will be sustained, and the record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i) (2013). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's application was filed after May 11, 2005, and thus, is governed by the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

To establish eligibility for cancellation of removal, the respondent must show among other things that he resided in the United States continuously for 7 years after having been admitted in any status. Section 240A(a)(2) of the Act. As relevant in this case, section 240A(d)(1)(B) of the Act explains that any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2)

[1] On July 1, 2013, the Immigration Judge certified the record to the Board. On September 17, 2013, the Board declined to consider the certification because it appeared to be interlocutory in nature, and remanded the record to the Immigration Judge. On September 27, 2013, the Immigration Judge reinstated the May 7, 2013, order of removal.

or removable from the United States under section 237(a)(2) or 237(a)(4). Section 240A(d)(1) of the Act.

On March 16, 1994, the respondent was admitted to the United States as a lawful permanent resident. On November 5, 1999, the respondent pleaded guilty to possession of a controlled substance, to wit: more than 1 gram of cocaine (Exh. 1, 3). On November 1, 2012, the state court vacated the conviction pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010) (Exh. 4). After the state court vacated the 1999 conviction, the Department of Homeland Security filed a Form I-261 (Additional Charges of Inadmissibility/Deportability) to replace the allegation concerning the 1999 conviction with an allegation concerning the respondent's additional 2012 conviction for possession of cocaine (Exh. 5). It is the 2012 conviction on which the charge of deportability under section 237(a)(2)(B)(i) is based.

The respondent acknowledged in his testimony on March 26, 2013, that he possessed cocaine in 1999 (I.J. dated May 1, 2013, at 2, 3; Tr. at 138-39, 160). Although the state court had vacated the conviction, the Immigration Judge determined that the respondent could not establish 7 years of continuous residence because the respondent's testimonial admission that he possessed cocaine in 1999 was sufficient to render him inadmissible under section 212(a)(2) of the Act, and thereby break the continuous residence that began when the respondent was admitted as a lawful permanent resident in 1994 (I.J. dated May 1, 2013, at 3-4).[2] In reaching his conclusion, the Immigration Judge relied on *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006), in which we held that an alien need not be charged and found inadmissible or removable on a ground specified in section 240A(d)(1)(B) of the Act in order for the alleged criminal conduct to terminate the alien's continuous residence in this country.

In *Matter of Jurado*, *supra*, we observed that Congress used the word "renders" in section 240A(d)(1)(B) of the Act, and we found that the phrase "renders the alien inadmissible or removable" requires only that an alien "be or become" inadmissible or removable, *i.e.*, be potentially removable if so charged. *Id.* at 31. We explained that —

> an alien need not have been convicted of an offense under section 212(a)(2) of the Act in order for the "stop-time" rule to apply. For example, the rule may be triggered by an alien's admission of acts constituting the essential elements of such an offense under section 212(a)(2)(A)(i).

Id. Thus, under *Matter of Jurado*, *supra*, the stop-time rule potentially could apply to an alien such as the respondent who has a vacated conviction. We also note that the respondent in *Matter of Jurado*, like the respondent here, was a lawful permanent resident who had been charged with deportability rather than inadmissibility, but he nevertheless was held to have been rendered inadmissible for purposes of the stop-time rule.

[2] The Immigration Judge actually referred to continuous "physical presence," but we assume this was inadvertent, inasmuch as it is 7 years of continuous *residence* that the respondent must demonstrate for purposes of qualifying for cancellation of removal for a lawful permanent resident, under section 240A(a)(2) of the Act.

We conclude, however, that there must be compliance with our decision in *Matter of K-*, 7 I&N Dec. 594 (BIA 1957), before the stop-time rule is triggered by an alien's admission that he committed a section 212(a)(2) offense. In *Matter of K-*, we stated that a valid admission of a crime for immigration purposes requires that an alien be given an adequate definition of the crime, including its essential elements, and that it be explained in understandable terms. In this case, the respondent was not so advised before he admitted through his testimony that he possessed cocaine in 1999 (Tr. at 160). As there was no compliance with *Matter of K-*, *supra*, the respondent's admission that he possessed cocaine in 1999 cannot be used to trigger the stop-time rule in section 240A(d) of the Act, *i.e.*, the admission does not stop the respondent's continuous residence that began when he was admitted to the United States as a lawful permanent resident in 1994.

Thus, we will remand the record for the respondent to apply for cancellation of removal under section 240A(a) of the Act. On remand, the parties shall be given an opportunity to present evidence regarding the cancellation of removal application, including evidence relevant to whether the respondent merits cancellation of removal as a matter of discretion.[3] The respondent also shall have an opportunity to apply for any other relief for which he currently may be eligible.

Accordingly, the following order will be entered.

ORDER: The appeal is sustained, and the record is remanded for further proceedings consistent with this opinion and for the entry of a new decision.

FOR THE BOARD

Board Member Patricia A. Cole concurs in the decision to sustain this appeal and remand the proceedings for the respondent to seek any appropriate relief. However, I agree with the respondent that the dicta in Matter of Jurado-Delgado, 24 I&N Dec. 29 (BIA 2006) is not controlling for a lawful permanent resident who would not be removable for a vacated conviction. Consequently, Matter of K-, 7 I&N Dec. 594 (BIA 1957) is also not relevant to these proceedings.

[3] We note, for example, that the respondent's 2012 conviction for possession of cocaine may be considered an adverse factor to be weighed against the respondent's positive equities.