U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: C[redacted]-J[redacted], H[redacted] M[redacted] **A [redacted]-586**

Date of this notice: 3/1/2018

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:
Geller, Joan B

Userteam: Docket

File: [redacted] 586 – Miami, FL Date: MAR - 1 2018

In re: H[redacted] M[redacted] C[redacted]-J[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Magdalena E. Cuprys, Esquire

ON BEHALF OF DHS: Rodion Tadenev
Assistant Chief Counsel

APPLICATION: Asylum

The Department of Homeland Security ("DHS") appeals the Immigration Judge's October 4, 2017, decision granting the respondent's application for asylum under section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A). The appeal will be dismissed, and the record will be remanded as set forth below.

We review findings of fact determined by the 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 Immigration Judge determined that the respondent established extraordinary circumstances excusing the 1-year filing deadline for asylum (IJ at 11-13; Tr. at 40-52). *See* section 208(a)(2)(D) of the Act; 8 C.F.R. § 1208.4(a)(5). The DHS challenges that determination on appeal (DHS's Br. at 7-9). Specifically, the DHS argues that the respondent's status under the Deferred Action for Childhood Arrivals ("DACA") program, which is a form of prosecutorial discretion rather than the conference of a lawful status, does not constitute an extraordinary circumstance (DHS's Br. at 7-9). We will affirm the Immigration Judge's decision.

"The term 'extraordinary circumstances' in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline." 8 C.F.R. § 1208.4(a)(5). The respondent bears the burden of showing those circumstances (1) "were directly related to the alien's failure to file the application within the 1-year period" and (2) "the delay was reasonable under the circumstances." *Id.* The regulations enumerate six possible circumstances of what might constitute extraordinary circumstances and specifically state that a finding of "extraordinary circumstances" is "not limited to" such enumerated possibilities. *Id.*; *see also Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002) (explaining that the extraordinary circumstance analysis requires an "individualized analysis of the facts of the particular case").

We acknowledge, as the DHS points out on appeal, that DACA status is not listed under the regulations as a potential extraordinary circumstance excusing the 1-year filing deadline (DHS's Br. at 8). However, as noted above, the regulations provide only a non-exhaustive list of

potentially qualifying "extraordinary circumstances," and the respondent is not required to show that the circumstances of his case fit perfectly within one of the listed examples.

We also acknowledge that the DACA program does not confer substantive rights, immigrant or nonimmigrant status, or a pathway to citizenship to its recipients (DHS's Br. at 8). We are unpersuaded, however, that these factors are necessary to find an extraordinary circumstance. We note that parole, which is listed as a potential qualifying "extraordinary circumstance" under 8 C.F.R. § 1208.4(a)(5)(iv), does not confer substantive rights, immigrant or nonimmigrant status, or a pathway to citizenship. Even though the DACA program is a form of prosecutorial discretion, we agree with the Immigration Judge that the receipt of DACA benefits reasonably disincentivized the respondent from filing for asylum within the filing deadline such that it qualifies as an extraordinary circumstance (IJ at 12). *See, e.g.*, *Matter of Sosa Ventura*, 25 I&N Dec. 391, 394 (BIA 2010) (explaining that temporary protected status (which is listed as a possible extraordinary circumstance) "was created to codify and standardize a type of deferral of deportation called 'Extended Voluntary Departure' or 'EVD,' which had existed for decades to address humanitarian concerns."). Accordingly, we agree with the Immigration Judge that the respondent is not barred from asylum by the 1-year filing deadline (IJ at 11-13).

The Immigration Judge also determined that the respondent was not barred from asylum due to a conviction for a particularly serious crime (IJ at 13-14). *See* section 208(b)(2)(A)(ii) of the Act. In 2016, the respondent was convicted of attempted robbery in violation of FLA. STAT. §§ 812.13(2)(c) (robbery), 777.04 (attempt) and sentenced to 60 days in jail and 2 years of probation (Exhs. 1, 2). In 2016, the respondent was also convicted of fleeing or attempting to elude a law enforcement officer in violation of FLA. STAT. § 316.1935(2) and sentenced to 2 years of probation (Exhs. 1, 3). The DHS argues on appeal that both convictions qualify as particularly serious crimes (DHS's Br. at 9-13). We will affirm the Immigration Judge's determination.

To determine whether the "particularly serious crime" bar is applicable, the Immigration Judge examines the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). In making this determination, the Immigration Judge may consider not only the fact of the respondent's conviction, but "all reliable information . . . including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." *Matter of N-A-M-*, 24 I&N Dec. at 342. It is the respondent's burden to prove by a preponderance of the evidence that the particularly serious crime bar does not apply to him. *See* 8 C.F.R. §§ 1208.13(c)(2)(i)(A), 1240.8(d).

The statute of conviction for the respondent's robbery conviction provides in relevant part:

> (1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. . .

> (2)(c) In the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree . . .

FLA. STAT. § 812.13 (2016).

The Immigration Judge found that the respondent's attempted robbery conviction stemmed from a dispute with a cab driver (IJ at 14; Tr. at 52-60, 107-10; Exh. 2). The respondent took a cab to visit his father, but did not have the money to pay the cab fare. The cab driver wanted to keep the respondent's backpack as collateral for the unpaid cab fare while the respondent went to get money from his father. The respondent did not want the cab driver to keep his backpack, and a struggle ensued. The cab driver was not injured during the incident. The respondent pleaded guilty to attempted robbery and was sentenced to 60 days in jail and 2 years of probation (Exh. 2).

We agree with the DHS that unarmed robbery is a serious offense that falls within the "ambit of a particular serious crime" (DHS's Br. at 10-11). *See Matter of N-A-M-*, 24 I&N Dec. at 337. We are not persuaded, however, that such an offense qualifies as a particular serious crime based solely on its elements, and therefore the Immigration Judge reasonably considered the nature and circumstances of the respondent's particular offense to determine if it qualified as a particular serious crime. *Id.* at 342. Given the circumstances of the respondent's offense as explained above and the relatively light sentenced imposed upon the respondent for his criminal behavior, we agree with the Immigration Judge that the respondent's attempted robbery conviction does not qualify as a particular serious crime barring asylum (IJ at 14).[1] *See, e.g.*, *Matter of Frentescu*, 18 I&N Dec. at 247 (burglary of a dwelling is not a particularly serious crime given the nature and circumstances of the alien's particular offense).

The statute of conviction for the respondent's offense of fleeing or attempting to elude a law enforcement officer provides in relevant part:

> Any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated commits a felony in the third degree. . .

FLA. STAT. § 316.1935(2) (2016).

The Immigration Judge found that the respondent was driving a friend's car when a police vehicle pulled up behind him and signaled for him to pull over (IJ at 14; Tr. at 60-65, 102-07; Exh. 3). The respondent drove for a while before pulling over the vehicle. No one was injured during the commission of this offense. The respondent was also charged with aggravated assault with a firearm due to an incident that occurred earlier in the evening, but the charges were dropped

[1] Although the DHS asserts that the respondent's criminal sentence of 60 days in jail and 2 years of probation "underscores the seriousness of the respondent's offense," we note that a felony in the second degree in Florida is punishable up to 15 years imprisonment (DHS's Br. at 11). *See* FLA. STAT. § 775.082(d).

because the evidence did not demonstrate that the respondent was the perpetrator of the incident. The respondent was sentenced to 2 years of probation for this offense (Exh. 3).

We acknowledge that the elements of the respondent's offense may bring it within the "ambit of a particularly serious crime" (DHS's Br. at 11-13). *See Matter of N-A-M-*, 24 I&N Dec. at 337. However, given the nature and circumstances of the offense, as stated above, and the light sentence imposed upon the respondent, we agree with the Immigration Judge that the respondent's conviction for alluding law enforcement does not qualify as a particularly serious crime (IJ at 14). The DHS relies on the allegations contained in the police report to argue that the nature and circumstances of the respondent's offense make it particularly serious (DHS's Br. at 12-13; Exh. 3). The Immigration Judge considered those allegations but ultimately found that the respondent's testimony, conviction, and light criminal sentence provided a more credible report about the nature of the respondent's alluding offense (IJ at 14). There is no clear error in the Immigration Judge's factual findings in this regard. Based on those factual findings, we agree that the respondent's alluding conviction does not qualify as a particular serious crime barring asylum (IJ at 14).

Finally, the DHS argues on appeal that the respondent does not merit asylum as a matter of discretion (DHS's Br. at 13-16). Upon our de novo review, we are unpersuaded that the respondent's asylum application should be denied as a matter of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). Like the Immigration Judge, we acknowledge the seriousness of the respondent's criminal behavior (IJ at 13-14; Exhs. 2, 3). We agree that the respondent's recent convictions, as well as his 2015 arrest for driving under the influence of alcohol, reflect poorly on the respondent's character (IJ at 13-14). However, as noted by the Immigration Judge, the respondent's criminal behavior has not resulted in physical injury to anyone or a substantial imposition of criminal penalties (IJ at 14). The Immigration Judge also noted that the respondent has complied with all of his court-ordered community service and payment of court costs (IJ at 5).

While the respondent's criminal behavior is a serious adverse factor, we conclude that it does not outweigh the equities in his case. First, and most importantly, the Immigration Judge found that the respondent qualified as a refugee because he has a well-founded fear of persecution if returned to Honduras, a determination that the DHS does not challenge on appeal. (IJ at 15-21). *See Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (the likelihood of persecution is an important factor to consider in the discretionary analysis). In addition, the respondent entered the United States under fairly traumatic circumstances in 2005 when he was 8 years old (IJ at 11-12; Tr. at 47-52). *Id.* (considering the applicant's manner of entry into the United States, including whether the applicant entered by fraud). He does not have substantial family ties to Honduras (IJ at 5-6; Tr. at 68-74). The record further indicates that the respondent has maintained employment in the United States (Tr. at 71-73).

Although a close call, under the totality of the circumstances presented, we conclude that the respondent warrants asylum as a matter of discretion. Thus, we will dismiss the DHS's appeal. We will remand the record for the required background and security checks.

ORDER: The 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