U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: YANG, ZHONG QIN

A 093-408-583

Date of this notice: 4/10/2019

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:
Grant, Edward R.

Userteam: Docket

File: A093-408-583 – Dallas, TX

Date: APR 10 2019

In re: Zhong Qin YANG a.k.a. Yang Zhongqin

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Felipe Alexandre, Esquire

APPLICATION: Reopening

On December 17, 2018, the respondent, a native and citizen of China, submitted a motion to reopen proceedings in which the Board dismissed his appeal on June 25, 2013. The motion will be granted, and the record remanded.

As this is the respondent's second motion to reopen and it was filed more than 5 years after the Board's final administrative decision, it is statutorily both time and number-barred. Section 240(c)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(2). The respondent has not identified any exception to these statutory bars within which his motion falls. Rather, he asks that proceedings be reopened sua sponte so that he may pursue a waiver of inadmissibility under section 212(h) of the Act, and as he reports that he is pursuing a nonimmigrant U visa, argues that his Notice to Appear was statutorily deficient, and asks for sua sponte reopening. 8 C.F.R. § 1003.2(a).

Proceedings may be reopened sua sponte if a change in law is fundamental in nature and not merely an incremental development in the state of the law. *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). As a general matter, we invoke sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations. *Matter of G-D-*, 22 I&N Dec. at 1133-34; *see also Matter of Beckford*, 22 I&N Dec. 1216 (BIA 2002) (the burden is on the movant to show exceptional circumstances).

In a June 25, 2013, decision, the Board noted that, under existing precedent, the respondent was ineligible for a waiver of inadmissibility under section 212(h) of the Act as, after being admitted to the United States, his status was later converted to that of a lawful permanent resident, and he later committed the offenses which formed the basis for the charges of removability (BIA 6/25/13, pg. 3). *Citing Malagon de Fuentes v. Gonzales*, 462 F.3d 498 (5th Cir. 2007); *Cabral v. Holder*, 632 F.3d 886 (5th Cir. 2011). The respondent correctly notes that the Board later issued a decision reflecting that individuals, such as himself, who adjusted their status to that of a lawful permanent resident after entering the United States, are eligible to seek section 212(h) relief.[1] *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015). In light of the circumstances presented in this case, we find it appropriate to grant sua sponte reopening in order

[1] The respondent argued as such at the time of his original proceedings.

to allow the respondent to pursue a waiver of inadmissibility under section 212(h) of the Act, as well as any other relief for which he may be eligible.

The respondent also argues that, because his Notice to Appear (NTA) lacked information as to the date and time of his hearing, his case should be reopened and terminated based on the decision of the United States Supreme Court in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (Motion at 6-10). However, in *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018), the Board distinguished *Pereira v. Sessions*, in determining that an NTA that does not specify the time and place of an individual's initial removal hearing vests an Immigration Judge with jurisdiction over removal proceedings and meets the requirements of section 239(a) of the Act, so long as a notice of hearing specifying this information is later sent to the individual. Here, the record indicates that the respondent subsequently received notice of the hearing dates and locations and appeared for those hearings. Further, the decision in *Pereira* involved the "stop-time" rule in cancellation of removal cases. This case does not involve the stop-time issue. As such, sua sponte reopening in this regard is not appropriate.[2] *Matter of G-D-*, 22 I&N Dec. 1132, 1132 (BIA 1999); 8 C.F.R. § 1003.2(a).

In closing, we find that the respondent has demonstrated an exceptional circumstance supporting sua sponte reopening of the proceedings. *Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (discretion to reopen a case sua sponte is "an extraordinary remedy reserved for truly exceptional situations"); *Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (sua sponte reopening is limited to exceptional circumstances and is not meant to cure filing defects or circumvent the regulations). As the respondent has shown that his motion should be exempt from the statutory limitations on motions to reopen, the following order shall be entered.[3]

ORDER: The record is remanded for further proceedings in accordance with this decision.

FOR THE BOARD

[2] This Board is bound by the jurisprudence of the United States Court of Appeals for the Fifth Circuit, where this case arises. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989). As such, the respondent's reliance on district court decisions. including those arising in the Fifth Circuit, is unavailing (Motion at 9). We also note that the respondent erroneously suggests that the United States Court of Appeals for the Eleventh Circuit has held contrary to the holding in *Matter of Bermudez-Cota*. However, that court has issued no such decision, and the language cited by the respondent indicating otherwise relates to a decision granting a stay of removal - not a Petition for Review.

[3] In light of the Board's decision, we need not reach the respondent's other arguments in support of reopening.