U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: Y[redacted], W[redacted] S[redacted]

A [redacted]-857

Date of this notice: 6/6/2019

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:
Mullane, Hugh G.
Malphrus, Garry D.
Baird, Michael P.

Userteam: Docket

File: [redacted]-857 – Harlingen, TX

Date: JUN - 6 2019

In re: W[redacted] S[redacted] Y[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Thelma O. Garcia, Esquire

ON BEHALF OF DHS: Mark R. Whitworth
Assistant Chief Counsel

APPLICATION: Asylum

The respondent, a native and citizen of China, appeals the Immigration Judge's December 13, 2017, decision denying his application for asylum.[1] Section 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained, and the record will be remanded for the completion of background and security checks.

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).

The Immigration Judge denied the respondent's application for asylum because the respondent did not file his application within 1 year of his entry into the United States (IJ at 7). *See* section 208(a)(2)(B) of the Act. The respondent argues on appeal that extraordinary circumstances excuse his late-filed asylum application. *See* section 208(a)(2)(D) of the Act; 8 C.F.R. § 1208.4(a)(5). He first raised this argument during his first hearing before the Immigration Judge on October 17, 2016 (Tr. at 3-4).

In order to have complied with the 1-year deadline for asylum, the respondent would have had to file his application by October 2015. Prior to September 14, 2016, asylum applications for individuals in removal proceedings had to be filed in open court at a master calendar hearing. *See* Immigration Court Practice Manual, Chapter 3.1(b)(iii)(A) (June 10, 2013); *see also* Operating Policies and Procedures Memorandum 16-01: Filing Applications for Asylum at 2 (September 14, 2016) (stating that effective immediately, asylum applications no longer need to be filed at a master calendar hearing and can be filed by mail or at the Immigration Court

[1] The Immigration Judge's grant of the respondent's application for withholding of removal and his denial of the respondent's application for protection under the Convention Against Torture are not challenged on appeal.

window). The respondent, who has been in removal proceedings since December 2014, did not have a hearing before the Immigration Court prior to the October 2015 deadline (IJ at 1-2; Exh. 1). The record indicates that the respondent filed a motion on August 18, 2015, requesting the Immigration Court schedule a hearing so that he could apply for asylum before October 2015. The Immigration Court, however, never responded to this motion. The respondent's first hearing before the Immigration Court was October 17, 2016, approximately 2 years after his October 2014 entry into the United States (IJ at 1-2; Exh. 1). This constitutes extraordinary circumstances directly related to the respondent's failure to file a timely application for asylum. *See* 8 C.F.R. § 1208.4(a)(5)

The record further establishes that the respondent filed for asylum within a reasonable period given these extraordinary circumstances. *See id.* The procedure for filing for asylum changed on September 14, 2016, to allow filings outside of master calendar hearings. *See* Operating Policies and Procedures Memorandum 16-01: Filing Applications for Asylum at 2 (September 14, 2016). The respondent filed his application on October 26, 2016, 9 days after his initial removal hearing (IJ at 2; Exh. 3). In these particular circumstances, we consider an approximately 6-week delay a reasonable period of time. *See Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193, 195 (BIA 2010) (noting that filing delays must be evaluated in relation to the particular circumstances involved). Therefore, the respondent is not time-barred from applying for asylum.

The DHS does not appeal the Immigration Judge's grant of the respondent's application for withholding of removal. Because the respondent has satisfied the higher burden of proof for withholding of removal, it follows that he has satisfied the lower burden for asylum. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 423-24 (1987) (holding that the "well-founded fear" standard for asylum is less than the "clear probability" standard for withholding of removal). The record does not contain any evidence warranting a discretionary denial of the respondent's application for asylum. *See Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (noting that the danger of persecution will generally outweigh all but the most egregious of adverse factors). Therefore, we conclude that the respondent is eligible for asylum. However, we will remand the record to the Immigration Judge for the DHS to conduct the required background checks. *See* 8 C.F.R. § 1003.1(d)(6)(ii)(A); *see also Matter of Alcantara-Perez*, 23 I&N Dec. 882, 884-85 (BIA 2006). Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained and the Immigration Judge's December 13, 2017, decision is vacated to the extent it denies the respondent's application for asylum.

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 DHS 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