U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Cuic, Aleksandar
Robert Brown LLC
1468 West 9th Street Suite 705
Cleveland, OH 44113

DHS/ICE Office of Chief Counsel - CLE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131

Name: RILEY, NORMAN HENRY

A 091-068-064

Date of this notice: 8/30/2019

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:
Noferi, Mark
Creppy, Michael J.
Malphrus, Garry D.

Userteam: Docket

File: A091-068-064 – Cleveland, OH

Date: AUG 30 2019

In re: Norman Henry RILEY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Aleksandar Cuic, Esquire

ON BEHALF OF DHS: Steven P. Vargo
Assistant Chief Counsel

APPLICATION: Adjustment of status

The Department of Homeland Security (DHS) has appealed the Immigration Judge's decision dated March 12, 2019, which granted the respondent's application for adjustment of status. The respondent has requested that the Immigration Judge's decision be affirmed. The appeal will be dismissed.

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).

The respondent filed an application for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), based on an approved visa petition filed on his behalf by his United States citizen daughter. It is undisputed that the respondent is statutorily eligible for adjustment of status under section 245(a) of the Act.[1] The only issue on appeal is whether or not the Immigration Judge properly granted the respondent's applications for adjustment of status as a matter of discretion.[2] The DHS argues that the Immigration Judge erred

[1] The respondent sought a waiver of inadmissibility under section 212(a)(1)(A)(iii) of the Act, which describe an alien who is determined to have had a physical or mental disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior. On December 6, 2018, the U.S. Department of Health and Human Services issued a letter informing the DHS that the respondent is found to be a "Class B" applicant, a classification that does not render him inadmissible under section 212(a)(1)(A)(iii) of the Act. *See* 42 C.F.R. §§ 34.4(b) (describing class A medical notifications), (c) (describing class B medical notifications).

[2] In a July 12, 2017, decision, the Immigration Judge found that the respondent was not mentally competent for purposes of his removal proceedings, and that both parties can discuss what safeguards may be appropriate to preserve the respondent's rights and privileges. There is also no

in failing to apply the higher discretionary standard set forth in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002). Alternatively, the DHS asserts that that a favorable exercise of discretion is not warranted even under the balancing test in *Matter of Arai*, 13 I&N Dec. 494 (BIA 1970). The respondent, on the other hand, argues that *Matter of Jean* is inapplicable, and that the Immigration Judge properly found that the adverse or negative factors in his case are outweighed by equities he has presented.

We note, at the outset, that the DHS did not specifically argue before the Immigration Judge that the heightened evidentiary showing set forth in *Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002), for applicants convicted of violent or dangerous crimes, should be applied in the instant case. Even considering the DHS's belated argument in this regard, the record does not clearly establish that the respondent was convicted of a crime that was of similar, equal or greater gravity as the criminal conduct of the applicant in *Matter of Jean*. The applicant in *Matter of Jean*, who was convicted of manslaughter and sentenced to two-to-six years' incarceration, struck, shook, and hit a nineteen-month old child on the head multiple times to stop him from crying, and failed to call or seek emergency assistance when the child lost consciousness. *Matter of Jean*, 23 I&N Dec. at 374-75. The Attorney General in that case emphasized the importance of "consider[ing] the nature of the criminal offense that rendered [the applicant] inadmissible," and found that he was "highly disinclined" to exercise his discretion, except in ordinary circumstances, "on behalf of dangerous or violent felons seeking [relief]" like the applicant in *Matter of Jean*. *Id.* at 383, 385.

In contrast, in the instant case, the respondent is not a convicted felon, and there has been no claim that the respondent was convicted of crimes that would render him inadmissible to the United States (*see, e.g.*, Tr. at 129, 202-03). The respondent pled guilty to the amended charge of misdemeanor assault under Ohio Rev. Code Ann. § 2903.13, "as charged in count[] 2 of the indictment," but the indictment is not included in the record, and thus, the factual basis for his plea is unknown. Even if the police report was considered, it reveals that the assault occurred amidst a verbal altercation that escalated to a physical altercation between the respondent and a man at a bus stop, culminating in the man punching the respondent in the face and the respondent stabbing the man (Exh. 12: In the Court of Common Pleas Cuyahoga County, Ohio, Journal Entry (May 11, 2017); Exh. 13). While this incident is not insignificant, it does not rise to the level of criminal conduct in severity, degree and kind at issue in *Matter of Jean*. Accordingly, we cannot conclude that the Immigration Judge erred in not applying the heightened evidentiary standard in *Matter of Jean* to the instant case.[3]

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). The record

appeal or challenge to the Immigration Judge's mental competency findings or to the adequacy of the procedural safeguards implemented in the instant case.

[3] In view of this disposition, we need not address the respondent's argument that *Matter of Jean* only applies to discretionary waivers under section 209(c) of the Act (Respondent's Br. at 3). We note, however, that in *Matter of Silva-Trevino*, 26 I&N Dec. 826, 836-37 (BIA 2016), the Board did not limit the applicability of *Matter of Jean* to only 209(c) waivers.

shows that the Immigration Judge thoroughly and thoughtfully considered and weighed the adverse factors in the instant case, which included the respondent's criminal history,[4] his misdemeanor conviction for assault which the Immigration Judge found was a violent but isolated incident attributable to the respondent's schizophrenia diagnosis, his prior drug use and his strained relationship with his children (IJ at 8). The Immigration Judge found these adverse factors were mitigated and outweighed by the positive and humanitarian factors present, such as his nearly 30-year residence in the United States, his 15-year history of employment with one employer, testimony from his employer and family that he is not an inherently violent individual, the fact that he is in sustained remission from cannabis use disorder, the hardship that he would face if returned to Jamaica due to his mental health needs, the availability of medical care and the presence of a familial and committed support system in the United States that would help ensure his adherence to treating and managing his schizophrenia and maintaining steady employment (*id.*). While the DHS questions the sufficiency of this support system, the Immigration Judge found that the respondent's aunt and employer credibly testified that they would, individually and jointly, support the respondent, monitor his behavior, and ensure that the respondent takes his medication regularly and that his medical needs are met (IJ at 4-5, 7; DHS's Br. at 10).

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 granting the respondent's application for adjustment of status as a matter of discretion. In view of the foregoing, the following order 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 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

[4] As noted by the respondent, the criminal charges referred to by the DHS in its appeal brief were dismissed by the criminal courts, and the reasons for the dismissal and the underlying facts of the respondent's misdemeanor disorderly conduct conviction are unknown (IJ at 7; Exh. 12; DHS's Br. at 9; Respondent's Br. at 5).