U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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OBANDO-SEGURA, JOSE ANDRES
A205-118-486
DHS-WCDC
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DHS/ICE Office of Chief Counsel - BAL
31 Hopkins Plaza, Room 1600
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Name: OBANDO-SEGURA, JOSE ANDR... **A 205-118-486**

Date of this notice: 10/4/2018

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Liebowitz, Ellen C
Malphrus, Garry D.
Mullane, Hugh G.

Userteam: Docket

File: A205-118-486 – Baltimore, MD

Date: OCT - 4 2018

In re: Jose Andres OBANDO-SEGURA

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Billy Sapp
Senior Attorney

APPLICATION: Continuance; administrative closure; termination; voluntary departure; remand

This matter was last before the Board on October 6, 2017, when we remanded the case for further proceedings. In a decision dated February 27, 2018, the Immigration Judge sustained the charge of removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), denied the respondent's requests for a continuance and administrative closure, and denied the respondent's application for voluntary departure pursuant to section 240B(b) of the Act, 8 U.S.C. § 1229c(b).[1] The respondent, a native and citizen of Colombia, appeals from that decision. While the appeal was pending, the respondent filed a motion to terminate. The Department of Homeland Security (DHS) opposes the appeal and the motion. The motion to terminate will be denied and the record will be remanded.

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).

This case has a long and complicated procedural history, which is explained in the Immigration Judge's February 27, 2018, decision. Most recently, the Board remanded the case to the Immigration Judge on October 6, 2017, to further consider whether the DHS met its burden to: (1) establish the respondent's removability under section 237(a)(2)(B)(i) of the Act; (2) permit the DHS an opportunity to amend the Notice to Appear and present additional evidence relating to the respondent's removability; (3) allow the respondent to renew his request for a continuance or administrative closure during the pendency of his request for a U visa; and (4) further consider the respondent's alternative request for voluntary departure. On February 27, 2018, in a detailed decision, the Immigration Judge sustained the charge of removability under section 237(a)(2)(B)(i) of the Act, denied the respondent's requests for a continuance and administrative closure, and denied the respondent's alternative request for voluntary departure.

[1] We note that the respondent's removability under Section 237(a)(1)(B) of the Act is not contested (IJ at 1-2).

The respondent filed a timely appeal from the Immigration Judge's decision. He argues that the Immigration Judge erred in sustaining the charge of removability under section 237(a)(2)(B)(i) of the Act and in denying his requests for a continuance and administrative closure (Respondent's Br. at 25-84). The respondent has also requested a remand in light of new evidence relating to his U visa petition (Respondent's Br. at 84). While the appeal was pending, the respondent filed a motion to terminate proceedings based on the Supreme Court's holding in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The DHS opposes the respondent's motion to terminate and argues that the Immigration Judge's decision should be affirmed.

The respondent's motion to terminate will be denied. In his motion, the respondent argues that his proceedings should be terminated in light of the Supreme Court's recent decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), in which it held that a Notice to Appear (NTA) that does not include the time and place of the hearing does not trigger the stop-time rule for purposes of cancellation of removal. The record reflects that the respondent was personally served with an NTA directing him to appear at the Immigration Court in Florence, Arizona, at a time and date to be set (Exh. 1). The respondent argues that the NTA is deficient under *Pereira* and that his proceedings should therefore be terminated. Jurisdiction is properly before the Immigration Court when a respondent receives a separate hearing notice consistent with the regulation contained at 8 C.F.R. § 1003.18(b). *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 444 (BIA 2018). Although the respondent alleges that he never received a hearing notice, the record reflects that the respondent was served by mail with a hearing notice directing him to appear for a hearing on October 11, 2012, at 8:30 AM. He subsequently appeared before the Immigration Court and did not raise any claim regarding a defective NTA. Under these circumstances, we conclude that jurisdiction properly vested with the Immigration Court. Accordingly, the motion to terminate will be denied.

Turning to the respondent's appeal, we conclude that a remand is necessary for the Immigration Judge to further address the respondent's removability under section 237(a)(2)(B)(i) of the Act. This provision provides in relevant part that "[a]ny alien who at any time after admission has been convicted of a violation of ... any law or regulation of a State ... relating to a controlled substance ..., other than a single offense involving possession for one's own use of [30] grams or less of marijuana, is deportable." It is undisputed that on August 19, 2008, the respondent was convicted under section 11360(a) of the California Health and Safety Code (IJ at 1, Feb 27, 2018; Exh. 1). At the time of the respondent's conviction, that statute provided that "every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana" is guilty. CAL. HEALTH & SAFETY CODE § 11360(a).

We are not persuaded by the respondent's argument that section 11360(a) of the California Health and Safety Code is categorically overbroad because it encompasses conduct that falls within the exception for offenses involving possession for one's own use of 30 grams or less of marijuana. In assessing an alien's removability under section 237(a)(2)(B)(i) of the Act, we employ a categorical inquiry for the threshold determination as to whether the offense is one "relating to a controlled substance." *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408, 412 (BIA 2014). However the phrase "a single offense involving possession for one's own use of [30] grams or less of marijuana" calls for a circumstance-specific inquiry into the character of the alien's unlawful

conduct on a single occasion, not a categorical inquiry into the elements of a single statutory crime. *Id.*; *see also Matter of Davey*, 26 I&N Dec. 37 (BIA 2012). Given that the respondent concedes that a conviction under CAL. HEALTH & SAFETY CODE § 11360(a) necessarily involves marijuana, a federally controlled substance, the offense is categorically one relating to a controlled substance (Respondent's Br. at 27). Thus, the inquiry turns to whether or not the DHS has met its burden to show by clear and convincing evidence that the respondent's offense does not fall within the personal use exception.

In sustaining the charge of removability, the Immigration Judge erroneously analyzed the current version of CAL. HEALTH & SAFETY CODE § 11360, which includes a provision indicating that the term "transport" means to transport for sale (IJ at 6, Feb. 27, 2018). Relying, in part, on this provision, the Immigration Judge concluded that the respondent's offense fell outside of the personal use exception (IJ at 10, Feb. 27, 2018). However, this provision was not a part of the statute when the respondent was convicted in 2008. Under the language of CAL. HEALTH & SAFETY CODE § 11360(a) as it existed at the time of the respondent's conviction, an individual could potentially be convicted for transporting 29 or 30 grams of marijuana for personal use. *See United States v. Casarez-Bravo*, 181 F.3d 1074, 1078 (9th Cir. 1999).

The Immigration Judge alternatively concluded that, even assuming the respondent's offense involved possession for one's own use of 30 grams or less of marijuana, the respondent is still removable because he has been convicted of multiple controlled substance offenses, including a Maryland conviction for conspiracy to possess a controlled substance with intent to distribute (IJ at 10-11, Feb. 27, 2018). However, in reaching this conclusion, the Immigration Judge did not identify any specific statutes or other law under which the respondent was convicted or provide any explanation for her conclusion that the respondent's other convictions qualify as offenses relating to a controlled substance for purposes of section 237(a)(2)(B)(i) of the Act. Although the respondent concedes that he has drug convictions in Nevada and Maryland, he argues that they are not offenses relating to a controlled substance for purposes of section 237(a)(2)(B)(i) of the Act because the state statutes under which he was convicted encompass substances that are not federally controlled (Respondent's Br. at 29-36).

We acknowledge the DHS's argument on appeal that the respondent's offense does not fall within the personal use exception because court records show that the offense involved multiple pounds of marijuana and that the circumstances indicate that it was not solely for personal use (DHS's Br. at 2). However, the Board lacks fact-finding authority, except in limited circumstances, and the Immigration Judge's decision does not contain sufficient factual findings upon which to base such a conclusion. *See* 8 C.F.R. § 1003.1(d)(3)(i). Although the Immigration Judge made some factual findings regarding the circumstances of the respondent's offense, these findings were made in the context of addressing the respondent's request for a continuance (IJ at 12-13, Feb. 27, 2018). Moreover, the respondent contends that he was not given an opportunity to rebut the evidence relied on by the Immigration Judge in making those findings, and that she did not consider his affidavit discussing the circumstances of his offense (Respondent's Br. at 62-63).

In light of the foregoing, the record must be remanded for the Immigration Judge to further address whether the DHS met its burden to establish the respondent's removability under

section 237(a)(2)(B)(i) of the Act, including whether the DHS has met its burden to show by clear and convincing evidence that the respondent's California offense does not fall within the personal use exception.

Because the record will be remanded for further proceedings, we do not reach the respondent's remaining arguments.[2] The following orders will be entered.

ORDER: The respondent's motion to terminate is denied.

FURTHER ORDER: The record is remanded for further proceedings and the entry of a new decision.

Ellen Rebowitz
FOR THE BOARD

[2] We do note that the respondent challenges the Immigration Judge's denial of his request to administratively close these proceedings. However, the Attorney General has held that Immigration Judges and the Board do not have authority to administratively close removal proceedings except in very limited circumstances pursuant to a regulation or judicially approved settlement. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018).