U.S. Department of Justice

Executive Office for Immigration Review

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Name: SAINTELMI, NIXON

A 078-356-199

Date of this notice: 11/8/2018

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:
Kendall Clark, Molly

Userteam: Docket

File: A078-356-199 – Orlando, FL

Date: NOV - 8 2018

In re: Nixon SAINTELMI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Sui Chung, Esquire

APPLICATION: Reopening

On July 18, 2018, the respondent submitted a motion to reopen and terminate proceedings in which the Board dismissed his appeal on January 3, 2017. The motion will be granted.

Contrary to his arguments otherwise, the respondent's motion to reopen is statutorily barred as untimely because it was filed more than a year after the Board's final administrative decision (Motion at 7-8). 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). He contends that proceedings should be reopened, however, in light of the holdings in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) (holding that 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act, is unconstitutionally vague) and *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (holding that a notice to appear ("NTA") that failed to designate the specific time, place, or date of an alien's removal proceedings does not trigger the stop-time rule ending the alien's accrual of continuous presence). We recognize that a change in case law can support sua sponte reopening in certain circumstances. *Matter of G-D-*, 22 I&N Dec. 1132, 1132 (BIA 1999) (in order for a change in the law to qualify as an exceptional situation that merits the exercise of discretion by the Board of Immigration Appeals to reopen or reconsider a case sua sponte, the change must be fundamental in nature and not merely an incremental development in the state of the law); 8 C.F.R. § 1003.2(a).

Moreover, in order to determine whether reopening is warranted, the Board must determine whether the "evidence is of such a nature that ... if proceedings ... were reopened, with all attendant delays, the new evidence offered would likely change the result in the case." *Ali v. U.S. Att'y Gen.*, 443 F.3d 804, 813 (11th Cir. 2006) (*quoting Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992). The holding in *Sessions v. Dimaya* has no bearing on the respondent's removability under sections 237(a)(2)(A)(ii) or 237(a)(2)(B)(i) of the Act.[1] Moreover, neither the Immigration Judge nor the Board found that the respondent's conviction for burglary of an unoccupied dwelling in violation of Florida Statute section 810.02(1)(b)(3)(B) was a particularly serious crime based on a determination that it was an aggravated felony for immigration purposes. Rather, both the Immigration Judge and this Board instead considered factors enumerated in *Matter of N-A-M-*,

[1] In his April 14, 2015, decision, the Immigration Judge found the respondent removable under the two noted charges (4/14/15 IJ at 6). The respondent has not challenged these findings.

24 I&N Dec. 336 (BIA 2007)[2] in finding that the respondent had been convicted of a particularly serious crime (11/16/15 IJ at 5-6); 1/3/17 BIA at 5). As *Sessions v. Dimaya*, therefore, has no bearing on these analyses, the respondent has not demonstrated an exceptional circumstance supporting sua sponte reopening in this regard. *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997); 8 C.F.R. § 1003.2(a).

To the extent that the respondent argues that the Board otherwise erred with regard to finding that he had committed two or more crimes involving moral turpitude and that his controlled substance offenses supported a finding of removability, these contentions are in the nature of a motion to reconsider, which is untimely filed. *Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006) (a motion to reconsider contests the correctness of the original decision based on the previous factual record, while a motion to reopen seeks a new hearing based on new or previously unavailable evidence); section 240(c)(6) of the Act; 8 C.F.R. § 1003.2(b). He has not identified any exception relating to this aspect of his motion, and we find that reconsideration is not warranted.

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). 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, 8 U.S.C. § 1229(a), 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, neither reopening nor termination of the proceeds is warranted on this basis. *Matter of G-D-*, 22 I&N Dec. 1132, 1132 (BIA 1999); 8 C.F.R. § 1003.2(a).

However, in light of *Sessions v. Dimaya*, the respondent is no longer removable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act, for having committed an aggravated felony crime of violence under 18 U.S.C. § 16(b). Therefore, he is eligible to pursue an application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). In light of the evidence presented, we find it appropriate to grant sua sponte reopening in this regard, and remand the record to the Immigration Judge to allow the respondent to pursue an application for cancellation of removal. Accordingly, the following orders shall be entered.

ORDER: The motion to reopen is granted.

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[2] Therein the Board specifically found that, "In order to be considered a particularly serious crime under section 241(b)(3)(B)(ii) of the Immigration and Nationality Act, ... an offense need not be an aggravated felony under section 101(a)(43) of the Act." *Matter of N-A-M-*, 24 I&N Dec. at 341.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings in accordance with this decision.

FOR THE BOARD