U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: LUZARDO, LAURA MABEL

A 097-242-090

Date of this notice: 10/22/2018

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

Gilbert
Userteam: Docket

File: A097-242-090 – Hartford, CT

Date: OCT 22 2018

In re: Laura Mabel LUZARDO

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Robert C. Ross, Esquire

ON BEHALF OF DHS: Courtney Gates-Graceson
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native and citizen of Uruguay, and a lawful permanent resident of the United States, appeals an Immigration Judge's decision dated April 26, 2018, which found her removable, and denied her motion to terminate proceedings. The Department of Homeland Security ("DHS") has filed a response. The respondent has filed a motion to terminate with the Board. The appeal will be dismissed in part, sustained in part, and proceedings terminated.

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 Immigration Judge denied the respondent's motion to terminate based on her claim that she was a United States citizen (IJ at 3-4). We uphold the Immigration Judge's determination that the respondent did not establish that she is a derivative United States citizen pursuant to 320(a) of the Immigration and Nationality Act, 8 U.S.C. § 1431(a) (IJ at 3-4). A person who claims derivative citizenship has the burden to establish the claim. *See Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 164 (BIA 2001); *Matter of Tijerina-Villarreal*, 13 I&N Dec. 327, 330 (BIA 1969). Section 320 of the Act was the law that was in effect at the time the respondent turned 18 years old in 2005 for those in her situation, and applies to her case (IJ at 3-4).

The respondent relies on *Nwozuzu v. Holder*, 726 F.3d 323, 333 (2d Cir. 2013), which interpreted former section 321(a)(5) of the Act, 8 U.S.C. § 1432(a)(5), and held that a child need not establish lawful permanent resident status prior to the age of 18 in order to derive citizenship from a naturalizing parent or parents (Respondent's Br. at 9-10). However, the Second Circuit was addressing the language "thereafter begins to reside permanently in the United States," language that does not appear in section 320(a) of the Act. We are not persuaded by the respondent's arguments on appeal that *Nwozuzu v. Holder* is applicable to the respondent's situation inasmuch as section 320 of the Act, and not section 321(a) of the Act, applies to her case (Respondent's Br. at 8-10). The respondent adjusted status on September 7, 2005, about a year after she turned 18 (IJ at 1; Tr. at 71). Thus, inasmuch as the respondent was over 18 years of age

when she adjusted status, the respondent is not eligible to become a United States citizen pursuant to section 320(a) of the Act (IJ at 3-4).

The Immigration Judge also denied the respondent's motion to terminate based on her being removable for having been convicted of an aggravated felony theft offense as defined in section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G) (IJ at 4-6).[1]

The respondent has the following pertinent convictions: (1) two counts of larceny in the third degree pursuant to Conn. Gen. Stat. § 53a-124 on November 30, 2012, where she was sentenced to five years, execution suspended, and three years probation (IJ at 1-2; Exh. 15); and (2) larceny in the first degree pursuant to Conn. Gen. Stat. § 53a-122 where she was sentenced to five years imprisonment on June 30, 2016 (IJ at 2; Exh. 15).

Both Conn. Gen. Stat. § 53a-122 and Conn. Gen. Stat. § 53a-124 incorporate the definition of "larceny" set forth in Conn. Gen. Stat. § 53a-119, which is defined as occurring when, "with intent to deprive another of property or to appropriate the same to himself or a third person, [the defendant] wrongfully takes, obtains or withholds such property from an owner" through various means. *See* Conn. Gen. Stat. § 53a-119.

In finding that the respondent's larceny convictions were aggravated felony theft offenses, the Immigration Judge relied on the Second Circuit decisions in *Almeida v. Holder*, 588 F.3d 778 (2d Cir. 2009) and *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. 2004) which held that larceny in Connecticut was categorically a theft offense (IJ at 4). However, we observe that the United States Court of Appeals for the Second Circuit recently issued an order in *Bastian-Mojica v. Sessions*, 716 Fed. Appx. 45, 47 (2d Cir. 2017), in which it indicated that it does not consider *Almeida* and *Abimbola* to have adjudicated the issue of whether Connecticut General Statutes section 53a-119 is categorically a "theft offense" aggravated felony in light of the distinction between theft and fraud offenses discussed in *Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008) (distinguishing between theft-based and fraud-based offenses when considering whether an offense constitutes an aggravated felony, namely as an individual perpetrating a fraud offense frequently has the consent of the owner, unlike theft-based offenses).

In light of the Second Circuit's statement that it does not consider its own case law to have resolved the specific issue before us in this matter, and in light of the court's discussion of the impact of relevant Board case law on this issue, we conclude that, under these circumstances, the respondent has not been convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act. Accordingly, the respondent's appeal will be sustained and removal proceedings will be terminated.

[1] Although the Immigration Judge noted that the respondent's former counsel conceded removability, we do not deem the respondent bound by this concession inasmuch as the Immigration Judge allowed the respondent's new counsel to make arguments regarding the question of removability, including the submission of a brief on this question (IJ at 2, 4; Tr. at 86, 100-02, 125-26)

During the pendency of the appeal, the respondent filed a motion to terminate based on *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). In that case, the Supreme Court held that the stop-time rule was not triggered by a notice to appear that failed to identify the date and time for the hearing. This holding does not require or compel termination of proceedings. A notice to appear that does not specify the date and time of the alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings, and meets the requirements of section 239(a) of the Act, 8 U.S.C. § 1229(a)(1) when a notice of hearing specifying this information is later sent to the alien. *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 445-47 (BIA 2018). The respondent does not contest that he received this notice. Moreover, the respondent did not object to the notice to appear before the Immigration Judge thus waiving any claim with respect to the notice to appear. Therefore, although we will terminate proceedings based on the discussion above, we will not do so based on the issuance of *Pereira v. Sessions*.

Accordingly, the following orders will be entered.

ORDER: The appeal is dismissed in part and sustained in part.

FURTHER ORDER: These proceedings are terminated.

FOR THE BOARD