U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MARTINEZ REYES, JOSE SAMU... **A 098-388-569**

Date of this notice: 7/9/2013

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:
Liebowitz, Ellen C

TranC
Userteam: Docket

File: A098 388 569 - San Diego, CA Date: JUL - 9 2013

In re: JOSE SAMUEL MARTINEZ REYES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Johanna S. Schiavoni, Esquire

ON BEHALF OF DHS: Jeffrey Lindblad
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined under section 101(a)(43)(G)) (not sustained)

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation (sustained)

APPLICATION: Adjustment of status in conjunction with a waiver of inadmissibility under section 209(c); withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals the Immigration Judge's January 11, 2013, decision finding him ineligible for a waiver of inadmissibility under section 209(c) of the Immigration and Nationality Act, 8 U.S.C. § 1159(c), and denying his application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). *See* sections 208, 241(b)(3) of the Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-1208.18. The record will be remanded.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

On November 25, 2005, the respondent was granted asylum by an Immigration Judge (Exh. 9). The respondent did not adjust his status to that of a lawful permanent resident (Exh. 1). On January 30, 2012, the Department of Homeland Security ("DHS") issued the respondent a Notice to Appear ("NTA"), alleging he was removable from the United States based on criminal convictions committed after the respondent was granted asylum (Exh. 1). On January 11, 2013, the Immigration Judge found the respondent removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), based on his conviction under section 11379(a) of the California Health and Safety Code (I.J. at 4-5; Exh. 4). The respondent does not challenge this determination on appeal (Respondent's Br. at 19).

Before the Immigration Judge, the respondent sought adjustment of status under section 209(b) of the Act in conjunction with a waiver of inadmissibility under section 209(c) of the Act. The Immigration Judge concluded that the respondent was ineligible for a waiver, as the respondent is inadmissible under section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C), as an alien who the Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance; this is a ground of inadmissibility that cannot be waived by section 209(c) of the Act (I.J. at 5-7). The Immigration Judge also concluded that the respondent was ineligible for asylum, withholding of removal and protection under the CAT, and ordered him removed from the United States (I.J. at 11-19).[1] The respondent now appeals.

We point out that an alien who has been granted asylum cannot be removed from the United States unless and until his asylum status is terminated. *See Matter of V-X-*, 26 I&N Dec. 147, 149-50 (BIA 2013); *see also* section 208(c) of the Act; 8 C.F.R. § 1208.22. In *Matter of V-X-*, *supra*, which was issued subsequent to the Immigration Judge's decision in this case, the Board noted that the regulations contemplate that termination of an alien's asylum status may occur in conjunction with removal proceedings, but instructed that ordinarily issues of removability and eligibility for relief from removal should be deferred until a threshold determination is made regarding the termination of asylum status.[2] *Matter of V-X-*, *supra*, at 149-50; *see also Nijjar v. Holder*, 689 F.3d 1077, 1085-86 (9th Cir. 2012) (holding that Congress only authorized the Attorney General to terminate asylum status; thus, the regulations under which the DHS may terminate asylum are ultra vires).

Although alluded to at the hearing, the Immigration Judge's decision does not specifically address the termination of the respondent's asylum status (I.J. at 7; Tr. at 40, 69). The Immigration Judge's order should expressly terminate the respondent's asylum status, if she finds that termination is the appropriate outcome.

Moreover, the Immigration Judge's decision should also address the basis for termination and if it is based on finding the respondent's conviction to be an aggravated felony, the Immigration Judge should more specifically explain why it is an aggravated felony under the applicable law of the United States Court of Appeals for the Ninth Circuit (I.J. at 6-7). *See, e.g.*, *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007) overruled on other grounds by *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (analyzing petitioner's conviction under section 11379(a) of the California Health and Safety Code); *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th

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[1] The Immigration Judge found that the respondent's conviction did not constitute a particularly serious crime that would preclude him from withholding of removal under section 241(b)(3) of the Act (I.J. at 7-10).

[2] The Board also noted that an Immigration Judge need not reach the issue of termination of asylum status if the alien is eligible for, and deserving of, some form of relief that would make termination of asylum status moot, such as adjustment of status under section 209 of the Act. *See Matter of V-X-*, *supra*, at 149, n.1. As the Immigration Judge in the instant case denied the respondent's application for adjustment of status, she is required to reach the issue of termination. *Cf. Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004).

Cir. 2001) (analyzing petitioner's conviction under section 11360(a) of the California Health and Safety Code); *see also Young v. Holder*, *supra* (holding that an alien cannot carry his burden of demonstrating eligibility for relief by merely establishing that the record of conviction is inconclusive as to whether a conviction is for an aggravated felony).

The respondent presents some arguments on appeal regarding the effect of his conviction on his eligibility for relief (Respondent's Br. at 17-37). Since we are remanding proceedings to the Immigration Judge, we will give the respondent the opportunity to present these arguments before the Immigration Judge; the Department of Homeland Security ("DHS") should have the opportunity to respond. Moreover, the parties may submit additional evidence on remand regarding any relevant issues.[3] Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Ellen Rubowitz
FOR THE BOARD

[3] Insofar as the respondent argues that the Immigration Judge violated his due process rights as she did not notify the respondent that termination of asylum might occur and did not give the respondent an opportunity to present evidence that his conviction did not preclude him from a waiver of inadmissibility under section 209(c) of the Act, the record belies his assertion (Tr. at 40-43, 45-54; I.J. at 5; Exhs. 5 & 6). On remand, the respondent may present his arguments about whether a written notice of the intent to terminate his asylum status is required.