UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS

File No. A090 419 179	)	Date: April 3, 2014
	)	
IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
Robinson MARTINEZ,	)	
Respondent.	)	
	)	

CHARGES: INA § 237(a)(2)(B)(i): Conviction for Controlled Substance Violation at any Time After Admission;
INA § 237(a)(2)(A)(iii) as it Relates to INA § 101(a)(43)(U): Conviction for Aggravated Felony at any Time After Admission, Specifically, an Attempt or Conspiracy to Commit an Aggravated Felony.

APPLICATIONS: Termination of Proceedings;
INA § 245(a): Readjustment of Status, in Conjunction with a Waiver of Inadmissibility under INA § 212(h);
Motion to Change Venue.

ON BEHALF OF RESPONDENT:
Jose M. Martinez, Esq.

ON BEHALF OF THE GOVERNMENT:
Pamela Perillo, Assistant Chief Counsel

ORDER CERTIFYING DECISION OF THE IMMIGRATION JUDGE TO THE BOARD OF IMMIGRATION APPEALS

On August 20, 2013, this Court issued an oral decision denying the respondent's motion to terminate, pretermitting his application for readjustment of status under INA § 245(a) (made in conjunction with a waiver of inadmissibility under INA § 212(h)), and ordering him removed from the United States to Mexico on the charges contained in the Notice to Appear.[1] On February 12, 2014, the Board of Immigration Appeals remanded this case to the Court. The Court respectfully certifies the case to the Board, given what appears to be significant legal error on the Board's part.

[1] The undersigned Immigration Judge assumed jurisdiction over this case on July 1, 2013, due to the retirement of Judge Jimmie Benton. See TR at 139. Judge Benton had assumed jurisdiction over this case due to the retirement of Judge Howard Rose. Judges Benton and Rose conducted eleven hearings in this case over the course of two-and-a-half years. The Court apologizes to the respondent for any rudeness on the part of the prior Immigration Judges during those hearings.

In its August 20, 2013 decision, the Court denied the respondent's motion to terminate, which was based on his contention that he acquired United States citizenship from his mother, Sarita (Sara) Martinez, who, in turn, had acquired it from her father, Gregorio Martinez. IJ at 3-5. The Court observed that Gregorio Martinez was born on November 17, 1934, and that his daughter, Sarita, was born on July 4, 1952. IJ at 4. Given Sarita Martinez's July 4, 1952 date of birth, the Court held that former INA § 201(g) governed the issue of whether she acquired U.S. citizenship from her U.S. citizen father. Former INA § 201(g),[2] in pertinent part, stated that

> the following shall be nationals and citizens of the United States at birth:
> [a] person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien. . . .[3]

Applying former INA § 201(g), the Court held that because Gregorio Martinez was under 21 years of age at the time of his daughter's birth, he did not satisfy the five years of residence, post-sixteen years of age requirement. See Guzman v. U.S., Dept. of Homeland Sec., 679 F.3d 425 (6th Cir. 2012). The Court therefore concluded that Sarita Martinez failed to acquire U.S. citizenship from her father, Gregorio Martinez, and, as a consequence, she could not have transmitted it to her son, the respondent.

On appeal, the respondent asserted that the Court should have applied INA § 301(a)(7) and INA § 309(b) instead of former INA § 201(g). See Brief of Appellant at 14-16. The Board, without resolving the threshold issue of what statute applied, found that "a remand [was] warranted in order for the Immigration Judge to reassess the respondent's claim that he derived[4] United States citizenship through his mother." BIA at 2. The Board further found that the Court needed to develop the factual record with respect to the issue of whether Sarita Martinez was legitimated by her father, given the potential applicability of INA § 301(a)(7) and § 309(b). Id. at 3-4.

The Board erred in remanding the case for a further factual inquiry instead of first addressing

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[2] Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139.

[3] "The full text of the statute provides additional citizenship requirements and exceptions for children of parents employed by the United States government or by a United States religious, philanthropic, commercial, educational, scientific, or financial organization." Guzman, 679 F.3d at 431 n. 1. None of these exceptions applies in this case.

[4] The Board repeatedly and erroneously categorizes the issue as one of citizenship by derivation. However, the issue is whether the respondent acquired U.S. citizenship at birth, not whether he derived it via his mother's naturalization, which occurred well after he reached 18 years of age. See Exhibit 42.

the Court's holding that former INA § 201(g) governed Sarita Martinez's claim of U.S. citizenship by acquisition. This is because the operative fact - Sarita Martnez's date of birth - is not in dispute. Sarita Martinez was born on July 4, 1952. See Exhibit 43. "The applicable law for transmitting citizenship to a child born abroad when one parent is a citizen is the statute in effect at the time of the child's birth." Iracheta v. Holder, 730 F.3d 419, 423 (5th Cir. 2013) (citing Marquez–Marquez v. Gonzales, 455 F.3d 548, 559 n. 23 (5th Cir. 2006)); Alcarez-Garcia v. Ashcroft, 293 F.3d 1155, 1157 (9th Cir. 2002). INA § 301(a)(7) was first effective on December 24, 1952, five months after Sarita Martinez's birth date, and was not retroactive. See Matter of Sepulveda, 14 I&N Dec. 616, 617 (BIA 1974) (citing Wolf v. Brownell, 253 F.2d 141, 142 (9th Cir. 1957)). Therefore, it does not govern the issue of whether Sarita Martinez acquired U.S. citizenship.

Furthermore, even if the Court or Board would have concluded that former INA § 301(a) governed, Sarita Martinez still could not have acquired U.S. citizenship. Former INA § 301(a) provided:

> (a) The following shall be nationals and citizens of the United States at birth:
> . . . (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

Gregorio Martinez was only 17 years, 7 months and 17 days old at the time of Sarita's birth. See Exhibits 27 and 43. Thus, Gregorio Martinez could not have satisfied former INA § 301(a)'s less arduous physical presence requirement, as Sarita Martinez was born well before he reached the age of 19. Consequently, even under former INA § 301(a),[5] Gregorio Martinez could not have transmitted U.S. citizenship to his daughter, Sarita. The Board's remand for further factual development of the record on the issue of legitimation was thus unwarranted, given that the operative, established, undisputed facts (i.e., Gregorio Martinez's and Sarita Martinez's dates of

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[5] Indeed, the respondent, in his appeal, also invokes a later amendment of INA § 301(g), which renders a U.S. citizen

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years.

However, this amendment was first effective in 1986, and thus does not apply to the issue of whether Sarita Martinez acquired U.S. citizenship. See Lake v. Reno, 226 F.3d 141, 144 n. 1 (2d Cir. 2000) (citing Pub.L. No. 99–653, § 12, 100 Stat. 3655, 3657 (Nov. 14, 1986)); U.S. v. Sandoval-Gonzalez, 642 F.3d 717, 720 n. 2 (9th Cir. 2011).

birth) rendered the acquisition of U.S. citizenship by Sarita Martinez an impossibility under either provision.

Sarita Martinez (Sara Gomez) first became a U.S. citizen on October 7, 2010, when she naturalized. See Exhibit 42. As such, Sarita Martinez did not transmit U.S. citizenship to her son, the respondent, at the time of his birth. The Court thus asks the Board to again review the Court's legal determination that the respondent did not acquire U.S. citizenship.

The Board also erred inasmuch as it remanded the instant case for the Court to reconsider whether the respondent remains removable under INA § 237(a)(2)(A)(iii) as an aggravated felon, given the U.S. Supreme Court's decision in Moncrieffe v. Holder, 133 S.Ct. 1678 (2013). This is because Moncrieffe addressed the issue of when a state conviction for possession with intent to distribute marijuana may be deemed an offense "punishable under the [Controlled Substances Act]" as a felony. Id. at 1681. Here, the respondent was convicted in U.S. District Court for the Western District of Michigan, for Use of a Communication Facility, in violation of 21 U.S.C. § 843(b), a felony directly proscribed under the Controlled Substances Act.[6] See Exhibit 3. As any analysis of state law is impertinent to the issue of whether this conviction comprises an aggravated felony, Moncrieffe is wholly inapposite. The Court therefore stands by its original ruling that the respondent's conviction constitutes an aggravated felony under INA § 101(a)(43)(U).[7] See IJ at 2 (citing Matter of Chang, 16 I&N Dec. 90, 92 (BIA 1977)).

The Board also erred inasmuch as it remanded the instant proceeding for the Court to consider the respondent's eligibility for adjustment of status. This is because the respondent is wholly ineligible for adjustment of status, as he cannot waive his inadmissibility under INA § 212(a)(2)(A)(i)(II). In its August 20, 2013 decision, the Court held that the respondent was statutorily ineligible for a waiver of inadmissibility under INA § 212(h). IJ at 5. Indeed, the Board, in its remand, affirmed the Court's ruling that the respondent was statutorily ineligible for a waiver of inadmissibility under INA § 212(h). See BIA at 5. The Court further notes that at his July 1, 2013 hearing, the respondent, through counsel, conceded ineligibility for adjustment of status. TR at 142-43. Because the respondent thus lacks eligibility for adjustment of status, any remand for that purpose is futile.

Lastly, the Court addresses the Board's invitation to the respondent to renew his motion for a change of venue. See BIA at 4. Under Matter of Rahman, 20 I&N Dec. 480, 482 (BIA 1992), a party must demonstrate "good cause" for a change of venue. Factors considered include

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[6] To the extent that the respondent contends that an individual other than himself was convicted of said crime, the Court notes that at his August 20, 2013 hearing, the respondent, through counsel, conceded the fact of his conviction. See TR at 166.

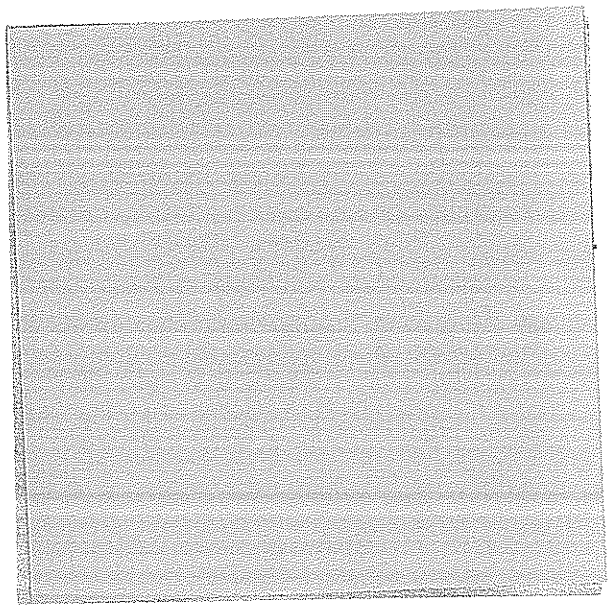
[7] Because the respondent has been convicted of an aggravated felony, he is ineligible for cancellation of removal. See INA § 240A(a)(3); BIA at 5 n. 7 (allowing the respondent to "raise the issue of eligibility for cancellation of removal on remand").

administrative convenience, expeditious treatment of the case, location of witnesses, and cost of transporting witnesses or evidence to a new location. Matter of Velasquez, 19 I&N Dec. 377, 382-83 (BIA 1986). The respondent seeks a change of venue to present the testimony of witnesses who reside in McAllen, Texas, on the issue of whether he acquired U.S. citizenship. However, no further development of the factual record is necessary; that issue rests on undisputed facts. See supra, at 2-4.

With respect to the respondent's assertion that he was "denied access to his attorney" because his office is six hours away, see Brief of Appellant at 24, the Court observes that it has allowed counsel to appear telephonically on numerous occasions, and has in no way impacted their ability to confer. The Court notes that "[t]he Government is not required to accommodate the [respondent's] choice of a distant attorney . . . by changing venue at considerable expense, especially where there is no showing that local counsel is unavailable." Matter of Rahman, 20 I&N Dec. 480, 484 (BIA 1992).

The Court thus finds that the respondent has failed to demonstrate good cause for a change of venue. His motion to change venue to McAllen, Texas is thus denied.

For the foregoing reasons, the Court certifies the instant case to the Board pursuant to 8 C.F.R. § 1003.1(c). The Court requests that the Board again review its August 20, 2013 decision, in conjunction with the instant decision certifying this case.



ORDER

IT IS ORDERED THAT THE INSTANT CASE BE CERTIFIED TO THE BOARD OF IMMIGRATION APPEALS UNDER 8 C.F.R. § 1003.1(c).

4/3/14
Date

SAUL GREENSTEIN
Immigration Judge