U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: MARTINEZ, ROBINSON

A 090-419-179

Date of this notice: 12/4/2014

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:
Pauley, Roger

schwarzA
Userteam: Docket

File: A090 419 179 – Houston, TX Date: DEC - 4 2014

In re: ROBINSON MARTINEZ a.k.a. Juan Ramon Fuentes a.k.a. Smokey Martinez a.k.a. Robin Martinez a.k.a. Juan Ramon Fuentes, Jr.

IN REMOVAL PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Jose M. Martinez, Esquire

ON BEHALF OF DHS: Kevin Lear
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

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

APPLICATION: Termination; adjustment of status; waiver of inadmissibility

This case was last before the Board on February 12, 2014, when we remanded the record to the Immigration Judge for further analysis of the respondent's claim that he acquired citizenship through his mother, Sara (Sarita) Martinez, under sections 301(g) and 309(b) of the Immigration and Nationality Act, 8 U.S.C. § 1401(g), 1409(b).[1] We also remanded for further proceedings regarding the respondent's removability in light of *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), and for consideration of the respondent's eligibility for adjustment of status in light of the visa petition filed by the respondent's United States citizen daughter. We invited the Immigration Judge to consider any motion to change venue raised by the respondent on remand, and to allow the respondent to challenge his removability in the event that he did not sufficiently establish his United States citizenship.

On April 3, 2014, the Immigration Judge issued a new decision. The Immigration Judge certified the record to the Board "given what appears to be significant legal error on the Board's part" (I.J. dated April 3, 2014, at 1). *See* 8 C.F.R. § 1003.1(c).

The Immigration Judge found that the respondent did not acquire citizenship through his mother, Sara, because Sara did not acquire citizenship through her father under the law in effect at the time of Sara's birth. The Immigration Judge concluded that the Board, in remanding for

[1] The respondent was born in Mexico on August 7, 1971.

further analysis under sections 301(g) and 309(b), failed to consider the threshold issue of whether section 201(g) of the Nationality Act of 1940 (which was the law in effect before former section 301(a)(7) (now 301(g)) became effective) governed whether Sara acquired citizenship at her birth (I.J. dated April 3, 2014, at 3). *See* former 8 U.S.C. § 601(g), 54 Stat. 1137, 1138-39. Thus, in his decision to certify the record to the Board, the Immigration Judge asked us to review his legal determination that the respondent did not acquire United States citizenship through his mother (I.J. dated April 3, 2014, at 4; Tr. dated April 3, 2014, at 15).

The Immigration Judge concluded that the Board erred in remanding the record to determine whether the respondent was removable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act in light of *Moncrieffe v. Holder*, *supra*. The respondent was convicted under 21 U.S.C. § 843(b) for the use of a communication facility, which is a felony under the Controlled Substances Act ("CSA"). Thus, because the respondent's conviction is a felony under the CSA, the Immigration Judge determined that *Moncrieffe v. Holder* was not relevant inasmuch as it addressed when a state conviction for possession with intent to distribute marijuana may be an offense punishable as a felony under the CSA (I.J. dated April 3, 2014, at 4).

The Immigration Judge also found that the Board erred in instructing him to consider the respondent's eligibility for adjustment of status. The Immigration Judge concluded that the respondent was not eligible for a waiver of inadmissibility under section 212(h) of the Act, and thus, could not waive his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act for his controlled substance offense. Indeed, we previously affirmed the Immigration Judge's determination that the respondent did not establish his statutory eligibility for a waiver of inadmissibility under section 212(h) of the Act (I.J. dated April 3, 2014, at 4; BIA dated February 12, 2014 at 5).

After the Immigration Judge certified the record to the Board, the respondent filed an appeal. In addition to challenging the merits of the Immigration Judge's decision, the respondent argues that the Immigration Judge erred in certifying the case to the Board.

We will accept jurisdiction of this case by certification. *See* 8 C.F.R. § 1003.1(c). We also will address the issues raised by the respondent's appeal as they pertain to the Immigration Judge's reasons for certifying the record to the Board.[2]

After filing his appeal, the respondent filed a motion to reconsider and a motion to terminate proceedings. Although he filed the motions with the Board, the motions are addressed to the Immigration Judge. The Immigration Judge had already certified the record to the Board when the respondent filed the motions; thus, the Immigration Judge does not have jurisdiction over the motions (DHS Br. at 2). We will address those motions in this order.

[2] The respondent filed a brief in opposition to the Immigration Judge's decision to certify the case to the Board, which also appears to be the respondent's brief in support of his appeal.

The respondent filed additional motions with the Board; a motion to remand, and a motion to quash the Immigration Judge's decision to certify the record to the Board.

We first address the respondent's citizenship claim, *i.e.*, which law governs the issue of whether the respondent's mother, Sara, acquired citizenship through her father such that she was able to transmit citizenship to the respondent when he was born in Mexico in 1971. We previously remanded for the Immigration Judge to make specific findings of fact assuming that sections 301(g) and 309(b) applied. As stated previously, the Immigration Judge determined on remand that section 201(g) of the Nationality Act of 1940 applies. The respondent argues that current sections 301(g) and 309(b) of the Act apply (Respondent's Br. filed September 2, 2014, at 17-27).

A person born abroad may automatically acquire United States citizenship at birth if his or her United States citizen parent was physically present in the United States for the requisite period before the person's birth. The applicable law for transmitting citizenship to a child born abroad when one parent is a United States citizen is the statute that was in effect at the time of the child's birth. *See Iracheta v. Holder*, 730 F.3d 419, 423 (5th Cir. 2013); *United States v. Cervantes-Nava*, 281 F.3d 501, 503 n.2 (5th Cir. 2002) (citing *United States v. Gomez-Orozco*, 188 F.3d 422, 426-27 (7th Cir. 1999)); *see also Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153, 163 (BIA 2001).

Upon further consideration, we agree with the Immigration Judge that section 201(g) of the Nationality Act of 1940 is the law governing whether Sara acquired citizenship from her father. The record establishes that Sara was born out of wedlock in Mexico on July 4, 1952, to United States citizen Gregorio Martinez and a Mexican citizen (I.J. dated April 3, 2014, at 2, 3; I.J. dated August 30, 2013, at 4; BIA dated February 12, 2014, at 2). For persons born between January 13, 1942, and December 23, 1952, section 201(g) of the Nationality Act of 1940 contains the applicable requirements, and for those born on or after December 24, 1952, former section 301(a)(7) (redesignated later as section 301(g)) of the Immigration and Nationality Act of 1952 governs. *See* 175 A.L.R. Fed. 67, § 2. Thus, because Sara was born in July 1952, her father could only transmit citizenship if he met the requirements of section 201(g).

Section 201(g) provided:

> A person born outside of the geographical limits of the United States and its outlying possession 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 sixteen years.

The Immigration Judge found that Gregorio Martinez, who was born on November 17, 1934, was 17 years of age when Sara was born on July 4, 1952 (I.J. dated April 3, 2014, at 3; DHS Br. at 3; Exh. 27, 43). Thus, it is mathematically impossible for him to have lived at least 5 years in the United States after attaining the age of 16 years before Sara was born (DHS Br. at 3).

The respondent argues that current section 301(g) of the Act applies because section 309(b) of the Act provides that–

> the provisions of section 301(g) shall apply to a child born out of wedlock on or after January 13, 1941, and before December 24, 1952, as of the date of birth, if the paternity of such child is established at any time and while such child is under the age of 21 years by legitimation.

Section 301(g), in turn, provides that–

> 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.[3]

The respondent argues that the plain language of section 309(b) means that section 301(g) applies to his case given that his mother was born out of wedlock in 1952 (Respondent's Br. filed September 2, 2014, at 19, 21-27, 34, 38). Thus, he asserts that he need only establish that before Sara was born Gregorio resided in the United States for 2 years after attaining the age of 14 years (Respondent's Br. filed September 2, 2014, at 22).

In 1988, however, Congress clarified that the shortened required period of United States residence for the citizen parent provided by section 301(g) applies only to persons born on or after November 14, 1986 (I.J. dated April 3, 2014, at 3 n.5; DHS Br. at 3). *See* Pub. L. 100-525, § 8(r), 102 Stat. 2619 (specifying that the amendment to section 301(g) made by section 12 of Immigration and Nationality Act Amendments of 1986 applied to persons born on or after November 14, 1986). *See also U.S. v. Flores-Villar*, 497 F.Supp.2d 1160 (S.D. Cal. 2007). Thus, because Sara was born before November 14, 1986, the shortened residency requirements of section 301(g) do not benefit the respondent's case.

Further, as the Immigration Judge pointed out, even if we applied the law in effect between December 4, 1952, and November 14, 1986, the respondent cannot sufficiently establish that his mother Sara acquired citizenship through Gregorio (I.J. dated April 3, 2014, at 3). During that time, former section 301(a)(7) (later redesignated as section 301(g)) provided–

> a person 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.

[3] These residency requirements were added by the Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655, § 12.

As stated, Gregorio was 17 years of age when Sara was born. Thus, it is mathematically impossible for him to have satisfied the 5-year residency requirement after turning 14 years of age before Sara was born (I.J. dated April 3, 2014, at 3; DHS Br. at 3).

For these reasons we conclude that (a) section 201(g) of the Nationality Act of 1940 applies in determining whether Sara acquired citizenship at birth through Gregorio; (b) Sara did not acquire United States citizenship at birth because Gregorio could not have satisfied the residency requirements in effect when Sara was born; and (c) the respondent did not acquire United States citizenship at birth through his mother because she was not a United States citizen when he was born. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent has not sufficiently established that he is a United States citizen.[4]

The Immigration Judge concluded that the Board erred in remanding on the issue of whether the respondent was removable as an aggravated felon under section 237(a)(2)(A)(iii) of the Act in light of *Moncrieffe v. Holder*, *supra*. In that case, the Supreme Court considered whether an alien's Georgia conviction for possession of marijuana with intent to distribute qualified as an aggravated felony conviction under section 101(a)(43)(B) of the Act, making him removable under section 237(a)(2)(A)(iii) of the Act. The Court explained that the categorical approach requires looking not to the facts of a prior criminal case, but to "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding" removal ground. *Moncrieffe v. Holder*, *supra*, at 1684 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007)). The Immigration Judge determined that *Moncrieffe v Holder*, *supra*, was not relevant in the respondent's case because he was convicted of a federal crime specifically covered by the CSA.

The respondent was convicted under section 21 U.S.C. § 843(b) (Exh. 3). The statute provides that it shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter (*i.e.*, the CSA).

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[4] Gregorio is the respondent's grandfather, but he also is the respondent's adoptive father. The respondent argues that he acquired citizenship through Gregorio as his adoptive parent under former section 301(a)(7) of the Act (Respondent's Br. filed September 3, 2014, at 28-29; Motion to Terminate at 6-8) We explained in our prior decision, however, that the respondent is not able to establish his citizenship through his adoptive parents, because they did not file an Application for Certificate of Citizenship (Form N-600) prior to his turning 18 years of age (BIA dated February 12, 2014, at 2 n.4; Tr. dated April 4, 2013, at 21-22). *See* 8 C.F.R. § 322.2(a), (b). Additionally, Sara naturalized in 2010, well after the respondent turned 18 years of age. Thus, the respondent cannot derive citizenship through Sara's naturalization (DHS Br. at 3-4; BIA dated February 12, 2014, at 3 n.5). *See* section 320(a)(2) of the Act, 8 U.S.C. § 1431(a)(2).

With regard to section 237(a)(2)(A)(iii) of the Act, the term "aggravated felony" in section 101(a)(43)(B) encompasses "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." An offense is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is punishable as a felony under the CSA. *See Matter of Gustavo Ribeiro Ferreira*, 26 I&N Dec. 415, 416 (BIA 2014) (citing *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)).

Pursuant to 21 U.S.C. § 843(d)(1), the maximum term of imprisonment is 4 years.[5] Thus, because the statute proscribes a maximum penalty of more than 1 year imprisonment, and it is an offense under the CSA, the respondent has been convicted of an aggravated felony drug trafficking offense for purposes of removal (DHS Br. at 4-5). *See* 18 U.S.C. § 3559(a).

Moreover, this case is not governed by *Moncrieffe v. Holder, supra.* Unlike the distribution of marijuana, which is a felony under the CSA *unless* the offense involved a small amount of marijuana for no remuneration, it is clear that 21 U.S.C. § 843(b) is always a felony under the CSA, regardless of the quantity of marihuana involved. *See* 21 U.S.C. §§ 841(b)(4), 844. Thus, we are not persuaded that *Moncrieffe v. Holder, supra*, may apply simply because the judgment document did not specify whether the respondent's offense involved a small amount of marijuana for no remuneration (Respondent's Br. filed September 2, 2014, at 31). Accordingly, we conclude that the respondent is removable as an aggravated felon pursuant to section 237(a)(2)(A)(iii) of the Act (I.J. dated April 3, 2014, at 4).

The Immigration Judge concluded that the respondent is not eligible for a waiver of inadmissibility under section 212(h) of the Act because he did not present sufficient evidence to show that his offense involved simple possession of 30 grams or less of marijuana (I.J. dated August 20, 2013, at 5). *See* section 212(h) of the Act, 8 U.S.C. § 1182(h). We affirmed this ruling in our prior decision, noting that the respondent did not meet his burden to show that he was eligible for the 212(h) waiver (BIA dated February 12, 2014, at 5). *See* section 240(c)(4) of the Act, 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d); *Matter of Almanza*, 24 I&N Dec. 771, 774-75 (BIA 2009). Thus, in his order certifying the case to the Board, the Immigration Judge found that our remand for consideration of the respondent's eligibility to adjust status based on the petition filed by his United States citizen daughter was futile (I.J. dated April 3, 2014, at 4).

The respondent argues that the Immigration Judge erred in not considering *Martinez v. Mukasey*, 519 F.3d 532 (5th Cir. 2008) (Respondent's Br. filed September 2, 2014, at 33-34). In that case, the United States Court of Appeals for the Fifth Circuit, under whose jurisdiction this case arises, held that an alien who becomes a lawful permanent resident after his entry into the United States, rather than being admitted to this country while in the status of lawful permanent resident, is not precluded from seeking a section 212(h) waiver because he has been

[5] The statute provides for greater statutory maximum terms of imprisonment for repeat offenders, and for offenses that involve the manufacture of methamphetamine. *See* 21 U.S.C. §§ 843(d)(1), (2).

convicted since his entry of an aggravated felony. *Id. See also Matter of Rodriguez*, 25 I&N Dec. 784 (BIA 2012); *Bracamontes v. Holder*, 675 F.3d 380 (4th Cir. 2012); *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363 (11th Cir. 2011).

We concede that *Martinez v. Mukasey* is controlling authority. *See Matter of Rodriguez, supra.* The issue in this case, however, is not whether the respondent was precluded from applying for a section 212(h) waiver based on his having been convicted of an aggravated felony after he adjusted status. Rather, as stated previously, the respondent did not establish his threshold eligibility for the waiver because he did not sufficiently show that his controlled substance offense was a "single offense of simple possession of 30 grams or less of marijuana" as required by the lead paragraph of section 212(h) of the Act (DHS Br. at 5). Even on appeal and in his motions the respondent has not pointed to evidence in support of such a showing. Therefore, we affirm the Immigration Judge's conclusion that the respondent cannot waive his inadmissibility under section 212(a)(2)(A)(i)(II) of the Act with a section 212(h) waiver (I.J. dated April 3, 2014, at 4). It follows that the respondent is not eligible for adjustment of status. *See* 8 U.S.C. § 245(a) of the Act, 8 U.S.C. § 1255(a).

We disagree with the respondent's argument that the Immigration Judge erred in certifying the case to the Board (Respondent's Br. filed September 2, 2014, at 35-36). Although we stated in our prior decision that further findings of fact were required, upon reconsideration, we agree with the Immigration Judge's rulings regarding the applicability of section 201(g) of the Nationality Act of 1940, the respondent's removability as an aggravated felon under section 237(a)(2)(A)(III) of the Act, and the respondent's ineligibility for a section 212(h) waiver. The certification was proper inasmuch as it allowed the Immigration Judge to convey his concerns regarding errors of law in our prior decision. The respondent has not been prejudiced by the certification because we have considered his appellate arguments in addressing the Immigration Judge's reasons for certification. Further, contrary to the respondent's argument, the respondent had not already filed his appeal when the Immigration Judge certified the record to the Board (Respondent's Br. filed September 2, 2014, at 35). *See* 8 C.F.R. §§ 1003.1(c), 1003.7.

The respondent filed an affidavit of complaint against the Immigration Judge, and asserted in his brief that the Immigration Judge was not neutral and impartial at the April 3, 2014, hearing (Respondent's Br. filed September 2, 2014, at 36-37; Affidavit of Respondent Complaining Against Immigration Judge filed May 22, 2014). The respondent also claims that he is not able to have a fair and impartial hearing in Houston, and has filed a motion requesting recusal of the Immigration Judge in the instant case, as well as all other Immigration Judges within the Southern District of Texas, Houston Division (Motion to Disqualify and Recusal of Judge and Complaint filed May 22, 2014).

Our review of the transcript of the April 3, 2014, hearing does not reflect that the Immigration Judge was biased against the respondent. The Immigration Judge gave the respondent and his counsel sufficient opportunity to address the respondent's citizenship claim, his removability, and his eligibility for a section 212(h) waiver in conjunction with adjustment of status. The fact that the Immigration Judge ultimately disagreed with their legal arguments does not mean that he was biased against the respondent, or that he based his conclusions on mere belief rather than on application of the law (Affidavit of Respondent Complaining Against

Immigration Judge filed May 22, 2014, at 1-2, 3). We need not address whether recusal is warranted because we affirm the Immigration Judge's rulings in this case.

We note that the respondent's motion to reconsider and motion to terminate substantially mirror the arguments raised in the respondent's brief filed in opposition to the Immigration Judge's certification. Thus, because those motions pertain to the issues already resolved in this opinion, the motions are denied. For this reason we also deny the respondent's motion to remand, in which the respondent requested that we remand in light of his motions to reconsider and terminate (Motion to Remand at 2).

Finally, the respondent asserts in his motion to quash that the Immigration Judge did not properly serve his April 3, 2014, decision certifying the case to the Board (Motion to Quash at 1). The transcript reflects, however, that the Immigration Judge provided both parties with a copy of his decision certifying the case to the Board (Tr. dated April 3, 2014, at 22).

Accordingly, the following orders will be entered.

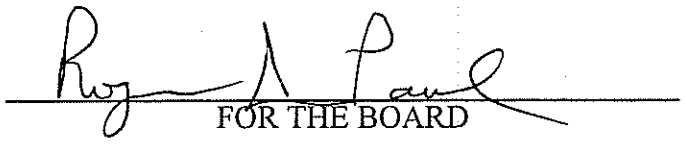
ORDER: The Immigration Judge's decision dated April 3, 2014, is affirmed.

FURTHER ORDER: The respondent's motion to reconsider is denied.

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

FURTHER ORDER: The respondent's motion to remand is denied.

FURTHER ORDER: The respondent's motion to quash the Immigration Judge's order certifying the case to the Board is denied.



FOR THE BOARD