U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: [redacted] [redacted]

Date of this notice: 2/21/2014

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:
Miller, Neil P.
Holmes, David B.
Kendall-Clark, Molly

TranC
Userteam: Docket

File: [redacted] – Los Angeles, CA Date: FEB 21 2014

In re: [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Anish Vashistha, Esquire

On April 25, 2013, the United States Court of Appeals for the Ninth Circuit granted the parties' joint motion to remand the record to the Board for further proceedings regarding the respondent's previously filed motion to reopen proceedings and motion to reconsider. The case had previously been before us on June 1, 2012, when we denied the respondent's motion to reconsider our December 21, 2011, denial of his motion to reopen proceedings. Upon remand, the respondent has filed a motion to remand the record to the Immigration Court with a request to expedite the proceedings. The Department of Homeland Security has not submitted supplemental briefing. Upon reconsideration, we will remand the record to the Immigration Court for further proceedings regarding the respondent's removability and his request for a waiver of inadmissibility pursuant to section 212(h) of the Act.

The respondent has pursued a waiver of inadmissibility under section 212(h) of the Act for over 10 years, in both pro se status and with representation. The respondent continues to argue that he should have been afforded an opportunity to apply for such relief at the time of his adjustment in 1997. The parties have jointly requested a remand to this Board for further proceedings regarding the respondent's eligibility for such relief. As an initial matter, we will address the jurisdictional issues which have arisen in the respondent's case since his departure from the United States. In our December 21, 2011, denial of the respondent's request for reopening, we found, inter alia, that we lacked jurisdiction because the respondent had departed the United States and had subsequently filed an untimely motion to reopen proceedings from abroad (2011 Bd. Dec. at 1). However, as will be discussed infra, we will equitably toll the respondent's filing deadline due to ineffective assistance of counsel. *See Singh v. Ashcroft*, 367 F.3d 1182, 1186 (9th Cir. 2004); *Iturribarria v. INS*, 321 F.3d 889, 899 (9th Cir. 2003). Accordingly, when construed as a timely motion to reopen, we accept jurisdiction over the respondent's motion. *See Matter of Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *see also Coyt v. Holder*, 593 F.3d 902 (9th Cir. 2010).

Upon further review of both the respondent's motion to reopen and his motion to reconsider, we find that the respondent preserved his right to pursue 212(h) relief when he stated, pro se, on his 2008 Notice of Appeal, that "the 212(h) waiver was not analyzed as case law dictates." *See Kaganovich v. Gonzales*, 470 F.3d 894 (9th Cir. 2006)(a petitioner exhausts a claim by raising it in his notice of appeal, even though it was not further discussed in briefs before the Board of Immigration Appeals). Given this finding, we revisit the respondent's ineffective assistance of counsel claim, and find that the respondent was prejudiced by his prior attorney's failure to raise the issue of his 212(h) eligibility in his 2010 motion to reconsider our

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dismissal of the respondent's pro se appeal.[1] As such, we will vacate both our August 4, 2010, decision and our December 21, 2011, decisions, and remand the record to the Immigration Court for further proceedings regarding the respondent's eligibility to apply for a waiver of inadmissibility pursuant to section 212(h) as of the date of his 1997 adjustment.

Lastly, we take note that the respondent's burglary conviction under C.P.C. § 459 was recently analyzed in the recent United States Supreme Court decision in *Descamps v. United States*, ___ U.S. ___, 133 S.Ct. 2276 (2013). Given the respondent's pro se status during his appeal, the basis of his motion to reconsider, the DHS' lack of opposition, and the evolving legal standards in this area, we will also remand the record to the Immigration Judge to further address the arguments, as set forth in the respondent's 2010 motion to reconsider, regarding whether the respondent's convictions constitute crimes involving moral turpitude under section 212(a)(2)(A)(I) of the Act.

As such, the following orders will be entered.

ORDER: The Board's December 21, 2011, denial of the respondent's motion to reopen is vacated.

FURTHER ORDER: The Board's August 4, 2010, denial of the respondent's motion to reconsider is vacated.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing decision.

FOR THE BOARD

[1] The respondent also substantially complied with the guidelines set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).