File: [redacted] - San Antonio, TX Date: OCT 23 2012

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: James Feroli, Esquire

ON BEHALF OF DHS: Elliot R. Selle
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (conceded)

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's July 19, 2011, decision denying his application for cancellation of removal for certain non-permanent residents pursuant to section 240A(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1229b(b).[1] The record will be remanded for further proceedings consistent with this decision.

We review findings of fact, including credibility findings, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent's application for cancellation was filed in 2010, the amendments to the Act brought about by the REAL ID Act apply (I.J. at 4; Exh. 2). *See* REAL ID Act § 101(h)(2); *Matter of S-B-*, 24 I&N Dec. 42, 44-45 (BIA 2006).

At the outset, we note that the Immigration Judge solely denied the cancellation application based on a finding that the respondent did not satisfy his burden of establishing the required 10 years of continuous physical presence as outlined at section 240A(b)(1)(A) of the Act, without reaching the other statutory cancellation requirements (I.J. at 7-8). The accrual of continuous physical presence is interrupted by any single absence from the United States exceeding 90 days.

[1] The Immigration Judge granted the respondent's application for voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b), and the respondent has provided proof that he paid the required voluntary departure bond in the context of this appeal (I.J. at 8).

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See section 240A(d)(2). In addition, an alien who voluntarily departs from the United States "with the knowledge that he does so in lieu" of the institution of removal proceedings before an Immigration Judge ceases to accrue continuous physical presence. *See Matter of Romalez*, 23 I&N Dec. 423, 429 (BIA 2002); *see also Matter of Avilez*, 23 I&N Dec. 799, 801 (BIA 2005); *Matter of Barragan*, 13 I&N Dec. 759 (BIA 1971).

Regarding the respondent's physical presence, he testified that he first entered the United States in approximately December 1996, and he presented an enrollment record verifying that he attended school in this country from December 3, 1996, through January 15, 1997 (I.J. at 3-4; Tr. at 16, 54-55; Exh. 3H). After entering the United States in 1996, he reported residing here continuously with the exception of two absences (I.J. at 4; Tr. at 16, 56-58; Exh. 2). On his application for relief, he maintains that he traveled to Mexico on January 20, 2000, and again on January 20, 2001 (I.J. at 4; Exh. 2). In the course of his testimony, he stated that he traveled to Mexico in December 2000 and again in December 2001 (I.J. at 4; Tr. at 16, 56-59). The respondent asserted that he last entered the United States without inspection in April 2001 (I.J. at 1-2, 5; Tr. at 6, 16-17,41-44, 59-62; Exh. 2). Regarding his April 2001 entry, the respondent indicated that he was initially apprehended by United States Border Patrol Agents and told that he could return to Mexico but he successfully entered the United States without detection a few days later (I.J. at 1-2, 5-7; Tr. at 16-17, 41-44, 59-62).

Based on the foregoing, the Immigration Judge concluded that the respondent did not satisfy his burden of proving 10 years of continuous physical presence preceding the issuance of the Notice to Appear (I.J. at 3). *See* sections 240A(b)(1)(A), (d)(1)(A) of the Act. Specifically, the Immigration Judge found that the respondent was voluntarily returned to Mexico in lieu of the institution of formal removal proceedings when he was detected by United States immigration authorities in April 2001 (I.J. at 5-7; Tr. at 16-17, 41-43, 59-62). Additionally, the Immigration Judge found that, although the respondent testified to leaving the United States in December 2000 and December 2001 and indicated in his application for relief that he departed in January 2000 and January 2001, the respondent most likely departed from the United States in December 1999 and December 2000 (I.J. at 4-5; Tr. at 16, 56-57; Exh. 2). The Immigration Judge based his conclusion, in part, on the fact that the respondent indicated he made his final trip to Mexico to renew his visa, which expired in December 2000 (I.J. at 4-5; Tr. at 56-57; Exh. 3C). As a result, because the respondent reported last entering the United States in April 2001, the Immigration Judge concluded that the respondent was absent between December 2000 and April 2001, a period of more than 90 days, thus interrupting his accrual of continuous physical presence (I.J. at 4-5).

On appeal, the respondent argues that the Immigration Judge erred in finding that his encounter with immigration authorities in April 2001 qualified as a voluntary departure, thus ceasing the further accrual of his continuous physical presence (Resp. Brief at 21-25). Specifically, he argues that in his case there was no bargained for exchange involving an acceptance of a benefit (administrative voluntary departure) in lieu of formal removal proceedings, as required by *Matter of Avilez*, *supra* (Resp. Brief at 22-24). In relying on *Matter of Avilez*, *supra*, the respondent asserts that the Immigration Judge erred in factually distinguishing the matter at hand from the precedent, as the exchange is the critical element and not whether the alien is detected within the United States or while attempting to enter (Resp. Brief at 24-25). In addition he maintains that the Immigration Judge's factual findings are clearly erroneous, in that the evidence does not establish,

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nor did he testify, that his two departures from the United States were in December 1999 and December 2000, respectively (Resp. Brief at 18-20).

Starting with the significance of the respondent's April 2001 encounter with immigration authorities, although the respondent acknowledges that he was offered the opportunity to return to Mexico while in immigration custody, we conclude that accepting such an opportunity to return to one's home country in exchange for his release from custody is insufficient to establish that a voluntary departure was effectuated, thus that the accrual of continuous physical presence was ceased by the encounter (I.J. at 5-6; Tr. at 16-17, 41-45, 59-61).

An alien may voluntarily depart from the United States pursuant to 8 C.F.R. § 240.25, in lieu of formal removal proceedings, and where such administrative voluntary departure is properly accorded, it will terminate the alien's continuous physical presence in this country because the "alien leaves with the knowledge that he does so in lieu" of the institution of removal proceedings before an Immigration Judge. *See Matter of Avilez*, *supra*, at 801; *Matter of Romalez*, *supra*, at 429; *Matter of Barragan*, *supra*; *see also Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 218 (5th Cir. 2003) (concluding that a departure from the United States under threat of deportation serves to terminate an alien's continuous physical presence). This is so because the departure essentially works "like a plea bargain" based on the parties' agreement that the threat of deportation alone is sufficient to end the alien's unlawful presence in this United States. *See Matter of Romalez*, *supra*, at 429. Moreover, departure pursuant to this "plea bargain" negates any legitimate expectation held on the part of the alien of a future resumption of continuous physical presence. *See Matter of Romalez*, *supra*. Accordingly, we agree with the respondent that the critical question in determining whether continuous physical presence is interrupted is whether this type of "plea bargain" was structured and not where immigration encountered the alien (Resp. Brief at 24-25).

Under the pertinent regulations, a valid grant of voluntary departure requires that the alien both request this benefit and agree to any terms and conditions imposed as a result. *See* 8 C.F.R. § 240.25(c). Moreover, where the Department of Homeland Security (DHS) and the alien reach such an agreement, the DHS shall memorialize it in writing by completing a Notice of Action–Voluntary Departure (Form I-210). *See id.*

While we have not identified any relevant precedent decisions discussing the import of the Form I-210 and the other regulatory requirements attached to administrative voluntary departure within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, several circuit courts have placed significant weight on the Form I-210, and in some instances, have found that communication of the advisals on the form determinative on the issue of whether an alien agreed to voluntarily depart. *See, e.g., Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 908 n.5 (8th Cir. 2005) (quoting from the Detention and Deportation Officer's Field Manual at Chapter 11.8, which provides in pertinent part that: "*It is essential that no voluntary departure period be granted without issuance of Form I-210. . .and that the affected alien be made aware of and agree to the terms of such a grant*" (emphasis in the original)); *see also Tapia v. Gonzales*, 430 F.3d 997, 1002 (9th Cir. 2005) (distinguishing the case at bar, in which there was no indication that the alien signed an agreement accepting administrative voluntary departure, from the fact pattern presented in *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003), and reasoning that in the absence of any evidence indicating that such an agreement was executed, the

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record did not establish that the alien understood his departure and concluding that an alien must accept the benefit under threat of deportation before voluntary departure interrupts an alien's accrual of continuous physical presence).

Here, however, the Immigration Judge concluded that the respondent was awarded voluntary departure in lieu of deportation proceedings based on the respondent's testimony that he was told he was free to leave immigration custody if he wanted to return to Mexico (I.J. at 5-6; Tr. at 16-17, 41-45, 59-61). This information alone is insufficient to establish that the respondent was offered and agreed to the terms of voluntary departure in lieu of proceedings. Accordingly, we conclude that the Immigration Judge erred as a matter of law in finding that the respondent's April 2001 encounter with immigration authorities interrupted his continuous physical presence.

Turning to the issues surrounding the respondent's entries and departures as they relate to his continuous physical presence, the Immigration Judge accurately observed that the respondent's cancellation application and testimony were inconsistent in this regard (I.J. at 4; Tr. at 16-17, 56-57; Exh. 2). However, we also agree with the respondent that the Immigration Judge's factual findings regarding the respondent's departures in December 1999 and December 2000, and the length of his second absence spanning from December 2000 through April 2001, are not adequately supported by the record, and thus, are speculative findings. *See Mwembie v. Gonzales*, 443 F.3d 405, 410 (5th Cir. 2006) (explaining that findings not supported by the record or based on pure speculation cannot stand); *see also Wang v. Holder*, 569 F.3d 531, 537 (5th Cir. 2009) (applying the standard set forth in *Mwembie v. Gonzales*, *supra*, in the context of cases governed by the REAL ID Act).

Although the Immigration Judge did tie his findings that the respondent returned to Mexico in December 1999 and December 2000 to the respondent's testimony that he last returned to Mexico to apply for a new visa and the observation that the visa expired in December 2000, we note that the attorneys and the Immigration Judge did not ask the respondent for clarification as to the discrepancies between the application and his testimony (I.J.at 4-5; Tr. at 16-17, 56-57; Exhs. 2, 3C). As a result, there is a gap between the respondent's testimony indicating he last traveled to Mexico in December 2001 and the Immigration Judge's supposition that he last went to his home country in December 2000 and remained until April 2001 (I.J. at 4-5; Tr. at 16-17, 56-57). Because we conclude that the Immigration Judge should have had more information prior to making these findings, we conclude that his factual findings in this regard are not grounded in the evidence and thus are speculative (I.J. at 4-5). *See Mwembie v. Gonzales*, *supra*, at 410.

As a result, we conclude that remand of the record is necessary to allow for further clarification in determining whether the respondent can satisfy the continuous physical presence requirement or whether he has any absences of greater than 90 days in the requisite period that render him statutorily ineligible for relief. In light of our disposition in this matter, we need not reach the merits of the respondent's motion to remand. However, as further clarification of the dates of the respondent's entries into and departures from the United States is required, it would be appropriate for the Immigration Judge to consider the evidence submitted on appeal along with any other record evidence that may be relevant in assisting him when entering a new decision (Resp. Brief at Tabs A-D; Exhs. 4RR, 4UU). Additionally, upon remand, should the Immigration Judge determine that the respondent has satisfied this statutory element, the Immigration Judge should consider the other statutory and discretionary considerations related to this form of relief.

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Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this opinion.

Teresa Dovar

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would find that the Immigration Judge correctly found that the respondent failed to meet his burden to demonstrate that he was not outside the United States for less than 90 days. See 8 C.F.R. §1240.8(d).