

Falls Church, Virginia 22041

File: A [REDACTED] - Kansas City, MO¹

Date:

MAY - 6 2011

In re: A [REDACTED] A [REDACTED] R [REDACTED] a.k.a. [REDACTED]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Matthew L. Hoppock, Esquire

ON BEHALF OF DHS: Melissa L. Castillo
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(a)

The respondent, a native and citizen of Mexico, who was previously granted lawful permanent resident status in the United States, has appealed from the Immigration Judge's decision dated November 29, 2010. The Immigration Judge found the respondent removable and found him ineligible for relief from removal based on his criminal convictions.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(I); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an Immigration Judge's decision *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

On July 1, 2008, the respondent was convicted of Criminal Possession of Marijuana, in violation of Kansas law. On March 31, 2009, the respondent was convicted of Criminal Possession of Marijuana, second offense, in violation of Kansas law. A record of each of these convictions was entered into the record of proceedings. *See* Exh. *See also* 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a). In addition, the respondent admitted the convictions. *See* Tr. at 11, 23. *See also* 8 C.F.R. §§ 1003.41(d), 1240.10(c).

The respondent was charged with being removable for having been convicted of a controlled substance violation and an aggravated felony relating to illicit trafficking in a controlled substance. *See* Exh. 1. The respondent disputed the aggravated felony charge of removability. *See* Tr. at 22.

¹ Pursuant to Operating Policies and Procedure Memorandum No. 04-06: Hearings Conducted through Telephone and Video Conference (Aug. 18, 2004), we consider the proceedings before the Immigration Judge in this matter to have been completed in Kansas City, MO, because the case was docketed for hearing in Kansas City, MO. Accordingly, we will consider the respondent's claim under the precedent decisions of the Court of Appeals for the Eighth Circuit.

A [REDACTED]

The Immigration Judge found the respondent removable as charged, based on the respondent's conviction for a felony recidivist drug offense. *See* I.J. at 2-4.

The respondent requested cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), but the Immigration Judge concluded he was statutorily ineligible for relief because of the aggravated felony conviction. *See* Tr. at 3; Exh.; I.J. at 4.

On appeal, the respondent renews his argument that his first conviction was not final within the meaning of 21 U.S.C. section 844(a). *See Carachuri-Rosendo v. Holder*, 130 S Ct. 2577 (2011); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 391 (BIA 2007). We agree. At the time that he committed the second offense, he was still awaiting sentencing on the first offense. A conviction does not become final until the defendant exhausts all appeals, waives appeal, or allows the appeal period to expire. *See U.S. v. Maxon*, 339 F.3d 656, 659 (8th Cir. 2003). *See also U.S. v. Andrade-Aguilar*, 570 F.3d 213, 218 (5th Cir. 2009); *Smith v. Gonzales*, 468 F.3d 272, 277-78 (5th Cir. 2006); *Sanchez-Castellano v. U.S.*, 358 F.3d 424, 426 (6th Cir. 2004); *Kapral v. U.S.*, 166 F.3d 565, 569 (3d Cir. 1999); *U.S. v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997); *U.S. v. Lovell*, 16 F.3d 494, 497 (2d Cir. 1994); *U.S. v. Morales*, 854 F.2d 65, 68-69 (5th Cir. 1988).

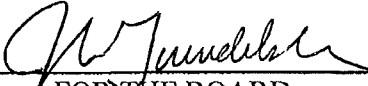
Consequently, we agree that the second offense does not constitute a felony recidivist drug offense. We therefore conclude that, with regard to the aggravated felony charge of removability, the Department of Homeland Security did not establish removability by clear and convincing evidence. *See* 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a); *Woodby v. INS*, 385 U.S. 276, 286 (1966). *Cf.* 8 C.F.R. §§ 1003.15, 1240.10.

We find it appropriate to remand the record to the Immigration Judge to further consider the respondent's request for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).

Accordingly, the following orders will be entered.

ORDER: The decision of the Immigration Judge is vacated.

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



FOR THE BOARD