U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: OMAR ALBERTO CISNEROS-ORDAZ

File: A045 124 831 - Oakdale, LA

May 10, 2011

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Frances Cruz, Esquire

ON BEHALF OF DHS:

Daniel J. Redwood
Assistant Chief Counsel

APPLICATION: Waiver under section 212(h)

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 December 15, 2010, which incorporates by reference a decision rendered by the same Immigration Judge on December 7, 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 January 31, 2006, the respondent was convicted of Escape from the Custody of a Peace Officer, in violation of New Mexico law. A record of this conviction was entered into the record of proceedings. SeeExhs. 2, 3. See also 8 U.S.C. § 1229a(c)(3)(B); 8 C.F.R. § 1003.41(a). In addition, the respondent admitted the conviction. See Tr. at 6. See also 8 C.F.R. §§ 1003.41(d), 1240.10(c).

The respondent was charged with being removable for having been convicted of an aggravated

felony relating to obstruction of justice. See Exh. 1. The respondent conceded removability. See Tr. at 17. The Immigration Judge found the respondent removable as charged. See I.J. at 2; Tr. at 17.

The respondent requested a waiver of inadmissibility under 212(h) of the Immigration and Nationality Act. See 8 U.S.C. § 1182(h). See Tr. at 17. However, the Immigration Judge concluded he was ineligible for relief because he entered as a lawful permanent resident who has been convicted of an aggravated felony. See I.J. Decision dated December 7, 2010. See also 8 U.S.C. §§ 1182(a), (h); Matter of Ayala, 22 I&N Dec. 398 (BIA 1998); Matter of Pineda-Castellanos, 21 I&N Dec. 1017 (BIA 1997); Matter of Yeung,21 I&N Dec. 610 (BIA 1996, 1997).

On appeal, the respondent renews his argument that he is statutorily eligible for a 212(h) waiver despite entering as a lawful permanent resident. In addition, the respondent now disputes removability despite previously conceding removability.

We agree with the respondent that Escape from the Custody of a Peace Officer, in violation of New Mexico Statutes 1978 section 30-22-10, does not constitute an aggravated felony relating to obstruction of justice, as defined in section 101(a)(43)(S) of the Immigration and Nationality Act, to wit, “a crime relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year.” See 8 U.S.C. § 1101(a)(43)(S).

In Matter of Espinoza-Gonzalez, 22 I&N Dec. 889 (BIA 1999), we concluded, based upon our review of the crimes listed in 18 U.S.C. chapter 73, entitled “Obstruction of Justice,” that obstruction-of-justice crimes include (1) “either active interference with proceedings of a tribunal or investigation, or action or threat of action against those who would cooperate in the process of justice,” and (2) an intent element defined as a “specific intent to interfere with the process of justice.” See Matter of Espinoza-Gonzales, supra, at 893. Those crimes include offenses such as perjury, bribery, interference in investigation of financial transactions, jury tampering, and threatening or intimidation of witnesses. See Matter of Espinoza-Gonzales, supra, at 891. See also Renteria-Morales v. Mukasey, 551 F.3d 1076, 1086(summarizing the Board's articulation of both an actus reus and mens rea element of the generic definition of obstruction-of-justice crimes). Cf. Matter of Batista-Hernandez, 21 I&N Dec. 955 (BIA 1997).

The respondent was charged with, and pled guilty to: “willfully and carelessly driv[ing] his vehicle in a manner endangering the live(sic) of another person to avoid apprehension after being given a visual or audible signal to stop by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle.”

We conclude that this offense does not qualify, categorically, or under the modified categorical approach, as one "relating to obstruction of justice" within the meaning of Matter of Espinoza-Gonzales, supra. Specifically, the offense is not defined by requiring interference with the proceedings of a tribunal or the official duties of a law enforcement officer, nor does conviction for the offense require proof that the accused harmed or threatened a person who would otherwise have cooperated in the process of justice. Although the crime of Escape from the Custody of a Peace Officer involves an effort to avoid lawful custody, this is insufficient to establish "obstruction of justice." See Matter of Joseph, 22 I&N Dec. 799, 808 (BIA 1999) (simply obstructing one's own arrest would not likely constitute an aggravated felony under section 101(a)(43)(S) of the Act).

We therefore conclude that the Department of Homeland Security (DHS) 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. Consequently, we find it appropriate to remand the record to the Immigration Judge to enable the DHS to consider whether any other charges of removability are appropriate.

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.
Roger A. Pauley
FOR THE BOARD