

Falls Church, Virginia 22041

File: [REDACTED] - Los Angeles

Date:

In re: [REDACTED]

APR 19 2006

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Leon B. Hazany, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] -
Crime involving moral turpitude

APPLICATION: Motion to reopen

This case was last before us on October 17, 2005, when we dismissed the respondent's appeal. The respondent now submits a motion to reopen claiming that his two previous attorneys provided ineffective assistance. We have jurisdiction over this matter pursuant to 8 C.F.R. § 1003.2. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has not filed an opposition brief in response to this motion. The motion will be granted and the record will be remanded to the Immigration Judge.

The respondent argues that he received ineffective assistance from both his attorney who represented him before the Immigration Judge and his attorney who represented him before the Board. The respondent is required to show, *inter alia*, that he suffered prejudice as a result of his attorneys' ineffectiveness. *Matter of Lozada*, 19 I&N Dec. 637, 640 (BIA 1988). The term "prejudice," refers to actual prejudice. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). This means that an alien might have prevailed at the hearing or on appeal had the negligent representation not occurred. *Maravilla v. Ashcroft*, 381 F.3d 855 (9th Cir. 2004). As found in our prior order, the respondent did not establish prejudice through the Immigration Judge's denial of cancellation of removal. *See* Board Decision, October 17, 2005 (finding respondent ineligible for cancellation of removal). The respondent, however, additionally argues on appeal that his prior attorneys erred by failing to request termination or a *nunc pro tunc* grant of a 212(h) waiver. Accordingly, we must determine if the respondent was prejudiced by such failure.

The respondent asserts that his conviction was likely "waived" under sections 245(i) or 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i) or 8 U.S.C. § 1182(h), when his application for adjustment of status was approved by the DHS and that he therefore should not have been charged under section 212(a)(2)(A)(i)(I) because he had already waived that ground of

[REDACTED]

inadmissibility.¹ First, we note that the record does not reveal what information was before the DHS when it reviewed the respondent's adjustment application. Inasmuch as the respondent was convicted of a crime involving moral turpitude *after* the respondent submitted his adjustment application, it is not clear from the record before us that the DHS was aware of the respondent's conviction.² The respondent has not presented any evidence with his motion to reopen establishing that the DHS was notified of his conviction. Therefore, it is nearly certain that the DHS granted the respondent's application for adjustment without consideration of a waiver because the respondent's file did not contain information regarding his then recent criminal conviction. There would be no reason to consider a waiver absent knowledge of the conviction.

In the respondent's sworn statement, provided with the motion to reopen, the respondent does not claim that he has any personal knowledge of the DHS's awareness of his conviction, nor does he claim personal knowledge of a waiver being applied in conjunction with his application. While the respondent's current attorney claims that the DHS was aware of the respondent's conviction and that a waiver was applied to establish the respondent's admissibility, representations by counsel are not considered evidence. *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, we find that the respondent has not presented sufficient evidence with his motion to reopen to support his assertion that his charge of inadmissibility was previously waived.

The respondent additionally argues that he was prejudiced by his prior attorneys' failure to apply for a 212(h) waiver and that such relief should be provided *nunc pro tunc*. We have determined in other factual scenarios that a section 212(h) waiver is available in conjunction with an application for adjustment of status, where it may be used to waive inadmissibility that would otherwise preclude adjustment of status. *See, e.g., Matter of Parodi*, 17 I&N Dec. 608 (BIA 1980); *Matter of Bernabella*, 13 I&N Dec. 42 (BIA 1968). The issue in this case, however, is whether the respondent can receive such relief when the Immigration Judge did not have jurisdiction over the respondent's original adjustment application.

The respondent claims that he is eligible for a 212(h) waiver because he has a United States citizen son who has medical complications that will result in the son's extreme hardship if he is removed from his current care. *See* 8 U.S.C. § 1182(h) (providing eligibility for aliens who have a United States citizen spouse, parent, or child who would suffer extreme hardship if the alien were removed). The respondent's son began experiencing medical problems before the respondent's

¹ We note that section 245(i) of the Act is a form of adjustment and not a waiver. We further note that 245(i) adjustment was not available to the respondent because he did not enter the United States without inspection and is not within an enumerated class in section 245(c) of the Act. *See* 8 U.S.C. § 1255(i)(1)(A).

² We further note that there is no evidence that the respondent concealed his convictions.

original application for adjustment of status was granted. See Supporting Exhibits for Motion to Reopen, Exh. P. Therefore, it appears that the respondent was eligible for a 212(h) waiver at the time of his original adjustment of status application.

The term "*nunc pro tunc*" is defined as a "phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done *Nunc pro tunc* signifies now for then, or, in other words, a thing is done now, which shall have same legal force and effect as if done at time when it ought to have been done." *Matter of Cazares*, 21 I&N Dec. 188, 207-208 (BIA 1997) (Rosenberg, dissenting) (citing Black's Law Dictionary). The function of a waiver under section 212(h) is to waive a ground of inadmissibility which is based upon an alien's criminal conviction. The waiver does not function to waive the alien's actual criminal conviction. *Matter of Balderas*, 20 I&N Dec. 389, 391 (BIA 1991).

In *Matter of L-*, 1 I&N Dec. 1 (BIA, A.G. 1940), *nunc pro tunc* relief was used to remedy the error made when the alien was wrongly admitted to the United States and was later charged with being deportable due to a conviction dated before his departure from the United States, and discretionary relief which would have been available in exclusion proceedings was not available in deportation proceedings. The Attorney General stated that a *nunc pro tunc* exercise of discretionary authority was warranted as it "amounts to little more than a correction of a record of entry." *Id.* at 6. Similarly, in the instant case, the respondent's status was adjusted to that of a lawful permanent resident despite the existence of a conviction which should have led to a finding of inadmissibility under section 212(a)(2)(A)(i)(I), a charge which could have been waived under section 212(h) of the Act if the respondent had established extreme hardship to his United States citizen son and that a favorable exercise of discretion was warranted.

We find that the respondent should have the opportunity to apply for *nunc pro tunc* relief under section 212(h) of the Act. Because *nunc pro tunc* relief has a retroactive effect, i.e., it has the same effect as if done when it should have been done, the fact that the respondent is a lawful permanent resident who would not now be eligible for a section 212(h) waiver for failure to meet the continuous lawful residence requirement, does not have any bearing on the respondent's eligibility for a *nunc pro tunc* section 212(h) waiver.³ Additionally, *nunc pro tunc* relief is warranted because the respondent has been charged with inadmissibility only under section 212(a)(2)(A)(i)(I) of the Act, and a section 212(h) waiver would dispose of all grounds of inadmissibility under which the respondent is removable. See *Matter of Garcia*, 21 I&N Dec. 254 (BIA 1996); *Matter of Roman*, 19 I&N Dec. 855, 860 (BIA 1988); *Matter of Vrettakos*, 14 I&N Dec. 593 (BIA 1974). Thus,

³ *Nunc pro tunc* consideration distinguishes the respondent's situation from that presented in *Matter of Ayala*, 23 I&N Dec. 398 (BIA 1998), because retroactive consideration puts the respondent back to a point in time when he had not yet been granted lawful permanent resident status.

although the respondent's original adjustment application was not within the Immigration Judge's jurisdiction, the respondent is currently within our jurisdiction and carries the benefits of his current standing in removal proceedings. See 8 C.F.R. § 1245.2(a) (providing jurisdiction rules for adjustment of status applications). In other words, inasmuch as the respondent is currently in removal proceedings, we find we have the authority to remand his claim to the Immigration Judge for consideration of his adjustment application in conjunction with a 212(h) waiver. We find this necessary because a remand ultimately could affect his status in such a way that his entry, no matter what its earlier character, is considered lawful, *nunc pro tunc*.

In conclusion, the respondent's claim was prejudiced by his prior attorneys' failure to seek *nunc pro tunc* relief under 212(h) of the Act. Accordingly, the record will be remanded for further proceedings in accordance with this decision. On remand (assuming legitimation of the child is established), the immigration judge should consider any evidence of hardship which may be presented by the respondent, so that a decision as to whether the respondent merits this waiver as a matter of discretion may be made.

ORDER: The motion to reopen is granted.

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


FOR THE BOARD