U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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570 Broad Street, Ste 1001
Newark, NJ 07102

DHS/ICE Office of Chief Counsel - ELZ
625 Evans Street, Room 135
Elizabeth, NJ 07201

Name: (b) (6) [redacted]

A (b) (6) [redacted]

Date of this notice: 12/3/2020

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:
Donovan, Teresa L.
Wilson, Earle B.
Gorman, Stephanie

MalikAr
Userteam: Docket

AILA Doc. No. 21122031. (Posted 12/20/21)

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(b) (6)

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Name: (b) (6)

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Date of this notice: 12/3/2020

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. §1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Donovan, Teresa L.
Wilson, Earle B.
Gorman, Stephanie

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Userteam: Docket

AILA Doc. No. 21122031. (Posted 12/20/21)

File: (b) (6) – Newark, NJ

Date: DEC 0 3 2020

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Laura Sophia Rodriguez, Esquire

APPLICATION: Withholding of removal; Convention Against Torture; remand

The respondent a native and citizen of Mexico, has appealed from the Immigration Judge's October 30, 2019, decision denying his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) (2018), as well as protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2) (2019).[1] After filing his brief, the respondent filed a motion to remand with additional evidence. The Department of Homeland Security ("DHS") has not responded to the appeal or motion. The appeal will be dismissed. The motion to remand will be granted.[2]

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment, or discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The record includes evidence that the respondent has been diagnosed with a serious mental disorder (IJ at 2; Exhs. 5, 6). The Immigration Judge conducted a judicial competency inquiry consistent with *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), to determine whether there was reasonable cause to believe the respondent is not competent to participate in the proceedings, and issued an oral decision on the matter on June 12, 2019 (*see* IJ at 2; 6/12/19 IJ Order; Tr. at 30-104). On the basis of this colloquy and the evidence of record, the Immigration Judge found that the respondent was competent to participate in the proceedings because he had demonstrated that he understood the nature of his removal proceedings, could consult with his attorney, and had a reasonable opportunity to present evidence and witnesses in support of his claim for relief from removal (IJ at 2; 6/12/19 IJ Order at 3-8; Exhs. 5, 6).

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[1] The respondent conceded, and the Immigration Judge concluded, that the respondent was statutorily barred from asylum under section 208 of the Act, 8 U.S.C. § 1158, because he did not file his application within 1 year of his arrival in the United States (IJ at 6). The respondent has not challenged this determination on appeal (Notice of Appeal; Respondent's Br.). Hence, it is deemed waived. *Matter of R A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012); *Matter of J-S-*, 24 I&N Dec. 520, 526 n.4 (A.G. 2008) (declining to address determinations not challenged on appeal).

[2] Although we have granted the respondent's motion to increase the page limit for his brief on this occasion, future briefs should be limited to 25 pages in accordance with the practice manual.

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(b) (6)

On appeal, the respondent has challenged the Immigration Judge's competency finding, asserting that the competency hearing was procedurally insufficient and the finding of competence was clearly erroneous (Respondent's Br. at 8-14). However, upon our review of the record, we do not find clear error in the finding and deem it unnecessary to remand the record for further analysis or a new hearing on the matter. *See Matter of J-S-S-*, 26 I&N Dec. 679, 684 (BIA 2015) ("A finding of competency is a finding of fact that the Board reviews to determine if it is clearly erroneous."); *see also Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (describing a finding of competency as a "factual conclusion").

Specifically, in response to questioning, the respondent indicated that (1) he understood that he was in removal proceedings and that he had the right to pursue relief from removal based on his sexual orientation; (2) he had an attorney who was assisting him; and (3) he understood how he could assist his attorney in the preparation of his case (6/12/19 IJ Order at 4-8; Tr. at 30-104). In addition, the Immigration Judge found that the respondent was able to provide relevant and logical responses to the questions posed to him (6/12/19 IJ Order at 4-7; Tr. at 30-104). Moreover, the respondent's medical evaluation from March 2019, showed that there were no overt acute mental health symptoms and his mental state was unremarkable (6/12/19 IJ Order at 4, 6; Exh. 5). Therefore, the Immigration Judge concluded that the respondent was competent and capable of participating in his removal proceedings (6/12/19 IJ Order at 4-8).

The respondent argues on appeal that the competency hearing was procedurally insufficient (Respondent's Br. at 8-10). However, the record reflects that the Immigration Judge conducted a thorough evaluation and fully considered both medical reports in the record (6/12/19 IJ Order at 3-8; Tr. at 30-104; Exhs. 5, 6). Although the respondent asserts that he was not able to create a more complete record for the Immigration Judge, he has not set forth any specific evidence that he was prevented from submitting (Respondent's Br. at 9-10). Additionally, while the respondent asserts that the Immigration Judge did not give proper weight to the findings of Dr. (b) (6) or properly consider the respondent's hallucinations (Respondent's Br. at 11-14), the Immigration Judge acknowledged Dr. (b) (6) report and the respondent's symptoms but appropriately observed that the respondent's symptoms had improved the following month (6/12/19 IJ Order at 3-7; Exh. 6). Finally, the respondent has not explained how the inconsistences related to his personal history would change the competency finding, and he has not submitted additional medical records to show that his symptoms had deteriorated at the time of his October 2019 merits hearing (Respondent's Br. at 12-14). Nor has the respondent identified specific instances during the hearing when his mental illness inhibited his ability to participate in the proceedings or set forth any additional safeguards that should have been implemented (Respondent's Br. at 14-15).

We acknowledge the updated evaluation from Dr. (b) (6) the respondent has submitted on appeal (Respondent's Motion, Attachment). Dr. (b) (6) stated that she re-evaluated the respondent in February 2020, and observed significantly worsened symptoms of psychosis with disorganized thinking (Respondent's Motion, Attachment). We are cognizant that mental competency is not a static condition. *See Matter of M-A-M-*, 25 I&N Dec. at 480. However, this new evidence does not tend to show that the respondent lacked competency at the time of his merits hearing. Therefore, based on the record before us, we affirm the Immigration Judge's competency determination.

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Section 241(b)(3)(B)(ii) of the Act provides that an alien is ineligible for withholding of removal if "the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." To determine whether the "particularly serious crime" bar is applicable, the Immigration Judge "examine[s] the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982).[3] The respondent bears the burden to prove by a preponderance of the evidence that the particularly serious crime bar does not apply to him. *See* 8 C.F.R. § 1208.16(d)(2) ("If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply."); *see also* 8 C.F.R. § 1240.8(d).

There is no dispute that the respondent is removable as charged (IJ at 2; Exhs. 1, 4; Respondent's Br.). There is also no dispute that the respondent was convicted of burglary in violation of N.J. Stat. Ann. § 2C:18-2A(1), and sentenced to 4 years in prison (IJ at 7; Exhs. 3, 13).[4] The Immigration Judge determined that the respondent's conviction was for a particularly serious crime, and therefore he was precluded from applying for withholding of removal under section 241(b)(3) of the Act (IJ at 9-11). The respondent has challenged this determination on appeal (Respondent's Br. at 15-21). We affirm.

NJ Stat. Ann. § 2C:18-2 provides:

> a. Burglary defined. A person is guilty of burglary if, with purpose to commit an offense therein or thereon he:
>
> (1) Enters a research facility, structure, or a separately secured or occupied portion thereof unless the structure was at the time open to the public or the actor is licensed or privileged to enter;
>
> (2) Surreptitiously remains in a research facility, structure, or a separately secured or occupied portion thereof knowing that he is not licensed or privileged to do so; or
>
> (3) Trespasses in or upon utility company property where public notice prohibiting trespass is given by conspicuous posting, or fencing or other enclosure manifestly designed to exclude intruders.

[3] While the applicability of the particularly serious crime bar is ultimately a question of legal judgment which we review de novo, the factual findings underlying any such judgment are made by the Immigration Judge and reviewed by this Board only for clear error. *See Perez-Palafox v. Holder*, 744 F.3d 1138, 1145-46 (9th Cir. 2014).

[4] The Immigration Judge concluded that this conviction was not an aggravated felony (IJ at 7-9). The DHS has not challenged this determination on appeal; hence, we deem the matter waived.

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b. Grading. Burglary is a crime of the second degree if in the course of committing the offense, the actor:

(1) Purposely, knowingly or recklessly inflicts, attempts to inflict or threatens to inflict bodily injury on anyone; or

(2) Is armed with or displays what appear to be explosives or a deadly weapon. Otherwise burglary is a crime of the third degree. An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit an offense or in immediate flight after the attempt or commission.

N.J. Stat. Ann. § 2C:18-2 (West)

We agree with the Immigration Judge that the respondent's conviction for burglary constitutes a conviction for a particularly serious crime (IJ at 9-11; Respondent's Br. at 18-21; Exhs. 3, 13). First, the Immigration Judge correctly concluded that the elements of the respondent's offense brought it into the ambit of being particularly serious because it involved unlawful entry into a building with the intent to commit a crime (IJ at 8-10). Moreover, the respondent's offense involved residential homes, which created a high risk of harm to persons (IJ at 10; Respondent's Br. at 18-19). Further, although the respondent argues that he was only convicted of a third degree felony and his offense did not involve bodily injury, a weapon or other aggravating factors, the Immigration Judge properly observed that the respondent was sentenced to 4 years in prison due to the seriousness of the offense (IJ at 10; Respondent's Br. at 18-21; Exhs. 3, 13).

We acknowledge the respondent's assertion that the Immigration Judge did not consider the particularly serious crime issue in light of the respondent's mental illness (Respondent's Br. at 20-21). *See Gomez-Sanchez v. Sessions*, 892 F.3d 985 (9th Cir. 2018). However, because this case arises in the United States Court of Appeals for the Third Circuit, *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014) (holding that an alien's mental health in a criminal act is not considered in assessing whether the alien was convicted of a particularly serious crime for immigration purposes), is applicable. Therefore, given this record, we affirm the Immigration Judge's determination that the respondent has been convicted of a particularly serious crime that renders him ineligible for withholding of removal. *See Matter of Frentescu*, 18 I&N Dec. at 247.

The particularly serious crime bar does not preclude deferral of removal under the Convention Against Torture pursuant to 8 C.F.R. § 1208.17 (IJ at 11). In light of the additional evidence showing worsening mental health symptoms, we will grant the respondent's motion to remand for further consideration of his application for deferral of removal under the Convention Against Torture (Respondent's Motion to Remand at 4-9). Specifically, the Immigration Judge should ascertain whether the current manifestations of the respondent's mental illness, as related in Dr. (b) (6) s updated evaluation, changes the prior deferral of removal determination. The Immigration Judge should also conduct an updated competency hearing in accordance with *Matter of M-A-M-*.

On remand, the parties should be afforded an opportunity to update the record with additional evidence relevant to any outstanding issue, and to make any additional legal and factual arguments desired regarding the respondent's eligibility for relief from removal, to include any changes in

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his competency since his merits hearing. The Board expresses no opinion regarding the ultimate outcome of these proceedings. The following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent's motion to remand is granted.

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

Teresa L Donarl

FOR THE BOARD

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