U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: GONZALES, JOSE LUIS **A 029-158-835**

Date of this notice: 11/26/2013

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:
Pauley, Roger

yungc
Userteam: Docket

File: A029 158 835 – Atlanta, GA

Date: NOV 26 2013

In re: JOSE LUIS GONZALES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolina Antonini, Esquire

ON BEHALF OF DHS: Renae M. Hansell
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] - Inadmissible at time of entry or adjustment of status under section 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Special rule cancellation of removal under NACARA

The Department of Homeland Security ("DHS") timely appeals an Immigration Judge's decision dated November 28, 2012, finding the respondent, a native and citizen of Guatemala, to be removable as charged, but granting his application for special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193, 2196 (NACARA).[1] The appeal will be dismissed.

The basic facts of this case are not in dispute. Beginning in January or February of 1987, the respondent owned and operated a small supply store for a period of approximately 6 months (Tr. at 49-50, 76). On five or six occasions during that period, a group of several unidentified armed men (described as "five, six, [or] seven") came to his store, threatened him, and took approximately 50 pounds of food products each time (Tr.at 76-78). The respondent testified that some of the men were in uniform and some were dressed as civilians, and that he was unable to distinguish between military and guerrilla uniforms (Tr. at 75-75).

On appeal, the DHS argues that the Immigration Judge erred in granting relief in this case, as the respondent was barred because he provided material support to Guatemalan guerrillas at a time when those guerrillas were known as a terrorist organization, and that the respondent knew or should have known that the guerrillas to whom he provided food were engaged in terrorist activity. *See* section 212(a)(3)(B)(iv)(VI) of the Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). In making this argument, the DHS argues that the Immigration Judge "appears to have found, albeit not explicitly, that the respondent's conduct . . . was done under duress," and that such a

[1] The DHS has not appealed the Immigration Judge's grant of non-LPR cancellation of removal to the respondent's wife (A097 209 821).

determination would be in error, as no such duress exception exists (DHS's Appeal Brief at 14). To the extent that the DHS argues that a duress exception does not exist to the material support bar, we agree. *See Alturo v. Holder*, 716 F.3d 1310 (11th Cir. 2013).

However, we agree with the respondent's argument on appeal that the Immigration Judge did not find that a duress exception applied or existed in this case (either explicitly or implicitly), as he did not need to reach that issue. Rather, he explicitly found that the respondent did not provide any material support to a terrorist organization for which a duress exception would potentially need to apply (Respondent's Brief at 16). In his decision, the Immigration Judge made the following finding:

> [I]n this case, the respondent provided no support whatsoever. He was a victim of what is essentially strong-armed robbery by individuals who came to his store and took his provisions under threat of his life. They did not ask the respondent for goods, and he never volunteered to give it to them. They simply showed up with guns and demanded whatever they wanted, took it, and failed to pay the respondent any money.[2]

I.J. at 6. The Immigration Judge appears to have adopted the view that the use of the undefined terms "commit" and "affords" in the statute implies affirmative and active support, rather than merely having something taken from an alien while he or she remains passive. Section 212(a)(3)(B)(iv)(VI) of the Act. We find this a reasonable interpretation, and find no basis to disturb it under the circumstances of this case. We note that this matter is distinguishable from those situations where an alien hands over money, goods, car keys, etc. under threat of force, as the respondent in this case did not hand over anything to anyone. As such, we agree with the Immigration Judge that the material support bar does not preclude special rule cancellation of removal under NACARA in this case. The DHS has not otherwise challenged the Immigration Judge's determination that the respondent has met the statutory requirements for NACARA cancellation of removal and merits such relief in the exercise of discretion. Accordingly, we will remand this matter for a required background check.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

[2] We observe that the Immigration Judge explicitly found the respondent to be credible, and that the DHS has not challenged the Immigration Judge's favorable credibility finding, including the respondent's description of what occurred (I.J. at 7).