In re Ignacio CISNEROS-Gonzalez, Respondent

File A92 890 131 - San Diego

Decided September 1, 2004

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

(1) Pursuant to section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (2000), an alien's period of continuous physical presence in the United States is deemed to end when the alien is served with the charging document that is the basis for the current proceeding.

(2) Service of a charging document in a prior proceeding does not serve to end the alien's period of continuous physical presence with respect to an application for cancellation of removal filed in the current proceeding. *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000), distinguished.

FOR RESPONDENT: Andrea Guerrero, Esquire, San Diego, California

FOR THE DEPARTMENT OF HOMELAND SECURITY: Jonathan Grant, Assistant District Counsel

BEFORE: Board En Banc: HOLMES, Acting Vice Chairman; HURWITZ, FILPPU, MOSCATO, MILLER, OSUNA, and PAULEY, Board Members. Concurring Opinion: SCIALABBA, Chairman; joined by GRANT, Board Member. Dissenting Opinion: COLE, Board Member, joined by HESS, Board Member.

FILPPU, Board Member:

The respondent appeals from an Immigration Judge's January 23, 2002, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2000). The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7) (2004). The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

I. BACKGROUND

The respondent is currently in removal proceedings, but he was previously in deportation proceedings, which were conducted under prior law. Specifically, on December 28, 1990, the respondent—a native and citizen of Mexico—was served an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of

Alien (Form I-221S), charging him with deportability under former section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (1988), as an alien who entered the United States without inspection. The respondent conceded deportability as charged, and on January 10, 1991, an Immigration Judge ordered him deported. The respondent waived appeal and made no application for relief from deportation, so he was physically deported to Mexico the same day. On the next day, January 11, 1991, the respondent returned to the United States without being admitted or paroled. He has remained in the United States since that time without interruption.

On June 5, 2001, more than 10 years after his illegal return, the Immigration and Naturalization Service, now the Department of Homeland Security ("DHS"), served a Notice to Appear (Form I-862) on the respondent, charging him with removability as an alien present in the United States without being admitted or paroled. *See* section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i) (2000). The respondent conceded removability and requested cancellation of removal under section 240A(b) of the Act, a form of relief that is available only to certain aliens who, at the time of filing the application, have been physically present in the United States for a continuous period of not less than 10 years.

The Immigration Judge concluded that the respondent could not satisfy the continuous physical presence requirement and denied his application for cancellation of removal. In coming to this conclusion, the Immigration Judge relied on the "stop-time" rule set forth at section 240A(d)(1) of the Act, which provides in pertinent part that an alien's period of continuous physical presence in the United States is "deemed to end . . . when the alien is served a notice to appear." Specifically, the Immigration Judge cited as controlling authority our precedent decision in *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236 (BIA 2000), which held in the context of a suspension of deportation application that service of an Order to Show Cause upon an alien "is not simply an interruptive event that resets the continuous physical presence clock, but is a terminating event, after which continuous physical presence can no longer accrue." *Id*. at 1241.

II. ISSUE

The issue before us is whether an alien who departs the United States after being served with a valid charging document can, upon his subsequent return to the United States, accrue a period of continuous physical presence—measured from the date of his return—so as to demonstrate eligibility for cancellation of removal.

III. ANALYSIS

Because the respondent is not a lawful permanent resident of the United States, he is eligible for cancellation of removal only if he can prove that he "has

been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date" upon which his application for relief was submitted. Section 240A(b)(1)(A) of the Act. This continuous physical presence requirement is subject to several "special rules" set forth at section 240A(d) of the Act, one of which provides in pertinent part that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 239(a)." Section 240A(d)(1) of the Act. Although the language of section 240A(d)(1) refers only to "notices to appear," Congress has clarified that continuous physical presence may also be terminated by service of an Order to Show Cause in deportation proceedings under prior law. *See* section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, 111 Stat. 2193, 2196 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"); *Matter of Nolasco*, 22 I&N Dec. 632 (BIA 1999).

Section 240A(d)(1) was enacted into law by section 304(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-595 ("IIRIRA"). Legislative history reflects that section 240A(d)(1) was enacted by Congress in order to restrict perceived abuses arising from the prior practice of allowing periods of continuous physical presence to accrue after service of a charging document. Specifically, the Judiciary Committee of the House of Representatives asserted that aliens in deportation proceedings had knowingly filed meritless applications for relief or otherwise exploited administrative delays in the hearing and appeal processes in order to "buy time," during which they could acquire a period of continuous presence that would qualify them for forms of relief that were unavailable to them when proceedings were initiated. *See* Report of the Committee on the Judiciary, House of Representatives, on H.R. 2202, H.R. Rep. No. 104-469 (1996).

With this legislative intent in mind, we held in *Matter of Mendoza-Sandino*, *supra*, that a period of physical presence accrued by an alien after service of an Order to Show Cause, but prior to the issuance of an administratively final order of deportation, could not be counted toward the 7 years of continuous physical presence required to establish eligibility for suspension of deportation. In other words, *Matter of Mendoza-Sandino* resolved the question whether service of a valid charging document precluded an applicant for relief from accruing a qualifying period of continuous physical presence *in the proceedings that arose from service of that charging document*. That decision did not resolve the question, presented here, whether an alien who departed the United States after being served with a valid charging document can seek relief *in a subsequent removal proceeding*, based on a new period of continuous physical presence measured from the date of his return. Applying the "stop-time" rule to an alien in these latter circumstances implicates ambiguities in the language and purpose of section 240A(d)(1) that were not present in *Matter of Mendoza-Sandino*, *supra*.

The language of section 240A(d)(1) of the Act is ambiguous as to the effect of a charging document served in an earlier proceeding relative to the accrual of continuous physical presence in subsequent proceedings. As the tribunal vested in the first instance with the Attorney General's authority to administer the Immigration and Nationality Act, we must therefore determine a reasonable interpretation of Congress' language. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). In doing so, we must take into account the design of the Act as a whole, pursuant to the rules of statutory construction. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

As previously noted, section 240A(d)(1) of the Act was enacted to prevent aliens from taking advantage of administrative delays in the hearing and appeal processes to accrue the term of continuous physical presence required to establish eligibility for relief. However, neither the language nor the legislative history of the "stop-time" rule suggests that Congress envisioned it to be a means of preventing aliens from illegally reentering the United States after a prior removal or deportation. On the contrary, that purpose was to be served by section 305(a)(3) of the IIRIRA, 110 Stat. at 3009-599, which directed the Attorney General to reinstate and reexecute prior orders of exclusion, deportation, or removal against aliens, such as the present respondent, who had unlawfully reentered the United States. Under the reinstatement procedure, which is codified at section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) (2000), an alien who has reentered the United States unlawfully after entry of a prior order of exclusion, deportation, or removal is generally ineligible for a hearing before an Immigration Judge, or for any form of relief under the Act, and is to be removed expeditiously in accordance with his or her prior order. *See also* 8 C.F.R. § 1241.8 (2004).

Creation of the reinstatement procedure evinced a congressional understanding that aliens who reentered the United States unlawfully after deportation would be ineligible for cancellation of removal simply by virtue of the unlawful nature of their reentries. Naturally, it was expected that such aliens would rarely, if ever, find themselves in a position to actually submit an application for such relief to an Immigration Judge. In light of this understanding, we presume that Congress did not intend, when drafting the "stop-time" rule, to erect an additional, gratuitous barrier to relief for previously deported aliens. This presumption finds support in section 240A(c) of the Act, which lists the categories of aliens who are ineligible for cancellation of removal and does not include aliens with prior orders of exclusion, deportation, or removal. It strains credulity to conclude that Congress intended the "stop-time" rule to serve as an oblique preclusion for persons with prior deportation orders when a far less convoluted alternative was available in section 240A(c).

We acknowledge that the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this proceeding arises, holds that the reinstatement procedure of section 241(a)(5) does not apply retroactively to aliens, such as the respondent, whose most recent unlawful reentry to the United

States occurred prior to the effective date of the IIRIRA. *See Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001). While the Ninth Circuit's decision in *Castro-Cortez* helps to explain why the respondent's 1991 deportation order has not been reinstated, that decision does not affect our analysis regarding the scope of the "stop-time" rule. Specifically, the fact that Ninth Circuit law makes reinstatement unavailable in this particular instance does not authorize us to separate the language of section 240A(d)(1) from its stated purpose in order to use it as a second line of defense against illegal reentrants. Although the reinstatement process affects only those aliens who have reentered the United States *unlawfully*, the proposed interpretation of section 240A(d)(1) would affect every alien present in the United States against whom a valid charging document was ever issued—including those who were deported or granted the privilege of voluntary departure and then reentered the United States *lawfully*. We do not believe that Congress intended section 240A(d)(1) to ban such aliens from eligibility for cancellation of removal.

IV. CONCLUSION

In conclusion, both the overall design of the statute and Congress' concerns leading to its enactment indicate that the "stop-time" rule was not intended to extend to charging documents issued in earlier proceedings. Consequently, we conclude that the "notice to appear" referred to in section 240A(d)(1) pertains only to the charging document served in the proceedings in which the alien applies for cancellation of removal, and not to charging documents served on the alien in prior proceedings. Thus, when the DHS does not or cannot reinstate the order against a previously deported alien, but instead places that alien in removal proceedings, the alien may demonstrate statutory eligibility for cancellation of removal by relying on a qualifying period of continuous physical presence accrued after his reentry.

Accordingly, the appeal will be sustained and the record will be remanded for further proceedings.

ORDER: The appeal is sustained.

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

CONCURRING OPINION: Lori L. Scialabba, Board Chairman, in which Edward R. Grant, Board Member, joined

I respectfully concur.

Section 240A(d)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d)(1) (2000), states that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . .

when the alien is served a notice to appear." The statute does not specify whether "notice to appear" means the *first* notice to appear or the *most recent* notice to appear in a case where more than one charging document is issued. The majority opinion determines that "notice to appear" means the most recent notice to appear, while the dissent concludes that it refers only to the first notice to appear issued to an alien.

If the statutory language invited a middle-of-the-road approach, I would agree with the majority that aliens who reenter the United States *lawfully* after removal or deportation begin a new period of continuous physical presence upon reentry. I would disagree that aliens who reenter the United States *illegally* have the ability to begin another period of continuous physical presence, which Congress specifically intended to end through new measures enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA").

The majority opinion states that neither the language nor the legislative history of the "stop-time" rule suggests that Congress envisioned it as a means of preventing aliens from illegally reentering the United States after removal. That purpose was to be served by the reinstatement provision of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) (2000). I disagree that the existence of section 241(a)(5) makes this question moot. I first note that it is the overall purpose and design of the Immigration and Nationality Act to prevent illegal entry. Second, even if the immediate point of the "stop-time" rule was not to prevent illegal reentry but rather to prevent the alien from continuing to accrue continuous physical presence, that premise would logically continue to its purpose of preventing an alien from accruing a new period of continuous physical presence by simply departing and returning illegally.

Further, the ability of the Department of Homeland Security ("DHS") to reinstate orders of removal is different from the qualification of an alien to apply for relief in any subsequent proceedings.[1] The majority opinion proposes that section 241(a)(5) would bar aliens who reenter the United States illegally from eligibility for cancellation, and that any other provision in the Act to bar an alien from accruing time toward such eligibility would be gratuitous. This does not follow. Sections 241(a)(5) and 240A(c) of the Act were not meant to be exhaustive and do not speak to each individual eligibility criteria for every form of relief.

However, I do not join the dissent insofar as the dissent does not recognize a new period of continuous presence for an alien who reenters the United States lawfully. That alien's status has changed. Once the Government grants an alien lawful status and admits him under that new status, a new period of presence begins. Under these circumstances, I would not find that the first notice to appear terminated the alien's continuous physical presence permanently.

[1] There may be aliens who receive a charging document but leave without a final order of removal. In those cases, the DHS would have no order to reinstate.

While I believe this middle-of-the-road approach would more closely follow the spirit of the law in the facts of this case, I do not find support in the language of section 240A(d)(1) for such an approach, under which a notice to appear would mean one thing to aliens who reenter legally and another to aliens who reenter illegally. Therefore, I join the majority opinion. My concerns over the outcome of this case are ameliorated by the fact that the respondent is not being granted relief. Rather, he is simply eligible to apply for relief, and his history of unlawful entries and his conviction for reentering the United States illegally are negative discretionary factors that the Immigration Judge may certainly consider.

For the foregoing reasons, I respectfully concur.

DISSENTING OPINION: Patricia A. Cole, Board Member, in which Frederick D. Hess, Board Member, joined

I respectfully dissent.

In *Matter of Mendoza-Sandino*, 22 I&N Dec. 1236, 1241 (BIA 2000), we held that service of a valid charging document on an alien "is not simply an interruptive event that resets the continuous physical presence clock, but is a terminating event, after which continuous physical presence can no longer accrue." In accordance with this uncomplicated principle, I agree with the Immigration Judge that an alien who was previously served a valid Order to Show Cause resulting in his deportation may not, in subsequent removal proceedings, qualify for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b) (2000), based on a period of physical presence accrued after he unlawfully reentered the United States. In my view, continuous physical presence, once terminated by service of a valid charging document, remains terminated permanently.

Our decision in *Matter of Mendoza-Sandino*, *supra*, was consistent with the unambiguous language of section 240A(d)(1) of the Act, which specifies that an alien's period of continuous physical presence "shall be deemed to end . . . when the alien is served a notice to appear." Yet the majority now perceives ambiguities in this language that I cannot discern and employs those ambiguities to justify an interpretation of section 240A(d)(1) that is incompatible with the purposes underlying the Act as a whole.

Under the majority's interpretation, an alien whose continuous physical presence in the United States has been terminated by service of a valid charging document may evade the preclusive effect of the "stop-time" rule, i.e., "reset[] the continuous physical presence clock," by the simple, expedient route of departing the United States and reentering unlawfully. *Matter of Mendoza-Sandino*, *supra*, at 1241. Such an interpretation rewards illegal reentry and cannot, in my view, be reconciled with the language and purpose of the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), as a whole.

While the majority states that it finds nothing in the legislative history of the "stop-time" rule to suggest "that Congress envisioned it to be a means of preventing aliens from illegally reentering the United States after a prior removal or deportation," this position ignores the very enforcement-oriented provisions of this legislation. *Matter of Cisneros*, 23 I&N Dec. 668, 671 (BIA 2004). The IIRIRA contained numerous provisions to control illegal entrants and to penalize persons unlawfully present in the United States, including those that would limit the available legal process, impose criminal liability for reentering after deportation, and expedite the removal of such aliens. The majority does recognize that the purpose of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) (2000), is to punish and deter illegal reentry. This section of the law precludes aliens who have reentered illegally from applying for any form of relief under the Act by the reinstatement of prior deportation orders. The majority acknowledges the congressional expectation that such aliens would not be in a position to submit an application for relief to an Immigration Judge, yet finds that because the Department of Homeland Security ("DHS"), formerly the Immigration and Naturalization Service, cannot reinstate a prior deportation order in this case, the respondent should be able to benefit from his illegal reentry and seek relief as if he had never been deported.

The DHS cannot reinstate the respondent's prior deportation order because this matter arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, which has held that section 241(a)(5) of the Act does not apply retroactively to aliens such as the respondent. *See Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001). The majority discounts the importance of the reinstatement procedure by noting that the unavailability of reinstatement in this particular case has no bearing on the meaning of the "stop-time" rule. Yet this glib observation ignores the fact that both the "stop-time" rule and the reinstatement procedure were enacted as core elements of the same statute, the IIRIRA.

It is axiomatic that a statute should be construed so that effect is given to *all* its provisions and that no part of it will be rendered superfluous or insignificant. *Matter of Masri*, 22 I&N Dec. 1145, 1148 (BIA 1999). As the Supreme Court has cautioned, "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (citations omitted). At a minimum, no part of a statute may be interpreted in such a manner that it affirmatively defeats the purpose of another part, yet the majority's interpretation of section 240A(d)(1) does just that. Thus, even if I were to accept the majority's conviction that the language of section 240A(d)(1) is ambiguous, I would resolve that ambiguity in favor of an interpretation that is consistent with the larger statutory scheme, of which the reinstatement procedure is an essential part.

In conclusion, I would affirm the Immigration Judge's decision and hold that the respondent is precluded from relying on any period of continuous physical presence that he may have accrued after a valid Order to Show Cause was served on him in December 1990. This result is dictated by the clear language of section 240A(d)(1), as well as the purpose of the Act as a whole. Congress' creation of the reinstatement procedure in the IIRIRA reflects a clear legislative judgment that aliens such as the respondent—who have reentered the United States unlawfully after deportation—should be removed expeditiously and denied access to relief from removal, including cancellation of removal. The majority's interpretation of section 240A(d)(1) is contrary and frustrates this clearly articulated policy.

Accordingly, I dissent.