

DEL PILAR V. U.S. ATTY. GEN.

326 F.3d 1154, 16 Fla. L. Weekly Fed. C 475,
2003 WL 1786663 (C.A.11,2003.)

326 F.3d 11542003 WL 1786663326 F.3d 1154

Headnotes

• Opinion •

Cases Citing This Case

United States Court of Appeals,
Eleventh Circuit.

Joselito DEL PILAR, Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,
Immigration and Naturalization Service,
Respondents.

No. 02-13539

Non-Argument Calendar.

Feb. 21, 2003.

SYNOPSIS

Alien petitioned for review of order of Board of Immigration Appeals (BIA), INS No. A36-109-126, reversing immigration judge's grant of waiver of inadmissibility and remanding for limited purpose of permitting alien to designate country of removal. On government's motion to dismiss petition, the Court of Appeals held that: (1) order qualified as "final order of removal," within meaning of statute that vested Court of Appeals with authority to consider petitions challenging final removal orders; (2) under section of Immigration and Nationality Act (INA) providing that Court of Appeals has no jurisdiction to review final order of removal if alien has been found to be removable by reason of having committed aggravated felony, Court of Appeals had jurisdiction to determine only whether alien was an alien, who was removable based on his conviction for aggravated felony; and (3) alien's North

Carolina conviction of taking indecent liberties with minor qualified as conviction [*1155] for "sexual abuse of a minor," so as to constitute "aggravated felony."

Motion granted; petition dismissed.

HEADNOTES**[1] Aliens  54.3(1)**

24 ----

24III Immigration

24k52 Detention, Supervision and
Deportation

24k54.3 Judicial Remedies and Review

24k54.3(1) In General.

Order of deportation becomes "final," within meaning of statute vesting Court of Appeals with authority to consider petitions challenging final orders of removal, upon a determination by the Board of Immigration Appeals (BIA) or upon the expiration of time within which alien may seek review from the BIA. Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C.A. § 1252(a)(1).

[2] Aliens  54.3(1)

24 ----

24III Immigration

24k52 Detention, Supervision and
Deportation

24k54.3 Judicial Remedies and Review

24k54.3(1) In General.

Order of Board of Immigration Appeals (BIA), reversing immigration judge's grant of waiver of inadmissibility and remanding for limited purpose of permitting alien to designate country of removal, qualified as "final order of removal," within meaning of statute that vested Court of Appeals with authority to consider petitions challenging final removal orders. Immigration and Nationality Act, § 242(a)(1), as amended, 8

U.S.C.A. § 1252(a)(1).

[3] **Aliens** ⚙️ **54.3(1)**

24 ----

24III Immigration

24k52 Detention, Supervision and
Deportation

24k54.3 Judicial Remedies and Review

24k54.3(1) In General.

Under section of Immigration and Nationality Act (INA) providing that Court of Appeals has no jurisdiction to review final order of removal if alien has been found to be removable by reason of having committed aggravated felony, Court of Appeals has jurisdiction to determine only whether alien petitioning for review of removal order is (1) an alien, (2) who is removable (3) based on conviction for aggravated felony.

Immigration and Nationality Act, § 242(a)(2)(C), as amended, 8 U.S.C.A. § 1252(a)(2)(C).

[4] **Aliens** ⚙️ **53.2(3)**

24 ----

24III Immigration

24k52 Detention, Supervision and
Deportation

24k53.2 Crime and Immorality

24k53.2(3) Number and Nature of
Prosecutions or Punishment; Clemency or
Recommendation Against Deportation.

[See headnote text below]

[4] **Aliens** ⚙️ **54.3(1)**

24 ----

24III Immigration

24k52 Detention, Supervision and
Deportation

24k54.3 Judicial Remedies and Review

24k54.3(1) In General.

Alien's North Carolina conviction of taking indecent liberties with minor qualified as conviction for "sexual abuse of a minor,"

so as to constitute an "aggravated felony" conviction that supported alien's removal and that precluded judicial review of removal order. Immigration and Nationality Act, § 242(a)(2)(C), as amended, 8 U.S.C.A. § 1252(a)(2)(C).

COUNSEL

[*1155] Socheat Chea, Atlanta, GA, for
Petitioner.

Anthony P. Nicastro, David V. Bernal, Civ.
Div., Washington, DC, for Respondents.

Petition for Review of a Final Decision of
the Board of Immigration Appeals.

Before DUBINA, MARCUS and WILSON,
Circuit Judges.

OPINION

PER CURIAM:

Joselito Del Pilar petitions for review of a decision of the Board of Immigration Appeals (BIA), reversing the immigration judge's (IJ's) grant of a waiver of inadmissibility pursuant to former section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c) (repealed 1996). In response, the government filed a motion to dismiss, arguing that we lack jurisdiction to review Del Pilar's petition, because (1) there is no final order of removal; and (2) Del Pilar falls within the class of criminal aliens for which 8 U.S.C. § 1252(a)(2)(C) explicitly prohibits judicial review of removal orders. As we agree that we do not have jurisdiction, we dismiss Del Pilar's petition.

[*1156] **BACKGROUND**

Del Pilar, a native and citizen of the Philippines, was admitted to the United States as an immigrant in January of 1977. On April 24, 1992, he pled guilty to three counts of taking indecent liberties with children in

violation of section 14-202.1 of the North Carolina Statutes and was sentenced to ten years of imprisonment. Based upon Del Pilar's criminal convictions, on February 15, 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against him, charging him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony. Although the IJ found Del Pilar removable as charged, he granted Del Pilar's application for a waiver of inadmissibility under former section 212(c). (FN1) The INS appealed, however, and the BIA reversed the IJ's grant of the waiver and remanded the case for the sole purpose of allowing Del Pilar to designate a country of removal. Thereafter, Del Pilar filed a petition with this Court for review of the BIA's decision. In response, the government filed a motion to dismiss Del Pilar's petition.

DISCUSSION

I.

[1] As the removal proceedings against Del Pilar were commenced after April 1, 1997, the date the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) became effective, we apply "the permanent provisions of [the] INA as amended by IIRIRA, 8 U.S.C. § 1252" to this case. *Oguejiofor v. Attorney Gen.*, 277 F.3d 1305, 1308 (11th Cir.2002) (per curiam). "[Section] 1252(a)(1) ... vest[s] the courts of appeals with the authority to consider petitions challenging final orders commanding the removal of aliens from the United States." *Brooks v. Ashcroft*, 283 F.3d 1268, 1272 (11th Cir.2002); see 8 U.S.C. § 1252(a)(1). Yet, "[our] review of all questions of law and fact ... arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter" is limited to "judicial review of a final order." 8 U.S.C. § 1252(b)(9) (emphasis added). An order of deportation becomes "final" upon a determination by the

BIA or the expiration of the time within which an alien may seek review from the BIA. See 8 U.S.C. § 1101(a)(47)(B)(i)-(ii).

[2] Here, the BIA's order reversing the IJ's decision to grant Del Pilar section 212(c) relief amounted to an order that Del Pilar be removed. Although this Court has no binding authority addressing whether the BIA's remand for the limited purpose of permitting Del Pilar to designate a country of removal rendered the removal order nonfinal, two of our sister circuits provide some guidance. See *Castrejon-Garcia v. INS*, 60 F.3d 1359, 1361-62 (9th Cir.1995) (finding that a BIA order reversing an IJ's grant of suspension of deportation and remanding the case "for a determination of voluntary departure in lieu of deportation" was a final order of deportation under former INA section 106a(a), 8 U.S.C. § 1105a(a) as nothing was pending before the BIA and "the petitioner had no reason or basis for appealing the [IJ's] decision in his favor"); *Perkovic v. INS*, 33 F.3d 615, 618-19 (6th Cir.1994) [*1157] (finding that a BIA order reversing an IJ's grant of asylum and remanding the case was a final order of deportation under § 1105a(a) and noting that it was not "aware of [any] authority for the proposition that a [BIA] order rejecting an asylum application is not a final order unless a formal order of deportation has already been issued"). As all of the issues presented to us were subject to a final order by the BIA and there is nothing remaining for Del Pilar to appeal as the only thing left for the IJ to determine is the country to which Del Pilar will be removed, we find that the BIA's order constitutes a final order of removal.

II.

[3] Although the BIA's order is a final order of removal under § 1252(a)(1), our review of Del Pilar's petition is severely limited under § 1252(a)(2)(C). *Brooks*, 283 F.3d at 1272. Indeed, § 1252(a)(2)(C) precludes us from exercising "jurisdiction to

review any final order of removal against an alien who is removable by reason of having committed" certain enumerated criminal offenses, including those covered in § 1227(a)(2)(A)(iii). 8 U.S.C. § 1252(a)(2)(C). Therefore, our review of Del Pilar's petition is limited to "whether [he] is (1) an alien (2) who is removable (3) based on a conviction for an aggravated felony." *Bahar v. Ashcroft*, 264 F.3d 1309, 1311 (11th Cir.2001) (per curiam).

Bahar, 264 F.3d at 1313.

[4] Here, it is uncontested that Del Pilar is an alien. Moreover, he is removable under § 1227(a)(2)(A)(iii) as an "alien who [wa]s convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii); *see id.* § 1101(a)(43)(A) (defining the phrase "aggravated felony" as including the "sexual abuse of a minor"). (FN2) Therefore, we are precluded from reviewing the BIA's decision.

CONCLUSION

Accordingly, we do not have jurisdiction to review Del Pilar's petition. Thus, the government's motion to dismiss is hereby GRANTED.

DISMISSED.

(FN1.) In *INS v. St. Cyr*, 533 U.S. 289, 326, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), the Supreme Court held that, although it was repealed in 1996, section 212(c) discretionary relief is available to aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." As Del Pilar pled guilty in February of 1992, he was eligible to apply for section 212(c) relief.

(FN2.) We previously have held "that the term 'sexual abuse of a minor' encompasses the North Carolina offense of taking indecent liberties with children."