U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - BAL
31 Hopkins Plaza, Room 1600
Baltimore, MD 21201

Name: SULTAN, ATIF **A096-252-000**

Date of this notice: 5/22/2012

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

File: A096 252 000 - Baltimore, Maryland

Date: MAY 22 2012

In re: ATIF SULTAN

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Andres C. Benach, Esquire

ON BEHALF OF DHS: Billy J. Sapp
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Remand

During the pendency of his appeal from an Immigration Judge's February 23, 2010, decision, the respondent filed a motion to remand based upon a Petition for Alien Relative (Form I-130) filed on his behalf by his United States citizen wife. The Department of Homeland Security (DHS) has opposed this motion contending that the respondent is not deserving of a favorable exercise of discretion. The record will be remanded.

We review an Immigration Judge's findings of fact for clear error, and review questions of law, discretion, and judgment, and all other issues on appeal de novo. 8 C.F.R. § 1003.1(d)(3).

The respondent has filed documentation to support his motion to remand including the Notice of Action (Form I-797) indicating his Petition for Alien Relative (Form I-130) was approved on March 11, 2010. As more support of his motion, the respondent submitted an application for adjustment of status (Form I-485), his wife's naturalization certificate, and his children's birth certificates as evidence supporting the bona fides of his marriage. *See* 8 C.F.R. § 1003.2(c)(1); 8 C.F.R. § 1245.1(c)(8)(v) (providing that an approved I-130 is primary evidence of eligibility). We find the respondent demonstrates prima facie eligibility for relief. *See, e.g., INS v. Abudu*, 485 U.S. 94 (1988); *see also Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *see also Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002).

We acknowledge the DHS' arguments with regard to fraud and discretion, but find these issues, which may involve additional findings of fact, should be assessed by the Immigration Judge in the first instance. *See Matter of Fedorenko,* 19 I&N Dec. 57, 74 (BIA 1984); 8 C.F.R. § 1003.1(d)(3)(iv). While we express no opinion as to the ultimate merits of the respondent's claim,

we will grant the motion to remand in order for the respondent to pursue adjustment of status under section 245 of the Act.

Accordingly, the following order will be entered:

ORDER: The respondent's motion to remand is granted. The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Baltimore, Maryland

File A 096 252 000 February 23, 2010

In the Matter of

ATIF SULTAN,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGE: Immigration and Nationality Act, Section 237(a)(1)(B), as one who after admission as a nonimmigrant under Section 101(a)(15) of the Act, has remained in the United States for a period of time longer than permitted, in violation of the Act or any other law of the United States.

APPLICATION: Immigration and Nationality Act, Section 245(I), adjustment of status (employment based).

ON BEHALF OF THE RESPONDENT:

Andres C. Benach, Esquire
Dwayne Morris, LLP
505 9th Street, NW
Suite 1000
Washington, DC 20004

ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:

Billy J. Sapp, Esquire
Assistant Chief Counsel
Immigration and Customs Enforcement
31 Hopkins Plaza, Seventh Floor
Baltimore, Maryland 21201

ORAL DECISION OF THE IMMIGRATION JUDGE

I. Statement of the Case

This is a removal case involving a male alien, native and citizen of Pakistan. He was served with a Notice to Appear, dated February 25, 2003, which is a part of this record as

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Exhibit 1. The Notice to Appear indicates the respondent is not a citizen or national of the United States but a native and citizen of Pakistan. It indicates he was admitted to the United States through New York, New York, on or about September 26, 1999, as a nonimmigrant visitor for pleasure, with authorization to remain in the United States for a temporary period not to exceed March 25, 2003 [Exhibit 1]. The Notice to Appear indicates the respondent subsequently received an extension of his status to remain in the United States for a temporary period not to exceed August 9, 2000, but that he remained in the United States beyond that date without authorization from the Immigration and Naturalization Service (now DHS). Based thereon, the Department of Homeland Security alleges that the respondent is removable from the United States under Section 237(a)(1)(B) of the Immigration and Nationality Act, as one who after admission as a nonimmigrant under Section 101(a)(15) of the Act, has remained in the United States for a period of time longer than permitted [Exhibit 1].

The respondent appeared previously in Immigration Court and admitted the allegations contained in the charging document, and conceded that he is removable as charged. Based on the respondent's admission to the allegations contained in the charging document and his concession of removability, the Court finds that the respondent's removability has been established by evidence that is clear and convincing, as is required under

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Section 240(c) of the Immigration and Nationality Act. See also Woodby v. INS, 385 U.S. 276 (1966) [decided in context of deportation proceedings].

The Court next turns to the respondent's applications for relief. The respondent previously appeared in Immigration Court and indicated that he would be seeking adjustment of status under Section 245(I) of the Immigration and Nationality Act, as a beneficiary of an employment-based immigrant visa petition. The previous Immigration Judge reached a determination that the respondent was statutorily ineligible for adjustment of status because he was attempting to carry over an April 30 of 2001 priority date, acquired through an alien labor certification filed on his behalf by Cleaners of America, to a new employer who is sponsoring him for a similar position (Top Notch Cleaners). On January 11, 2008, the Board remanded the case taken on appeal of the Immigration Judge's determination that the respondent could not port the priority date and have adjudication through the Immigration Court. The Immigration Judge had found that pursuant to Matter of Perez Vargas, 23 I&N Dec. 829 (BIA 2005), he had no jurisdiction to make a determination under Section 204(j), of the Immigration and Nationality Act. The Immigration Judge therefore denied the respondent's application for adjustment. Subsequent to the Board's decision in Matter of Perez, the United States Court of Appeals for the Fourth Circuit vacated the decision in Matter of Perez, holding that the

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Immigration Judge's statutory jurisdiction over applications for adjustment of status necessarily encompassed the jurisdiction to make factual findings provided for in Section 204(j) of the Act, regarding portability of priority dates. The case was therefore remanded for consideration in light of the United States Court of Appeals for the Fourth Circuit vacation of the decision in Matter of Perez Vargas.

The respondent has submitted the application for adjustment of status with supporting documentation, which includes the Notice of Approval of the I-140, on behalf of Cleaners of America, showing the April 30, 2001, priority date. He has also enclosed documentation from his new employer, Top Notch Cleaners, showing an indication that Top Notch Cleaners is prepared to provide the respondent full time employment at the prevailing wage, once he is admitted to the United States in lawful permanent resident status.

II. Statement of the Facts

The respondent has testified at length in these proceedings. He testified that he was born in May 1968, in Peshawar, Pakistan. He is married and has been married since 2004, to Nazneen Nelab, a lawful permanent resident of the United States. The respondent is also the father of two United States citizen children. He testified that he is seeking adjustment of status and intends to work as a supervisor for Top Notch Cleaners, in Columbia, Maryland, even though he acknowledges that

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he presently lives in the State of California. He has indicated that he has an MBA, from the Philippines 1991, and that he has no other schooling. The respondent states that he came to the United States in September 1999 on a B-1/B-2 visa and no departures.

The respondent's testimony indicated that he recalls that Cleaners of America filed a petition for him to immigrate into the United States. He acknowledges that organization used the legal services of Global Legal Services to file the alien labor certification and the immigrant visa petition. He acknowledged, as well, that the attorney that handled the process was an individual by the name of Mr. Rex Wingerter, and that was done in 2001. Respondent testified there was also an individual by the name of Naran Ivanchukov, who was used as a broker according to the respondent.

The respondent states that Mr. Wingerter and Mr. Ivanchukov told him that there were several construction and/or cleaning companies who would hire the respondent, if he were interested. The recruiter also asked the respondent about his background experience and respondent told the recruiter about his cleaning experience in Pakistan, according to his testimony. The respondent promised to work for Cleaners of America once he received an unemployment authorization document from the Department of Homeland Security. He states that he met a number of people at Cleaners of America and he was asked about his past

cleaning experience. He states that he spoke of his Pakistani experience in cleaning. According to the respondent's testimony, he did not suspect that anything was wrong with the job offer made to him. He states that he assumed that the recruiter was legitimate. He has testified that he later learned that Mr. Ivanchukov and Mr. Wingerter were charged and convicted of Immigration fraud. He states that he paid Global Services for their Immigration services and he recalls that a labor certification was approved on his behalf. Additionally, he testified that an I-140 was filed with the I-485 and that he recalls presenting a letter from a company in Pakistan to establish his past experience in cleaning. It was his testimony, as well, that he did indeed receive an employment authorization document and that in June of 2004 he started working at Cleaners of America. He states that at Cleaners of America he "cleaned and vacuumed floors, collected trash, et cetera."

The respondent states that he believed that he was supposed to start work as a supervisor and thus he was dissatisfied with the menial cleaning job that he had been given at Cleaners of America. He states that he worked there until December of 2004 and that in late 2004, he learned that there were criminal allegations about Cleaners of America. He states that he later learned that organization was just "filing petitions for jobs that did not exist." The respondent was interviewed by the FBI, about whether or not he had paid any

money to Cleaners of America to be his sponsor. He states that he showed FBI agents his badge. He testifies, as well, that Cleaners of America withdrew the I-140 filed on his behalf. The respondent indicates that he contacted his attorney. He stated that he had a new employer at Top Notch Cleaners, that had offered him a supervisory position and he sought legal counsel in connection with that petition. He states that he buttressed his past experience to support the ETA-750A and B, labor certification, and I-140, on his experience from Kraffers Private, Limited. He states that it is a company that he started in Pakistan. He described it as a "marble processing and installation company." He testified that company was operated from his home. He has indicated that there is "clean up involved in the marble business." He states that the marble business involved grinding and polishing, which created mud and dust. He states that he had crews that did the clean up, consisting of five to seven people. He states that there were some 21 cleaners all together and that he supervised all of them. He testified that he instructed them on where to clean, how to clean, and where to dispose of the remains of the cleaning. He states that it was between 1991 and 1999 that he did that and that 60 percent of his duties at Kraffers had focused on the clean up duties. It was his testimony, as well, that Kraffers is located at 121 Canal Road but that it never set up there. He states that they were planning to build on land there but when they started to build,

there was a land dispute and the deal fell through. He has provided that testimony in order to establish that the letter his brother drafted regarding his cleaning supervising experience is accurate. Additionally, this respondent has testified that if he is denied adjustment of status, his lawful permanent resident spouse will experience hardship. He states that his family in Pakistan has "had problems." He states that one of his brothers was murdered in Pakistan about three years ago and that another brother was injured in a bomb blast in early 2009. He states, as well, that his mother "is struggling."

On cross-examination, the respondent conceded that he lives in the State of California and not in the State of Maryland. He states that there is an equipment company that he started, that is his main source of income. He acknowledged that he has no family living in the Maryland area. He states that he will be doing contracting and cleaning work for maintenance of buildings in connection with the contracting work. He acknowledged on cross-examination that individuals from the United States Consulate spoke with his brother in Pakistan in order to confirm whether or not the respondent had legitimate past experience to support the labor certification and I-140 submitted in an effort to obtain permanent residence.

In addition to the respondent's testimony, the Court heard testimony from Raghid Shourbaji. Mr. Shourbaji has testified that he is the owner of Top Notch Cleaners and that he

has a job offer available to the respondent once he is admitted as a lawful permanent resident [Exhibit 10-R]. Mr. Shourbaji has also enclosed a letter in support of his testimony that a job offer is made available to the respondent. Mr. Shourbaji's testimony was that the respondent responded to an ad, run in a newspaper, for a position at Top Notch. The respondent told Mr. Shourbaji that he had worked in facilities management previously. Top Notch needed someone with experience and so the job was offered to the respondent, which forms the basis of the job offer at issue before the Court. Mr. Shourbaji indicated that he relied on the respondent's past experience and acknowledged that Top Notch has "no affiliation with Cleaners of America."

III. Statement of the Law

Section 245(a) of the Immigration and Nationality Act, provides for the adjustment of status for an individual who can establish that he was inspected and admitted or paroled into the United States and that he has made an application for adjustment of status. The applicant for adjustment of status under Section 245(a) of the Immigration and Nationality Act, must also establish that he is eligible to receive an immigrant visa and is admissible to the United States for permanent residence. Additionally, the applicant for adjustment of status must establish that an immigrant visa is "immediately available to him at the time his application is filed." See INA Section 245(a). Section 245(I) of the Immigration and Nationality Act, allows for

the adjustment of status for aliens who are presently present in the United States, even those who have entered the country without inspection or is within one of the classes enumerated in subsection (C) of Section 245(a). If "a petition for classification under Section 204 was filed with the Attorney General on or before April 30, 2001, or an application for a labor certification under Section 212(a)(5)(A) was filed pursuant to the regulations with the Secretary of Labor or on before such a date."

The respondent has submitted an application for adjustment of status. He claims that the priority date of April 30, 2001, which was obtained upon the filing of the ETA-750A and B, and I-140, in the context of the application for permanent residence filed on behalf of the respondent by Cleaners of America, is his priority date. He has indicated that even though he did not follow through with that petition, for reasons which shall be discussed in these proceedings, he is entitled to carry over that priority date to his new position and that he would be, therefore, eligible for adjustment of status under Section 245 of the Immigration and Nationality Act. As noted by the Board of Immigration Appeals in his January 11, 2008 remand, the decision of the United States Court of Appeals for the Fourth Circuit, in Perez-Vargas v. Gonzales, 478 F.3d 191 (4th Cir. 2007), Immigration Judge lacked jurisdiction to reach determination as to whether or not the respondent's priority date was portable.

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However, in light of the reversal of that decision by the U.S. Court of Appeals for the Fourth Circuit, in Matter of Perez Vargas, 23 I&N Dec. 829 (BIA 2005), the Immigration Judge has jurisdiction to reach a determination as to the portability of a priority date under Section 204(j) of the Immigration and Nationality Act.

IV. Position of the Parties

The respondent takes the position that his April 30, 2001 priority date, acquired through the petition filed by Cleaners of America, is portable to his current position at Top Notch Cleaners. He indicated that the new company is ready, willing and able to employ him once he has obtained permanent resident status. The Department of Homeland Security, however, argues that there was fraud involved in the initial petition at Cleaners of America and that the I-140 previously approved was revoked. The Department of Homeland Security argues that it was revoked as of the effective date of approval, which would be December 15, 2003, and that the respondent, therefore, has no approved I-140 for which he can adjust or carry over a priority date for eligibility for adjustment at his new position. Respondent asserts that he is eligible for adjustment of status based upon the approved I-140 filed by Cleaners of America. The case is that priority date is "portable." He argues that the indictment issued in this case to former counsel, Rex Wingerter and Mr. Ivanchukov, listed dozens of fraudulent labor

certifications but do not include the labor certification filed by Mr. Sultan. Respondent argues that his withdrawal of that petition does not imply any fraudulence on his behalf. He argue that there is a memo from Customs and Immigration Services, that says that his approved I-140 can be carried over to Top Notch, his new employer. He states that no fraud can be alleged to him, as well, because he indeed went and did the job for Cleaners of America with the intent to work for them under the labor certification agreement. He states that even though the 750A and B were withdrawn and revoked, as well as the I-140, having been withdrawn and revoked, were still approvable at the time of filing.

The Department of Homeland Security argues that the employment letter that the respondent offered to support his claim was fraudulent. They argue that the ETA-750A and B, and I-140, originally submitted were fraudulent, as well, which is why they were revoked. The Department of Homeland Security vehemently argues against the authenticity of the letters submitted to establish the respondent's past experience for purposes of eligibility of the approval of the ETA-750A and B, and I-140 filed for the respondent by Cleaners of America. It argues, as well, that the job offer from Cleaners of America was not a bona fide job offer. DHS argues that the Court should take into consideration "the totality of the circumstances in this case" to reach a determination that there is a great degree of

fraud here and, as a result, the respondent cannot establish that he is eligible for adjustment of status. The Government raises that argument primarily on a position that the I-140 was not approvable ~~and~~ when filed, nor the ETA-750A and B, because of the fact that they were induced by fraud.

V. Findings of Fact and Conclusions of Law

I have had an opportunity to observe the respondent's demeanor throughout these proceedings, as well as the demeanor of the witness that he has called to support his application for adjustment of status. I will find that the respondent has been essentially truthful regarding who he is and the fact that he has filed for adjustment of status through an approved alien labor certification, initially filed by Cleaners of America. The documentation in this record establishes conclusively that, indeed, the respondent had filed for adjustment of status through Cleaners of America and that he had acquired a priority date of April 30, 2001. It appears, as well, that the witness called in these proceedings to support the respondent's claim has testified truthfully about a job offer to the respondent, if he is allowed to carry over the priority date from the previously filed ETA-750A and B, and I-140. Nevertheless, this Court finds that there is evidence in this record which would lead to the conclusion that the respondent is not statutorily eligible for adjustment of status.

I will note that there is no evidence in this case that

the respondent was in direct complicity with the Global Immigration Services, immigration fraud, to the extent that the Government alleges. However, it is clear that the respondent went along with their manipulation and deception of the system. The respondent provided a specifically crafted letter from his brother in Pakistan allegedly confirming his past experience in cleaning and maintenance. The respondent submitted that letter to support the ETA-750A and B, and the I-140 filed by Cleaners of America, while looking the other way, while Global Services submitted those documents to the United States Government to facilitate his immigration to the United States. While I find that the respondent was not in direct complicity with the fraud that led to the conviction of Mr. Wingerter and the others in this case, I must note that there are entirely too many levels of fraud involved to allow the approved I-140 to remain viable. I will note that the Department of Homeland Security has revoked the originally filed I-140 in light of the numerous levels of fraud. I will note that the levels of fraud include the submission of ETA-750A and B to the Department of Labor, as well as the I-140 to the Department of Homeland Security, in an effort to obtain adjustment of status. I find, as well, that the letter crafted by the respondent's brother to support his claim is also part and parcel of that fraud perpetrated in an effort to obtain adjustment of status. While the respondent would assert that the letter is authentic, there was an indication that the

respondent's brother executed the letter. However, under the instant circumstances, there is no way to reach the respondent's brother to verify that documentation. In other words, that the letter was authentic. While the respondent has attempted to clarify that by subsequent letters, he is unable to explain convincingly to this Court how it is that if such a company were established, there were so many problems with matters such as the address, the respondent's duties, and particularly the omission of the fact that the respondent worked as a marble installer, as opposed to a person who was hired specifically for the purposes of cleaning and maintenance, as would be led to believe for purposes of the I-140 through Cleaners of America or Top Notch, for that matter.

I will note that the respondent was quite vague as to why the letters from his brother in Pakistan simply describe his cleaning duties and make no reference to his marble cutting, and cleaning, and installation. He simply says that he followed Mr. Wingerter's and Mr. Ivanchukov's instructions in getting confirmation of his past employment verification from his brother in Pakistan. The letter from his brother is clearly a sham. Thus, the labor certification and the I-140 were a sham, as well. Absent evidence that the labor certification and the I-140 relief on experience other than that alleged by the respondent makes it clear that the ETA-750A and B, and the I-140 were not ~~provable~~ approvable when filed. I make this finding because of the various levels of

fraud that are involved in this case. Had those levels of fraud been known to the adjudicators of the ETA-750A and B, and the I-140, it is clear that the applications would not have been approved. I find, therefore, that the priority date of April 30, 2001, is not portable because the documents underlying the approved applications were not approvable at the time of filing. I note, as well, that they have also been withdrawn and revoked, and therefore the respondent has no valid priority date in order to apply for adjustment of status before the Court. Since an immigrant visa is not immediately available to the respondent, the respondent is not statutorily eligible for adjustment of status under Section 245 of the Immigration and Nationality Act. The Court will therefore deny the respondent's application for adjustment of status and order him removed from the United States to Pakistan as charged.

VI. Order

IT IS ORDERED that respondent's application for adjustment of status under Section 245 of the Immigration and Nationality Act be and the same is hereby denied;

IT IS FURTHER ORDERED that the respondent be removed from the United States to Pakistan, as charged in the charging document.

Phillip Williams
PHILLIP T. WILLIAMS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before PHILLIP T. WILLIAMS in the matter of:

ATIF SULTAN

A 096 252 000

Baltimore, Maryland

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Ruth H. Hughes

Ruth H. Hughes (Transcriber)

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June 1, 2010
(Completion Date)