U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: AMWOMA, ZEBERIO

A 096-129-849

Date of this notice: 11/10/2014

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

Userteam: Docket

File: A096 129 849 – Bloomington, MN

Date: NOV 10 2014

In re: ZEBERIO AMWOMA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: R. Leo Pritschet, Esquire

ON BEHALF OF DHS: Laura W. Trosen
Assistant Chief Counsel

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)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] -
Fraud or willful misrepresentation of a material fact

The respondent has filed an appeal of the Immigration Judge's April 12, 2013, decision finding the respondent removable under section 237(a)(1)(A) of the Immigration and Nationality Act for having been inadmissible at the time of his adjustment of status under section 212(a)(6)(C)(i) of the Act by reason of fraud or willful misrepresentation of a material fact. The Department of Homeland Security ("DHS") has filed a brief in opposition to the respondent's appeal. The record will be remanded.

The respondent challenges the Immigration Judge's determination that he misrepresented a material fact in his application for adjustment of status and thus was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act at the time adjustment of status was granted. He also argues that the Immigration Judge was predisposed to find him removable as charged.

We review findings of fact, including the determination of credibility, made by the Immigration Judge under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The record shows that the respondent in the present case did not disclose on his applications for adjustment of status filed in July 2003 and January 2005 the five children that he fathered in Kenya with Margaret Kemunto Amwoma (Tr. at 26-29; Exh. 5). Section 3B of the Application to Register Permanent Residence or Adjust Status, Form I-485, states "List your present husband/wife, all of your sons and daughters (if you have none, write "none") (Exh. 2). The respondent wrote "none" on the form filed in 2003 (Exh. 2). On the form filed in 2005 with

the assistance of counsel, the respondent only included the name of his United States citizen spouse (Exh. 2; Tr. at 26-29). The Immigration Judge determined that the respondent's misrepresentation was material as it shut off a potential line of inquiry regarding his possible marriage to the mother of his five children which is relevant for his eligibility for relief (I.J. at 5-6).

Section 237(a)(1)(A) of the Act calls for the removal of any alien who at the time of entry or adjustment of status was inadmissible. Under section 212(a)(6)(C)(i) of the Act, an alien is inadmissible if by fraud or willfully misrepresenting a material fact the alien seeks to procure or has sought to procure or has procured a visa, other documentation, or admission into the United States. *See Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998). To sustain its burden of demonstrating that the respondent is removable as charged, the DHS is required to prove four things: (1) the respondent misrepresented or concealed some fact; (2) the respondent did so willfully; (3) the fact was material; and (4) the misrepresentation resulted in the person obtaining a visa, documentation, or entry into the United States. *See Kungys v. United States*, 485 U.S. 759, 767 (1988).

Pursuant to the Supreme Court's decision in *Kungys v. United States, supra*, to find the respondent's misrepresentation regarding his children was material, the record must demonstrate by clear, unequivocal, and convincing evidence that the misrepresentation either did result in the erroneous grant of a benefit, or that it had a "natural tendency" to affect the decision to grant the benefit. *Id.* at 771. The Board has considered this second aspect in terms of the tendency of the misrepresentation to shut off a line of inquiry which might well have resulted in a proper determination that the respondent be excluded. *See Matter of Bosuego*, 17 I&N Dec. 125 (BIA 1979; 1980); *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; A.G. 1961). Once the DHS has made this showing, the burden shifts to the respondent to demonstrate that, nevertheless, no proper finding of inadmissibility could be made. *See Kungys v. United States, supra,* at 771-72; *Matter of Bosuego, supra.* It is not sufficient for the DHS to show simply that a line of questioning was foreclosed; DHS must also produce sufficient evidence to "raise a fair inference that a statutory disqualifying fact actually existed." *Kungys v. United States*, *supra*, at 783.

The Immigration Judge found that the respondent's concealment of the existence of his children constituted a material misrepresentation. To that end, the Immigration Judge determined that while the omission of the children on the respondent's adjustment application in and of itself would not affect the respondent's eligibility for adjustment of status, his failure to disclose the existence of the children cut off a line of inquiry that leads to the question whether or not the respondent had a prior undissolved marriage to the children's mother, a factor which would have rendered him inadmissible (I.J. at 4-6). *See Kungys supra; Falaja v. Gonzales*, 418 F.3d 889 (8th Cir. 2005) (the test of whether a misrepresentation is material for purposes of adjustment of status to permanent resident, is whether it was predictably capable of affecting, that is, had the natural tendency to affect the official decision of the agency); *Matter of D-R-*, 25 I&N Dec. 445, 450 (BIA 2011) ("The test for whether 'concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service."); *Matter of Ng*, 17 I&N Dec. 536 (BIA 1980).

We find it necessary to remand the record to the Immigration Judge for further consideration and analysis. The Immigration Judge does not appear to have shifted the burden of proof to the respondent upon the DHS's showing of materiality of the misrepresentation. *See Matter of Bosuego, supra.* Additionally, the respondent argues in his appeal brief that the Immigration Judge mischaracterized and failed to consider the numerous affidavits and documents he submitted in support of his removal hearing (Respondent's Brief at 18). During the initial master calendar hearing in 2012, the respondent's attorney told the Immigration Judge that he had filed several documents in April 2012 with the DHS relating to the charge of removability issued against the respondent (Tr. at 3, 9-10). The respondent's attorney claimed that the DHS omitted the documents from the group exhibit that the DHS submitted to the court (Tr. at 3, 9-10).[1] Therefore, on remand, the Immigration Judge should consider and evaluate all evidence of record to determine whether the respondent had met his burden of showing that no proper finding of inadmissibility could be made. The parties also should be provided the opportunity to present any additional relevant evidence.

As to the respondent's argument that the Immigration Judge was predisposed to deny him relief, in order to establish that his right to due process was violated, the respondent must demonstrate both a fundamental procedural error and that the error resulted in prejudice. *See Njoroge v. Holder*, 753 F.3d 809 (8th Cir. 2014); *Doe v. Holder,* 651 F.3d 824 (8th Cir. 2011) (to establish a due process violation in removal proceedings, an alien must demonstrate both a fundamental procedural error and prejudice as a result of the error); *Bracic v. Holder*, 603 F.3d 1027 (8th Cir. 2010). The respondent in this matter has not proven prejudice.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceedings and entry of a new decision.

FOR THE BOARD

[1] The respondent has also filed additional evidence on appeal relating to the matrimonial laws in his country. We do not consider evidence presented for the first time on appeal. 8 C.F.R. § 1003.1(d)(3)(I); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2003). However, in light of our decision to remand the case, the respondent may present the evidence to the Immigration Judge on remand.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BLOOMINGTON, MINNESOTA

File: A096-129-849 April 12, 2013

In the Matter of

ZEBERIO AMWOMA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGE: Section 237(a)(1)(A) - at the time of entry of adjustment of status, inadmissible under Section 212(a)(6)(C)(i), fraud or willful misrepresentation of a material fact.

APPLICATIONS: Termination of proceedings and voluntary departure.

ON BEHALF OF RESPONDENT: LEO PRITSCHET, Attorney at Law

ON BEHALF OF DHS: LAURA TROZAN

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a citizen of Kenya who was placed in removal proceedings on June 7, 2012, by the filing with the Immigration Court of the Notice to Appear, Exhibit 1. The respondent was charged with being subject to removal under Section 237(a)(1)(A) of the Immigration and Nationality Act (Act) for being inadmissible at the time of entry or adjustment of status under Section 212(a)(6)(C)(i) of the Act, fraud or willful misrepresentation of a material fact.

The respondent, through counsel, admitted the first four factual allegations contained in the Notice to Appear with the amendment to allegation no. 3 being a B1 visa rather than B2. The respondent denied allegation no. 5 relating to the fraud or willful misrepresentation and denied that he was subject to removal as charged.

The Government submitted documents in support of the allegation and the charge, Exhibit 2. The respondent submitted documents in support of his denial of the factual allegation and the charge, Exhibit 3. And the Court has also considered the respondent's written brief in regard to materiality, Exhibit 4. The respondent also testified in this case.

The documentary evidence and the respondent's testimony reflect that the issue in this case relates to the respondent's failure to identify five biological children in his application for permanent resident status, Form I-485, Exhibit 2, starting on page 53. The respondent subsequently filed a Form N-400 application for naturalization in September 2011, Exhibit 2, page 1, in which he includes these children.

The Government argues that the respondent's failure to include his biological children at the time of his application for permanent resident status is a willful misrepresentation of a material fact. The respondent argues that the failure to identify these children is not material to the respondent's application for adjustment of his Immigration status.

The Court notes, first of all, as far as the evidence goes, that the Government's evidence contained in Exhibit 2 reflects the history of the respondent's case relating to his acquisition of permanent resident status and subsequent application for naturalization. It includes a sworn statement taken of the respondent at the time of his interview on his naturalization application, Exhibit 2, pages 11 through 14. It includes copies of the birth certificates of the five children belonging to the respondent, Exhibit 2,

pages 15 through 19. And it contains the I-485 that was approved in the respondent's case and which reflects no mention of the five children, Exhibit 2, pages 53 through 57.

In contrast, the respondent's evidence contained in Exhibit 3, is, other than the birth certificates of the respondent's children and his divorce decree from his United States citizen wife and his own birth certificate, documents that appear to have been specifically created for the purpose of submission to this Court in this hearing. The Court does not give the same weight to those documents as it gives to the respondent's own statements relating to his adjustment of status and naturalization interviews.

The respondent has summarized, very well, most of the case law that relates to the issue of whether a fact is material or not for purposes of excludability under Section 212(a)(6)(C)(i) of the Act. The respondent starts with the cases of Matter of S- and B-C-, a 1961 Attorney General Decision in which a test was set forward to include analysis, first of all, of whether the record establishes that the respondent is excludable on the true facts and if the true facts would render the respondent excludable, then the misrepresentation is material. If it does not, then the second and third questions must be considered. The decision goes on to state, second, did the misrepresentation tend to shut off a line of inquiry which is relevant to the alien's eligibility and, if a relevant line of inquiry has been cutoff, might that inquiry have resulted in a proper determination that the alien be excluded.

In the first instance, does the record establish that this respondent would be excludable on the true facts? In other words, if the respondent had disclosed his five children, would that have rendered him excludable? The Court finds that it would not. Second, the Court looks at whether the misrepresentation would tend to shut off a line of inquiry relevant to the respondent's eligibility. The Court finds that it does. And in fact the Court finds that logically following the line of inquiry that would have proceeded

from disclosure of his five children he would, in all likelihood, have been denied adjustment of status. The Court notes in this regard that the respondent himself testified, and the birth certificates of the children establish, that they are the product of one mother named Margaret and the respondent. See Exhibit 2, pages 15 through 19. The respondent himself testified, and stated in a previous sworn statement, that he was married to Margaret in a customary marriage. The respondent testified, and the sworn statement reflects, that when the respondent came to the United States on his visitor visa, he may have indicated at that time that he was married. In the sworn statement contained in Exhibit 2, page 12, the question from the interviewer posed was "during the N-400 interview today, December 8, 2011, you testified that you were married customarily to Margaret, but that your family did not approve". The answer given by the respondent was "yes". The interviewer asked, "where was the customary marriage"? The response given by the respondent was, "in Kisii, Kenya. The exactly place is Sankara, a marketplace, my hometown".

The respondent goes on to state in that sworn statement that there was no ceremony, no judge, no government house. It was not official. She just came and stayed with me. There is no evidence to establish whether the respondent had a customary marriage by cohabitation and the birth of children based upon this statement, however, the Court also notes that in the sworn statement the respondent was also asked the question "during the N-400 interview, you testified that you believe that you claimed to be married when you applied for your B1, B2 visa. Who did you claim to be your wife at that time in 1999"? The respondent answered, "Margaret Camuto Swenta." The birth certificates provided by the respondent in Exhibit 3 and the Government in Exhibit 2 are identical except for circles around certain information on the respondent's copies of those birth certificates. The birth certificates were all obtained in 2010 and

indicate a date of registration of February 24, 2010, see Exhibit 2, pages 15 through 19. All the birth certificates list the name and surname of the father as Zeberio Amwoma Amwoma. All of the birth certificates list the name and maiden name of mother as Margaret Camuto Amwoma. The respondent identified her as Margaret Swenta. The respondent's submission of the birth certificates bearing the name of the mother as Margaret Camuto Amwoma suggests a marital relationship between the father and mother of these children.

While the absence of the names, dates and places of birth of five children in and of itself would not affect the respondent's eligibility for adjustment of status, it is clear that the failure to disclose that information cutoff a line of inquiry that leads to the question of whether or not the respondent had a prior undisolved marriage to those children's mother. All the children have the respondent's last name. All of the birth certificates reflect that their mother bears the same last name. The respondent has, on more than one occasion, indicated that he was married to a woman named Margaret. And all of this evidence would lead to a line of inquiry concerning the respondent's prior marital status. If the respondent had an undisolved marriage, he would not have been eligible for adjustment of status on the I-485 which had been approved. That line of inquiry was cutoff and, consequently, has not reached any conclusion because the inquiry has never been conducted. Logically, when someone has five children with the same woman who bears his name and he has claimed to be married to, it would lead one to investigate whether such a relationship is considered a legal marriage in the country in which it occurred and would seek to determine whether any marriage records or dissolution records exist in that country. Because the Government was unable to look into those matters because they were not aware that the respondent had five children with the same woman in Kenya, eligibility could not be determined because that

line of inquiry was cutoff.

Based upon a consideration of the evidence in the record in this case, the Court finds that the charge against the respondent is sustained. The respondent misrepresented a material fact which cutoff a line of inquiry leading to an issue that relates directly to eligibility for adjustment of status and it appears, in this case, that adjustment of status may well have been denied.

The respondent seeks, in the alternative, voluntary departure and the Government is not opposed to that request. Accordingly, the Court will grant voluntary departure in the respondent's case to the maximum 60 days allowed by law upon the posting of a voluntary departure bond, which the Court will set at the minimum amount of $500.

Accordingly, the following order shall be entered.

ORDER:

1. The charge under Section 237(a)(1)(A), inadmissible under Section 212(a)(6)(C)(i) of the Act, is sustained.
2. The respondent is granted the privilege of voluntarily departing the United States on or before June 11 upon posting a bond in the amount of $500 within five business days with an alternate order of removal to Kenya.
3. Attached and incorporated herein is the Notice to Respondents Granted Voluntary Departure, which contains the additional advisals to persons granted post-conclusion voluntary departure.

Please see the next page for electronic signature

SUSAN E. CASTRO
Immigration Judge

//s//

Immigration Judge SUSAN E. CASTRO

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