U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: MISUMI, ANDREW ABURU

A 094-075-414

Date of this notice: 12/22/2014

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:
Cole, Patricia A.
Donovan, Teresa L.
Pauley, Roger

Userteam: Docket

File: A094 075 414 – Dallas, TX

Date: DEC 22 2014

In re: ANDREW ABURU MISUMI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Henry Maturi, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(C)(i), I&N Act [8 U.S.C. § 1227(a)(1)(C)(i)] - Nonimmigrant - violated conditions of status

APPLICATION: Adjustment of status

The respondent, a native and citizen of Kenya, has appealed the August 19, 2013, decision of the Immigration Judge denying his application for adjustment of status in the exercise of discretion. *See* section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1155(a). The appeal will be sustained.

We review an Immigration Judge's discretionary determination *de novo*. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The respondent's adverse factors include a conviction for driving while intoxicated, which he committed in 2007 (I.J. at 5, 6; Tr. at 27-28; Exh. 7). He also came to the United States as a nonimmigrant to attend college in 2005 but his father became sick and was unable to pay for a second semester in 2006 and thereafter died, such that the respondent owes the school $1200 (I.J. at 4, 5; Tr. at 18-19, 21, 34-39, 49-53).

On appeal, the respondent argues that he has countervailing equities which the Immigration Judge did not properly consider. He has lived in the United States since 2005 and is married to a United States citizen, with whom he has been in a relationship since 2006 (I.J. at 3, 4, 5; Tr. at 17, 19, 39). He also has two United States citizen step-children (I.J. at 4, 6; Tr. at 22-23). While the respondent was unemployed for a number of years because he had no work authorization, he cared for the children and assisted in maintaining the home he shares with his wife (I.J. at 6; Tr. at 17, 29-30, 32). The respondent has since obtained work authorization and is now employed (I.J. at 4; Tr. at 24-25, 31-32).

While the respondent's conviction is serious, he committed his offense more than 7 years ago and has no other criminal history. His debt to the college is also problematic. However, we conclude that the respondent has significant ties to the United States through his United States citizen wife and step-children and that overall his equities outweigh the negative factors presented. *See Matter of Arai*, 13 I&N Dec. 494, 496 (BIA 1970). Accordingly, we exercise

discretion in the respondent's favor, and upon our *de novo* review, we reverse the Immigration Judge's decision.[1] *See* 8 C.F.R. § 1003.1(d)(3)(ii).

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision of August 19, 2013, is vacated.

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

[1] The Immigration Judge did not specifically address the respondent's statutory eligibility for adjustment of status. However, no issues regarding his eligibility were raised during his Immigration Court proceedings or on appeal.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

MATURI, HENRY
2502 WESTERLAKE DRIVE
PEARLAND, TX 77584

IN THE MATTER OF
MISUMI, ANDREW ABURU

FILE A 094-075-414 DATE: Aug 21, 2013

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS ~~WITHIN 30~~ CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT

FF

CC: PEGGY PRICE
125 E. HWY 114, STE 500
IRVING, TX, 75062

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
DALLAS IMMIGRATION COURT

Date: August 19, 2013.

File: A094-075-414.

Immigration Removal Proceedings in the Matter of: Andrew Aburu Misumi, Respondent.

Charge: Section 237(a)(01)(C)(i), INA.

Application: Adjustment of Status, Section 245(a), INA.

Counsel for the Respondent: Henry Maturi, Esquire, 2602 Westerlake Drive, Pearland, Texas 77584.

Counsel for the Department of Homeland Security: John Allums, Assistant Chief Counsel, 125 East Carpenter Freeway, Suite 500, Irving, Texas 75062.

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History.

The Respondent is a 26 year old married male, native and citizen of Kenya. On May 29, the Department of Homeland Security charged the Respondent with being subject to removal from the United States. (Exhibit 1). During the course of the proceedings, the Respondent entered pleas as follows.

Allegations

(1) The Respondent admitted that he is not a citizen or national of the United States;
(2) The Respondent admitted that he is a native and citizen of Kenya;
(3) The Respondent admitted that he was admitted to the United States at 12/17/2005 on or about Boston, MA, as a nonimmigrant student to attend North Lake College in Irving, Texas; and,
(4) The Respondent admitted that he did not carry a full course of study from 01/03/2006 to 12/31/2008. The Respondent admitted that he stopped paying the required fees, and on 09/29/2006 his status was terminated.

Charges

Section 237(a)(a)(C)(i), INA, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he failed to maintain or comply with the conditions of the nonimmigrant status under which he was admitted.

Sustaining of the Charge: Pursuant to the Respondent's pleas, this Court sustained the allegations and charge of removal against the Respondent.

Application: The Respondent sought relief through an application for Adjustment of Status, Section 245(a), INA.

II. LAW.

INA, Section 245(a)

(a) Status of Person Admitted for Permanent Residence on Application and Eligibility for Immigrant Visa.

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

As noted above, in addition to satisfying the statutory requirements for adjustment of status, an applicant for relief under Section 245(a), INA must establish that he warrants such relief as a matter of discretion. The general standards developed in Matter of Marin, 16 I&N Dec. 581 (BIA 1978) for the exercise of discretion are applicable to Section 245(a). See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998). An Immigration Judge, upon review of the record as a whole, must balance the adverse factors evidencing the alien's desirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of relief appears in the best interests of this country.

Favorable factors include such factors as family ties within the United States, residence of long duration in this country, evidence of hardship to the respondent and his family if deportation occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to the Respondent's good moral character.

Among the factors deemed adverse to an alien are the nature and underlying circumstances of the grounds of exclusion or removal that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency, seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.

In regard to rehabilitation, a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. However, applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. A showing of rehabilitation is not an absolute prerequisite in every case involving an alien with a criminal record.

III. EXHIBITS.

Exhibit 1: Notice to Appear, dated May 29, 2009.
Exhibit 2: SEVIS ico Andrew Misumi.
Exhibit 3: Respondent's Exhibits in Support of Bona Fide Marriage.
Exhibit 4: Respondent's Motion Requesting Additional Time to File Documents.
Exhibit 5: Copy of Filed I-485.
Exhibit 6: Respondent's Application for Adjustment of Status. Signed in Court on August 19, 2013.
Exhibit 7: Record of Deportable/Inadmissible Alien (Form I-213).

IV. TESTIMONY.

A. The Respondent testified, in part, as follows.

Examination by the DHS Counsel

The Respondent stated that his status as a student was terminated.

The Respondent said that he had not worked in the United States. He said that while in this country he lived with his sister at first.

The Respondent said that he was 20 years old when he came to the United States. He said that he is 26 years old now.

The Respondent said that he entered the United States in December of 2005. He said after arriving he started dating "Sheila". He said that later they would live together. He further stated that after he was detained by "immigration" he would marry Sheila.

The Respondent said that when he quit attending school that he owed $1,200 in tuition. He said that he had not paid the college back for his tuition.

The Respondent said that Sheila has two children by two different fathers.

The Respondent said that he is now working at Quick Trip and that Sheila is going to school.

The Respondent said that Sheila is five years older than him and that she proposed to him.

The Respondent said that he did not go to school the second semester because his father died and he lost his source of funding. He further stated that he did not return to Kenya to attend his father's funeral.

The Respondent said that he was arrested for DWI.

The Respondent said that he began working part-time in April of 2013.

The Respondent said that he did not marry until after he was arrested by "immigration".

He said that he told his lawyer that he was going to get married and his lawyer said that is a good idea.

Examination by the Immigration Judge

The Respondent said that he did not have a transcript of his college courses. He said that he started school on January 3, 2006, when he was 19. He said that he completed the first semester. He said that he took three courses - English, Business Administration, and Math, and that he carried a 3.2 grade point average.

The Respondent said that after completing the first semester he was supposed to start the fall semester. However, he said that his father was sick and that he did not attend the fall semester. He said that his father died in 2007. The Respondent said that he did not have a death certificate in the record.

The Respondent said that he did not go home to Kenya after his father died. He said that he decided to stay here with Sheila.

The Respondent said that he met Sheila on January 1, 2006, at a club. He said that by March he was living with Sheila.

The Respondent said that his father died in the summer of 2006. He said that he did not go to the fall semester. He said that he kept living with Sheila who supported him. He said that Sheila worked at Educare.

The Respondent said that in March of 2008 he was convicted of DWI. He said that this was two years after he met Sheila. He said that he served one week in jail. He further stated that one year later he was charged by "immigration". He said that six weeks after he was charged by "immigration" that he and Sheila got married. He said that Sheila proposed.

The Respondent said that in April of 2013 he went to work for Quick Trip.

The Respondent said that the probation he received from the DWI was revoked once for failure to pay.

The Respondent said that he still owes his college $1,200.

V. FACTUAL AND LEGAL ANALYSIS.

Discretion

In exercising this Court's discretion, this Court has reviewed the record as a whole, and balanced the adverse factors evidencing the Respondent's undesirability as a permanent resident in this country, with the social and humane considerations presented to determine whether the granting of relief appears in the best interests of this country. *Citing, Matter of Edwards,* 20 I&N Dec. 872 (BIA 1994); *Matter of Arreguin,* 21 I&N Dec. 38 (BIA 1995); *Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994); *Matter of Roberts,* 20 I&N Dec. 294 (BIA 1991); *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988); and, *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978).

More specifically, this is a Respondent who arrived in this country on December 17, 2005, at Boston, Massachusetts. He was admitted to the United States to attend North Lake College in Irving, Texas. The Respondent said that he completed his first semester at North Lake College. He further provided that he completed three courses - math, English, and business administration, carrying a 3.2 GPA. However, the Respondent did not provide a transcript of his first semester, nor any other documentary support for having a 3.2 GPA. The Respondent enrolled for the 2006 fall semester at North Lake College, however, he did not attend that semester. His student status was terminated on September 29, 2006.

The Respondent said that he did not attend North Lake College in the 2006 fall semester because his father had died and he lost his source of financial support. However, he would subsequently testify that his father did not die until 2007. The Respondent did not provide a

death certificate for his father, nor any other documentary evidence to validate his father's death. Even though the Respondent no longer had student status in the United States, he did not return to his native country of Kenya. Nor did he attend his father's funeral. He said that he decided to stay with Sheila in the United States. From the time that the Respondent moved in with Sheila in March of 2006 until April of 2013 he was financially supported by Sheila. The Respondent held no jobs. The Respondent said that he did not work at all during that time period. He just stayed around where he and Sheila lived.

As reflected in the record, the Respondent was convicted on March 19, 2008, of DWI. He was sentenced to 180 days of confinement and 21 months probation. The offense included driving with an open container. Notably, the Respondent stated that his probation was once revoked for failure to meet his probationary payment.

Notably, the Respondent and Sheila married only after the Respondent was detained by immigration and charged with removal. The Notice to Appear was served on the Respondent on May 20, 2009. Six weeks later he was married to Sheila. The Respondent was married after proceedings had been initiated.

Drawing reasonable inferences from the evidence, and the lack thereof in part, it is the finding of this Court that the Respondent's true purpose in coming to this country was simply to get here and then remain. The evidence reflects that since arriving in December of 2005, and commencing college in January of 2006 - the Respondent has completed only 9 semester hours of credit. Once again, no transcript was provided in regard to his college attendance. Notably, the Respondent said that he still owes $1,200 to North Lake College - an indebtedness he never paid. Since arriving in the United States over 7 and one half years ago, the Respondent has only worked four months. He has in large part just been here, allowing Sheila to financially support him.

This Court further notes that the Respondent's DWI, involved driving with an open container. Most of the citizens of this country are never arrested for anything, and even less - never convicted of anything. By the time the Respondent had been in this country three years he had a most serious offense - DWI, driving with an open container. He received 180 days confinement and 21 months of probation. He did not serve the 180 days confinement. No judgment was provided to the Court.

This Respondent has not been in this country for a long time. He came in late 2005 to go to college. He had only been in the United States for five years at the time he was charged with removal. He does not have numerous family ties in the United States. He does have an aunt that lives in Arlington, Texas. The Respondent's family consists of his wife, Sheila, and Sheila has two children by two other men. The children's ages are 9 and 7. The Respondent did not register for service in this country's armed forces. Once again, his employment record in this country is minimal, only four months out of over seven years. He owns no property in this

country. He provided no evidence of community service. The record reflects that he is a probation violator, and he still owes $1,200 in tuition fees.

Notably, only the Respondent testified at his hearing.

Upon weighing the positive and negative factors, it is the finding of this Court that the Respondent's negative factors far outweigh his positive factors. Accordingly, this Court will deny the Respondent's application for adjustment of status. In this Court's view, this Respondent remaining in the United States is not in the best interests of the United States.

VI. Voluntary Departure.

The Respondent did not seek Voluntary Departure, Section 240B, INA.

VII. Orders.

IT IS ORDERED, that the Respondent's application for Adjustment of Status, Section 245(a), INA, be and is DENIED.

IT IS FURTHER ORDERED, that the Respondent be and is DENIED the privilege of Voluntary Departure, Section 240B, INA. The Respondent did not seek Voluntary Departure.

IT IS FURTHER ORDERED, that the Respondent be and is REMOVED from the United States to KENYA on the charge contained in the Notice to Appear.

WARNING TO THE RESPONDENT: An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the Government, other than because of exceptional circumstances beyond your control, you will not be eligible for VD, cancellation of removal, and any change of adjustment of status for 10 years from the date you are scheduled to appear.

Appear: This Decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 days of the issuance of this Decision.

Date: August 19, 2013.

Richard Randall Ozmun
Immigration Judge
EOIR/DHS