U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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1545 Hawkins Blvd.
El Paso, TX 79925

Name: ONYESOH, LESLIE

A 205-462-342

Date of this notice: 6/4/2014

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
Wendtland, Linda S.
Donovan, Teresa L.

Userteam: Docket

File: A205 462 342 - El Paso, TX

Date: JUN - 4 2014

In re: LESLIE ONYESOH a.k.a Aletor Ehidiame a.k.a. Afam Onyesho a.k.a. Aletor Aletor Aletor a.k.a. Udeep Bogollu a.k.a. Frank Victor Adams

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard E. O'Connell, Esquire

ON BEHALF OF DHS: Dixie Lee Pritchard
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled

Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Termination

The respondent appeals from a February 19, 2013, decision where an Immigration Judge denied his Motion to Reconsider the determination that the respondent was not a United States citizen and was otherwise removable from the United States without any relief from removal. The record will be remanded to the Immigration Judge for further proceedings.

We review findings of fact, including credibility findings, under the clearly erroneous standard. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

This case presents the question whether the respondent's lawful removal from the United States triggers the automatic withdrawal of a pending appeal from a motion to reconsider with this Board pursuant to 8 C.F.R. § 1003.4 (2013).[1] In the United States Court of Appeals for the Fifth Circuit, the jurisdiction of the instant case, we hold that it does not.[2]

[1] The United States Court of Appeals for the Fifth Circuit, the jurisdiction of the instant case, has expressly reserved the question at issue; *see Long v. Gonzales*, 420 F.3d 516, 521 n.6 (5th Cir. 2005) (stating that the court would save for another day the question whether an alien can be held to have withdrawn his appeal when he departs by forcible removal from the country, but finding that the alien waived appeal through his own actions, which resulted in a departure that

(Continued . . . .)

On September 18, 2012, The Department of Homeland Security (DHS) issued a Notice to Appear charging the respondent with being inadmissible due to convictions for crimes involving moral turpitude and for being unlawfully present in the United States without admission or parole. *See* sections 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), and 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i). The DHS initially alleged that the respondent was a native and citizen of the United Kingdom, but later amended that factual allegation to claim the respondent was a native and citizen of Nigeria (Exh. 1-A, Form I-261).

On January 30, 2013, the Immigration Judge determined that the DHS carried its burden of proving by clear and convincing evidence that the respondent was born outside the United States and that the respondent failed to rebut the resulting presumption of illegal presence. The Immigration Judge also concluded that both of the respondent's convictions were for crimes involving moral turpitude and that neither was subject to the petty offense exception because they were classified as felonies by statute (January 30, 2013, I.J. at 11). After concluding the respondent was inadmissible as charged due to his illegal presence and his crimes involving moral turpitude, the Immigration Judge denied his Motion to Terminate and ordered the respondent removed from the United States to Nigeria (January 30, 2013, I.J. at 10-11).

On February 5, 2013, the respondent filed a Motion to Reconsider with the Immigration Judge, alleging various errors and due process violations, and renewing his claim to United States citizenship. The Immigration Judge denied the respondent's motion on February 13, 2013. On March 8, 2013, the respondent appealed the Immigration Judge's February 19, 2013, decision denying his Motion to Reconsider to this Board, but did not file a request for a stay of removal. The DHS lawfully removed the respondent from the United States to Nigeria on June 4, 2013. On June 13, 2013, the respondent filed a brief supporting his appeal.

On July 8, 2013, the DHS filed a Notice of Respondent's Removal, claiming the respondent's appeal of the Immigration Judge's decision denying his motion had been automatically withdrawn pursuant to regulation. The DHS argues that this departure results in the withdrawal of his appeal, and the initial decision of the Immigration Judge is accordingly final to the same extent as though no appeal had been taken. *See* 8 C.F.R. §§ 1003.2(d) and 1003.4 (2013); *cf. Long v. Gonzales*, *supra*, at 520-21.

This appeal relates to an Immigration Judge's denial of the respondent's timely motion for reconsideration. The Fifth Circuit has held that an alien has a statutory right to file one motion to

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was sufficient to withdraw his appeal pursuant to the regulation); *cf. Rodriguez-Barajas v. Holder*, 624 F.3d 678 (5th Cir. 2010) (holding that a departure after the Board issued a decision but while a habeas petition was pending was not "prior to a decision" within the meaning of § 1003.4 and therefore did not deprive the Board of jurisdiction on remand). We note that the only appellate court decision (of which we are aware) that has directly addressed the issue presented in this case concluded that the departure of an alien through removal did not serve to withdraw his appeal to the Board under the regulations. *Madrigal v. Holder*, 572 F.3d 239 (6th Cir. 2009).

reconsider. *See Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012). The ruling urged by the DHS -- that the respondent's removal automatically withdrew the appeal of his motion to reconsider -- would create tension with the holdings of several circuits, including the Fifth Circuit, which have recognized a statutory right to adjudication of such a motion notwithstanding a departure. *See* section 240(c)(6) of the Act; *Lari v. Holder*, *supra* (holding the departure bar regulation could not be applied to statutorily authorized motions to reconsider and did not provide a valid basis for denying a motion to reconsider); *see also Garcia Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012) (holding the departure bar regulation could not be applied to statutorily authorized motions to reopen); *see also Prestol Espinal v. Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011); *see, e.g., Madrigal v. Holder*, *supra*. In light of the Fifth Circuit precedent in *Lari*, we find that the respondent's appeal from his motion to reconsider was not automatically withdrawn and that we have jurisdiction to decide the appeal.

Having concluded that the respondent's appeal has not been automatically withdrawn due to his removal and that we have jurisdiction to consider the respondent's appeal on the merits, we nonetheless will remand the record for further proceedings. In his motion to reconsider, the respondent alleges six errors by the Immigration Judge, including various claimed due process violations, and renews his claim to United States citizenship. The Immigration Judge's 1-page denial order does not adequately consider the respondent's arguments for reconsideration (Respondent's Br. at 15-17; Notice of Appeal at Attachment; Respondent's Motion to Reconsider at 1-7).

In light of this concern, we will remand the record to the Immigration Judge for further assessment and the entry of a new decision. *See* 8 C.F.R. § 1003.1(d)(3)(i); *Matter of S-H-*, *supra* (remanding to the Immigration Judge, noting the lack of factual findings and legal analysis); *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) (noting that "[t]he Board is an appellate body whose function is to review, not create, a record"); 8 C.F.R. § 1003.1(d)(3)(iv) (limiting the Board's fact-finding authority and stating the Board may remand the proceeding to the Immigration Judge where further fact-finding is needed).

Accordingly, the following order shall be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with this decision.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

ONEYSOH, LESLIE
8915 MONTANA AVE
EL PASO, TX 79925

IN THE MATTER OF
ONEYSOH, LESLIE

FILE A 205-462-342 DATE: Feb 19, 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
8915 MONTANA AVENUE
EL PASO, TX 79925

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: PRICHARD, DIXIE (TA-EPD)
1545 HAWKINS BLVD., SUITE 275
EL PASO, TX, 79925

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court
El Paso, Texas

A-205 462 342

In the Matter of

In Removal Proceedings

Leslie Onysesoh,
a/k/a Victor Frank Adams, et. al,
Respondent

MOTION(S): Reconsideration

FOR RESPONDENT: Pro se

FOR DHS: Dixie Lee Prichard, Esq.

Respondent has filed a Motion to Reconsider this court's decision finding respondent to be an alien and otherwise removable from the United States without apparent relief from removal. The DHS has submitted a response articulating their opposition to respondent's motion. After consideration of the respondent's points of error, and the DHS response, the court declines to reconsider its decision finding the DHS met its burden of proof and ordering respondent's removal from the United States.

In brief, the court finds the DHS' *circumstantial* evidence of foreign birth to be unrebutted by respondent. Although respondent submitted a statement claiming birth in the United States, the court found such statement to be unreliable given the inconsistencies between respondent's statement and the evidence submitted by the DHS. As respondent failed to testify in his own defense (after refusing to testify when called as a witness by the DHS), the *ONLY* probative evidence of respondent's alienage was submitted by the DHS.

ORDER: Respondent's motion to reconsider is denied.

William Lee Abbott
Immigration Judge

Date: February 19, 2013