U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: M[redacted], H[redacted]

A[redacted]-389

Date of this notice: 1/30/2017

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
Cole, Patricia A.
Wendtland, Linda S.

Userteam: Docket

File: A[redacted] 389 – Cleveland, OH

Date: JAN 30 2017

In re: H[redacted] M[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Amy Bittner, Esquire

ON BEHALF OF DHS: Kris K. Stoker
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section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] - Fraud or willful misrepresentation of material fact (withdrawn)

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

APPLICATION: Adjustment of status; waiver of inadmissibility

This matter was last before the Board on April 6, 2015, when we remanded the record to the Immigration Judge to further assess the respondent's eligibility for adjustment of status pursuant to section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a), insofar as it relates to her potential inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). On May 13, 2015, the Immigration Judge reaffirmed his prior adverse credibility finding and again concluded that the respondent is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having made a material misrepresentation on a prior adjustment application, thus rendering her statutorily ineligible for adjustment of status under section 245(a) of the Act absent an approved waiver of inadmissibility under section 212(i) of the Act. This timely appeal followed. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained, the Immigration Judge's decision will be vacated, and the record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *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).

The following facts and procedural history are not in dispute in this case. Before the Immigration Judge issued his April 29, 2013, decision, the respondent testified to the following, although the Immigration Judge did not credit her testimony (I.J.1 at 6-8).[1] The respondent's first marriage was a traditional ceremony conducted at her uncle's house in Sierra Leone in February 1983 (I.J.1 at 2, 7; Tr. at 28-29, 61-63, 65-66). Thereafter, she applied for a United States visa, and she acknowledged that she listed herself as single on the application (I.J.1 at 2; Tr. at 31-32; Exh. 5H). She considered herself single because she had separated from her husband and he was living in Moscow at the time (I.J.1 at 2; Tr. at 32, 34, 37). She then left Sierra Leone in October 1988 to live in Moscow with the man she married in 1983 (I.J.1 at 3; Tr. at 55-57, 63, 68, 72-73).

The respondent entered the United States as a nonimmigrant visitor in 1990 (I.J.1 at 3; Tr. at 34-35; Exhs. 1, 2, 7T). In 1992, she applied for asylum, again indicating she was single (I.J.1 at 3-4; Tr. at 35-37, 71-74, 77-78; Exh. 5G). In 1992, she also resumed living with the man she married in Sierra Leone in 1983 (I.J.1 at 3; Tr. at 40-41, 59, 71-72). In 1995, the respondent sought adjustment of status before the former Immigration and Naturalization Service (now United States Citizenship and Immigration Services, "USCIS"), through the diversity lottery based on her 1983 marriage (I.J.1 at 3; Tr. at 41-42, 59; Exhs. 5C, 6). In conjunction with this application, the respondent acknowledges that she submitted a marriage certificate registered in December 1989 (I.J.1 at 4; Tr. at 42, 60-63, 68, 70-71; Exh. 5H). She asserts that while in the United States, she asked her sister to procure a copy of the certificate and the respondent did not inspect the marriage certificate before submitting it to USCIS (I.J.1 at 4; Tr. at 42-44, 60-68, 70-73). Subsequently, the Forensic Document Lab concluded that the marriage certificate was fraudulent (I.J.2 at 3; Exh. 5F at 21-22). Thereafter, the respondent married her current husband, a United States citizen, on April 25, 2003, and based on this marriage the respondent now seeks to adjust her status (I.J.1 at 3, 5; Tr. at 42; Exhs. 3B, 4C-D, 4F).

In his April 29, 2013, decision, the Immigration Judge determined that the respondent was inadmissible for making a material misrepresentation when she submitted the fraudulent marriage certificate in conjunction with her first adjustment application (I.J.1 at 1-2, 12-13). His decision was based, in part, upon his adverse credibility finding (I.J.1 at 6-8). Accordingly, he concluded that the respondent is statutorily ineligible for adjustment of status unless she qualifies for a waiver of inadmissibility pursuant to section 212(i) of the Act (I.J.1 at 12-13). However, he denied this waiver because he found that the respondent's qualifying relative, her current United States citizen husband, would not experience extreme hardship should she be required to return to her home country (I.J.1 at 12-13).

On April 6, 2015, we remanded the record to the Immigration Judge because we concluded that he did not meaningfully explain how the respondent's submission of the fraudulent marriage certificate qualified as a material misrepresentation (Board Order at 2-3). Specifically, the Immigration Judge's April 29, 2013, decision did not address (1) why the respondent would

[1] The Immigration Judge issued decisions in this matter on April 29, 2013, and May 13, 2015, that will be referred to hereinafter as I.J.1 and I.J.2, respectively.

suspect that the marriage certificate was fraudulent when she received it; (2) what, if any, weight should be accorded to her sister's affidavit regarding production of the marriage certificate; and (3) what record evidence supports a conclusion that the respondent submitted the document with knowledge of its falsity (Board Order at 2-3; Exh. 7AA). In light of our disposition of the matter, we declined to resolve the additional challenges raised by the respondent in the context of her initial appeal (Board Order at 3).

On remand, the Immigration Judge reaffirmed his prior adverse credibility finding (I.J.2 at 3). Further, he determined that because the respondent bears the burden in establishing her admissibility and eligibility for adjustment of status, when considering the adverse credibility determination and the fact that she signed her application for adjustment of status under penalty of perjury, she could not carry her burden of proof to show that she did not engage in a material misrepresentation with respect to her first adjustment application as it was supported by the fraudulent marriage certificate (I.J.2 at 2-3). Specifically, he reasoned that had the respondent reviewed the marriage certificate she would have known it was inauthentic, and thus, submitting it renders her inadmissible (I.J.2 at 2-3). Alternatively, he maintained that by signing the application's attestation without reviewing the marriage certificate, the respondent committed fraud or a material misrepresentation when certifying that all of the information in the application and supporting documents was true and correct (I.J.2 at 3).

On appeal, the respondent challenges the adverse credibility finding as clearly erroneous (Resp. Brief at 10-11). In addition, she maintains that the Immigration Judge erred as a matter of law in finding her inadmissible under section 212(a)(6)(C)(i) of the Act inasmuch as she did not willfully submit false information to USCIS in support of her first adjustment application (Resp. Brief at 4-10).

Although we previously declined to reach this issue, we will take this opportunity to clarify that the Immigration Judge's overall adverse credibility finding is not clearly erroneous (I.J.1 at 6-8). He based this finding on specific and cogent reasons, including inconsistencies between the respondent's testimony and the documentary evidence, particularly concerning the respondent's first marriage (I.J.1 at 6-8). *See* section 208(b)(1)(B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii); *see also Diallo v. Holder*, 312 F. App'x 790, 798-99 (6th Cir. 2009). For example, the Immigration Judge noted that the respondent testified that her traditional marriage occurred at her uncle's home in February 1983, but the marriage certificate indicates that the marriage occurred at a mosque in December 1989 (I.J.1 at 7; Tr. at 28-29, 62-71; Exh. 5 at 24).

In addition, the respondent's testimony and documentary evidence provide inconsistent accounts with respect to when and under what circumstances she considered herself married to her first husband (I.J.1 at 7). Specifically, although the respondent testified that she sought registration of her traditional marriage in 1989, she listed herself as "single" on her 1992 asylum application, and no names were included in the former spouse section on the application's Biographic Information Form (Form G-325A) (I.J.1 at 7; Tr. at 73-78; Exh. 5 at 16-20). The respondent testified that she reported herself as "single" on her asylum application because she and her husband were then separated, although, she acknowledged, they were not legally divorced (I.J.1 at 7; Tr. at 36-37, 73-78).

In considering the respondent's explanations for the foregoing discrepancies, the Immigration Judge concluded that they were not sufficiently persuasive to adequately reconcile the identified problems (I.J.1 at 6-8; Tr. at 62-71, 73-78, 81-89). For instance, although the respondent maintained that the date discrepancy between when she married and the date on the marriage certificate was the result of a delayed registration in absentia, the Immigration Judge was unpersuaded by this explanation because, among other things, the respondent reportedly never sought a copy of the marriage certificate until 1995, when she wished to establish she had married in order to qualify for adjustment of status (I.J.1 at 7; Tr. at 62-71; Exh. 5 at 24). An Immigration Judge is not required to adopt the respondent's explanations for inconsistencies when there are other plausible views of the evidence. *See Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (drawing inferences from direct and circumstantial evidence is a routine and necessary task of any fact finder, and in the immigration context, the Immigration Judge is the fact finder). Thus, we discern no clear error in the Immigration Judge's adverse credibility determination (I.J.1 at 6-8).

Nevertheless, we conclude that the proper credibility determination alone does not provide specific reasons for finding that the respondent engaged in a material misrepresentation on her previous adjustment application. In this regard, we note that the Immigration Judge does not meaningfully tie this credibility determination to a factual determination that the respondent failed to show that she did not willfully commit a material misrepresentation in submitting a fraudulent marriage certificate to USCIS. As we explained in our prior remand order, in order to support a material misrepresentation finding, the Immigration Judge should make adequate factual findings explaining what knowledge the respondent may have had that the marriage certificate she proffered was fraudulent (Board Order at 2-3).

Here, the Immigration Judge's decision does not identify record evidence indicating that the respondent may have acted deliberately and voluntarily in submitting the marriage certificate (I.J.2 at 3-4). *See Parlak v. Holder*, 578 F.3d 457 (6th Cir. 2009) (finding that alien had willfully misrepresented a material fact on his applications for adjustment of status and naturalization by his "deliberate and voluntary" act of checking "no" on questions concerning his past arrests and criminal charges); *see also Kungys v. United States*, 485 U.S. 759, 772 (1988). Instead, the Immigration Judge primarily relied on the adverse credibility finding in concluding that the respondent would have known the marriage certificate was fraudulent had she inspected it, or alternatively, that she should not have signed the adjustment application's attestation under penalty of perjury because by doing so she was certifying that the marriage certificate was valid (I.J.1 at 11-12; I.J.2 at 2-3). However, the Immigration Judge's finding that the respondent should have inspected the marriage certificate prior to signing the "under penalty of perjury" attestation does not bear on the respondent's possible knowledge of fraud for purposes of section 212(a)(6)(C)(i) of the Act. The mere failure to adequately review a document before certifying its accuracy is not fraud. Thus, the Immigration Judge's analysis does not identify any specific basis for concluding that the respondent may have affirmatively and deliberately submitted the fraudulent marriage certificate to USCIS. Accordingly, we conclude that, notwithstanding the fact that the credibility determination is not clearly erroneous, the Immigration Judge's decision does not sufficiently address the concerns identified in our prior remand order, as it does not provide specific reasons for the Immigration Judge's finding that the respondent may have made

a willful and material misrepresentation on her first adjustment application and failed to prove otherwise.

We recognize that the respondent bears the burden of proof in establishing her admissibility for purposes of her adjustment application (I.J.2 at 4). *See Matter of Bett*, 26 I&N Dec. 437, 440 (BIA 2014) (requiring a respondent to establish clearly and beyond doubt that she is not inadmissible under section 212(a) of the Act in order to qualify for adjustment of status); *see also* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A) (requiring a respondent to establish eligibility for relief from removal by a preponderance of the evidence); 8 C.F.R. § 1240.8(d) (same). However, this burden does not permit the Immigration Judge to conclude that the respondent has not shown that she is not inadmissible, or to conclude that she knowingly engaged in making a misrepresentation, merely because a marriage certificate she submitted to USCIS was later proven to be fraudulent, absent some showing that the respondent may have been aware of the document fraud. *See*, *e.g.*, *Xing Yang Yang v. Holder*, 770 F.3d 294, 303-04 (4th Cir. 2014) (explaining that adverse credibility and willful misrepresentation are distinct legal concepts and that a "negative credibility finding alone is not the equivalent of a finding of willful misrepresentation and the one does not necessarily lead to the other") (internal quotations and citation omitted); *cf.* 8 C.F.R. § 1240.8(d). To conclude otherwise would result in a speculative factual determination, unable to withstand clear error review. As explained above, the Immigration Judge utilized an erroneous legal standard in rendering the willful misrepresentation ruling. When applying the proper legal principles and in setting aside any speculative factual conclusions, the willful misrepresentation ruling is not supported by the record.

Thus, we reverse the Immigration Judge's determination that the respondent is inadmissible under section 212(a)(6)(C)(i) of the Act. In light of our disposition, we will remand the record to the Immigration Judge for the purpose of otherwise assessing the respondent's eligibility for adjustment of status. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of A-H-*, 23 I&N Dec. 774, 790-91 (A.G. 2005) (noting the Board's broad authority to remand for further fact-finding to ensure that the Board "is not denied essential facts that bear on the appropriate resolution of a case"). On remand, the parties should have the opportunity to supplement the record with any additional documentary or testimonial evidence that they may wish to present. We express no opinion regarding the ultimate outcome of the respondent's case.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained, and the decision of the Immigration Judge is vacated.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD